No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MICHIGAN OFFICE OF FINANCIAL AND INSURANCE SERVICES,
Petitioner,

v.

WACHOVIA BANK, N.A., AND WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR ADMINISTRATIVE LAW PROFESSORS RICHARD J. PIERCE, JR., FRANK B. CROSS, AND MARK B. SEIDENFELD AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are law professors who each teach and write in the area of administrative law and who have a particular interest in principles of deference to administrative agencies. *Amici* have no stake in the outcome of this case. They are filing this brief solely as individuals and not on behalf of the institutions with which they are affiliated.[1]

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[1] Both parties have consented to the submission of this brief in letters filed with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or part. None of the *amici* submitting this brief has any financial interest in this matter and none has been compensated for their participation in the drafting of this brief. O'Melveny & Myers LLP, which serves as counsel for the *amici*, is appearing in cases in other courts raising banking preemption issues and is compensated by Bank of America for its work in those cases as well as for its assistance to the *amici* in the preparation of this brief. No other person or entity has made any financial contribution to the preparation or submission of this brief.

making, administrative law, and environmental law. He has published extensively in the area of federal environmental regulation and has addressed the role of administrative agencies in environmental regulation in several articles.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Professors Pierce, Cross, and Seidenfeld have filed this brief to address a basic question of administrative law raised by petitioner and her *amici* in this case, *viz.*, the extent to which a court should defer to an administrative regulation that preempts state law. As demonstrated in this brief, that question has already been clearly – and correctly – answered by this Court in an unbroken line of precedents dating back almost 50 years. Those precedents hold that when a federal agency, exercising regulatory power within the scope of the policymaking authority conferred on the agency by statute, promulgates a regulation that by its terms or operation displaces state law, that regulation is entitled to the same broad deference that would be accorded to any other regulation within the agency's statutory authority. The rule is settled, sensible, and straightforward: "[E]ven in the area of preemption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *New York v. FCC*, 486 U.S. 57, 64

(1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

Although that rule has been accepted and utterly non-controversial for decades, the Court has been urged in this case to discard the rule outright. The proposed alternative would force courts to treat agency regulations differently when they might have the effect of preempting state laws. Under this novel approach, developed most fully in a brief filed by Professor Thomas Merrill on behalf of the Center for State Enforcement of Antitrust and Consumer Protection Law ("State Center"), an agency regulation preempting state law can be upheld only if the court decides for itself that pre-emption is "required" to effectuate the statute's policy objectives. SC Br. 27.

This approach is not only contrary to precedent, but it is contrary to precedent precisely because it is an illogical framework for judicial review of federal agency regulations. This Court's general agency deference cases recognize that when Congress confers broad rulemaking authority on an agency, Congress intends to give the agency wide latitude in deciding what policies are appropriate for effectuating the statute's general objectives. That general rule of deference was not devised from wholecloth – rather, it was explicitly drawn from cases holding that agency judgments *about pre-emption* are *policy* judgments to which courts must defer. It makes no sense now to suggest that the rule of broad deference should exclude the very category of policy judgments on which the rule is based.

The court below thus applied the proper standard in upholding the agency preemption regulations at issue in this case. As the opinion explains, the regulations do not exceed the agency's authority and are not manifestly contrary to the statute. That should end the analysis.

ARGUMENT

I. THIS COURT'S PRECEDENTS REQUIRE FULL DEFERENCE TO AGENCY POLICY JUDGMENTS "EVEN IN THE AREA OF PREEMPTION"

This Court's precedents on judicial deference to agency regulations preempting state law are neither ambiguous nor inconsistent. As early as *United States v. Shimer*, 367 U.S. 374 (1961), the Court made clear that an agency determination that state laws should give way before the federal scheme is a basic policy determination entitled to the same broad judicial deference accorded other agency policy determinations. Subsequent decisions have reinforced that rule without exception. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 158 (4th ed. 2002) (noting the settled rule that "a federal agency can preempt a state statute, rule, or common law doctrine" and that "*Chevron* deference is due a legislative rule or adjudication in which an agency purports to preempt a state law").

A. Pre-*Chevron* Cases Established A Rule Of Broad Deference To Agency Policy Judgments, Including Judgments About The Need For Preemption

Twenty-five years before the Court issued its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court in *Shimer* established that courts must accord the broadest possible deference to agency policy judgments, even when those policy judgments involve the need for preemption of state laws. In *Shimer*, the Court upheld Veterans Administration ("V.A.") loan regulations clearly intended to "displace state law" (367 U.S. at 377), promulgated pursuant to the agency's general authority to prescribe rules and regulations governing V.A. loan guarantees. *Id.* at 381 n.9. Before analyzing preemption specifically, the Court invoked the basic, long-standing principle of deference to agency policy determinations:

> More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of [the] opinion that his action was clearly wrong."

Id. at 381-82 (quoting *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108-09 (1904)). The Court then applied that basic rule directly to the V.A.'s decision to preempt certain state loan guarantee laws. Significantly, the Court noted that the V.A.'s choice to preempt was not *required* by the statute it was enforcing. *See id.* at 382 ("It would, of course, have been possible for the Administrator to have promulgated regulations consistent with much of the present scheme which would have, in addition, accepted the benefits of local law . . . ."). But, the Court emphasized, the choice whether to "take advantage of [state] laws" or to displace them was a policy choice for the agency to make, not the courts: "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 383. Because the V.A. regulations at issue in the case were "a reasonable accommodation of the statutory ends," the Court upheld them. *Id.* at 385.

The Court reinforced *Shimer*'s rule of broad deference to preemptive agency regulations in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) – a case very similar in posture to the case currently before the Court. Like this case, *de la Cuesta* involved a regulation promulgated by a federal banking agency that expressly preempted state laws governing the exercise of certain federally con-

ferred banking powers. *Id.* at 146-47. Relying on *Shimer*, the Court explicitly equated the standard of deference applicable to preemption regulations with the standard applicable to all regulations. In general, the Court observed, "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he exceeded his statutory authority or acted arbitrarily." *Id.* at 154 (citing *Shimer*, 367 U.S. at 381-82). And when "the administrator promulgates regulations intended to pre-empt state law," the Court concluded, "the court's inquiry is similarly limited," 458 U.S. at 154, quoting the key passage in *Shimer* mandating deference to a preemption judgment that reflects a reasonable accommodation of conflicting policies within the agency's general authority.

The *de la Cuesta* Court also reiterated the important point that an agency may choose to preempt state law even where preemption is not required to fulfill the statute's objectives. *See id.* ("whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive"). Further, the Court noted, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* Thus in the context of *regulatory* preemption, a "narrow focus on *Congress'* intent to supersede state law" is "misdirected." *Id.* (emphasis added). What matters is whether the *agency* "meant to pre-empt [state] law, and, if so, whether that action is within the scope of the [agency's] delegated authority." *Id.* Applying that deferential standard, the Court upheld the agency's preemption regulation, because although "the wisdom of the Board's policy decision [wa]s not uncontroverted . . . neither [wa]s it arbitrary or capricious." *Id.* at 169.

The Court applied the same rule yet again in its unanimous decision in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Pursuant to a general statutory mandate to establish nationwide telecommunications service, the FCC

promulgated a preemption regulation reflecting its expert policy judgment that "only federal pre-emption of state and local regulation [could] assure cable systems the breathing space necessary" to expand and provide program diverse services. *Id.* at 708. Invoking the broad deference standard of *Shimer* and *de la Cuesta*, the Court enforced the regulation: "While that judgment may not enjoy universal support, it plainly represents a reasonable accommodation of the competing policies committed to the FCC's care, and we see no reason to disturb the agency's judgment." *Id.*

B. *Chevron* Is Based On The Pre-existing Rule Of Judicial Respect For Agency Policy Judgments, Including Judgments About Preemption

Although often regarded as a pathbreaking decision, the Court's decision in *Chevron* was in important respects simply an application of the firmly settled and non-controversial principle that courts must defer to agency policy judgments within the scope of their authority. As the *Chevron* Court explained, sometimes Congress "explicitly" leaves a "gap" in a statutory structure and thus "expressly" delegates to the agency the authority to decide what policy choices best effectuate the statute's objectives. 467 U.S. at 843-44. In such situations, of course, the Court had long recognized that courts must uphold agency policy choices unless arbitrary or capricious or manifestly contrary to the statute. *See id.* at 844 n.12 (citing cases). What *Chevron* arguably added to the law was the idea that when there is no explicit statutory gap, but there is a particular statutory *term* that is ambiguous, Congress "implicit[ly]" delegated to the agency the same authority to decide through regulation which construction of the term best advances the statute's policy objectives. *See id.* at 844.[2] In both situations, the Court explained, the pre-

[2] The Court later made clear that such a delegation can be presumed only when Congress gives an agency the power to act with the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

existing rule of broad deference to the agency's policy choice applies. *Id.*

It is notable that in this final step of the analysis, the *Chevron* Court specifically quoted *Shimer* and cited *Crisp* for its articulation of the proper deference standard. As the *Chevron* Court itself described that standard:

> ". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961). Accord, *Capital Cities Cable, Inc.* v. *Crisp, ante,* at 699-700.

Id. at 845. In other words, what soon became known as "*Chevron* deference" is a standard specifically drawn from *cases involving deference to agency policy judgments about preemption*. It would be ironic indeed to hold that the one area of agency policy decisionmaking to which *Chevron* does *not* apply is the very area that gave birth to the doctrine in the first place.

C. Post-*Chevron* Cases Confirm The Continuing Vitality Of The Rule Requiring Broad Deference To Agency Policy Judgments About Preemption

Cases decided after *Chevron* demonstrate that *Chevron* did not, in the course of drawing its deference standard from agency preemption precedents, somehow dilute those precedents *sub silentio*.

Two years after *Chevron*, the Court relied on *Crisp, de la Cuesta,* and *Shimer* to uphold FCC regulations preempting state laws regulating technical signal quality standards for cable television. *See New York v. FCC*, 486 U.S. 57 (1988). The Court reiterated that when preemption by an *agency* is involved, "the inquiry becomes whether the federal agency

has properly exercised its own delegated authority rather than simply whether *Congress* has properly exercised the legislative power." *Id.* at 64 (emphasis added). Because a "'pre-emptive regulation's force does not depend on express congressional authorization to displace state law,'" a "'narrow focus on Congress' intent to supersede state law [is] misdirected.'" *Id.* (quoting *de la Cuesta*, 458 U.S. at 154) (alteration in original). "Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action." *Id.* The Court further emphasized that when agency is given a "broad grant of authority to reconcile conflicting policies," that authority presumptively includes the power to reconcile policies *"even in the area of preemption,"* and thus courts must defer so long as the agency's decision is reasonable and not manifestly contrary to Congress's intent. *Id.* (quoting *Shimer* deference standard) (emphasis added). Finding no indications in the text or history of the 1984 Cable Act that Congress affirmatively intended to deny the FCC the power to preempt state law, the Court upheld the agency's preemption regulation. *Id.* at 69 ("[W]e find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt . . . 'is not one that Congress would have sanctioned.'" (quoting *Shimer*, 367 U.S. at 383)).

The Court again applied the *Shimer-Chevron* standard of broad deference to an agency's preemption judgment in *New York v. FERC*, 535 U.S. 1 (2002). In *FERC*, a State challenged FERC's assertion of exclusive jurisdiction to regulate certain transmissions and sales of electrical energy. In particular, the State complained that the federal circuit court reviewing the FERC order had failed to apply a "presumption against federal pre-emption" to the order. *Id.* at 17. The Court squarely rejected the State's position, explaining that review of an agency's preemption judgment "does not involve a 'presumption against pre-emption.'" *Id.* at 18. In that situation, the Court noted, the principal question is sim-

ply whether the agency's action is within the scope of the agency's delegated authority (paraphrasing the *Shimer-Chevron* standard). *Id.* To answer that question, a court must "determine whether Congress has given [the agency] the power to act as it has," but it must make that inquiry "without any presumption one way or the other." *Id.* at 18. Because the statute in that case gave FERC the power to regulate the transmission and sale of electric energy, the Court held that the statute necessarily gave FERC the power to preempt certain state laws on the subject. *Id.* at 19-20.

D. Cases Finding *No* Preemption Also Confirm The *Shimer-Chevron* Standard

The precedents of this Court finding that particular agency regulations did *not* preempt confirm the basic deferential standard of *Shimer* and progeny, while effectively illustrating both its breadth and its limits.

Three instructive cases are *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); and *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ("*Louisiana PSC*"). In *Hillsborough*, the Court held that FDA regulations governing the handling of blood plasma did not preempt a local ordinance imposing additional controls on blood plasma donation. The regulations did not preempt, the Court explained, principally because the FDA had stated in a preamble to the regulations that it did not intend the regulations to be exclusive. 471 U.S. at 714-15. Given the explicit agency statement of its intent *not* to preempt, the Court held that a presumption against preemption applied, and thus the Court would not read the regulations as preempting state law unless the regulations themselves compelled that reading. *Id.* at 715.

The Court's explanation of why the regulations did not compel an inference of preemption from their mere "comprehensiveness" is significant. As the Court explained, it is

generally "more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes" because "agencies normally deal with problems in far more detail than does Congress," and can "speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments." *Id.* at 717-18. Accordingly, "we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.* at 718.

Where an agency *does* make its preemptive intentions clear, by contrast, *Hillsborough* confirms that courts must accord wide deference to that judgment. In explaining why the agency's decision *not* to preempt was not inconsistent with the statute, the Court emphasized the breadth and importance of the agency's power to make preemption judgments on policy issues within the agency's authority. "[T]he FDA possesses the authority to promulgate regulations preempting local legislation," the Court explained, "and can do so with relative ease." *Id.* at 721. The agency's power to preempt local law when the agency deems appropriate is crucial, because "the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements," whereas "Congress . . . normally does not follow, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote." *Id.* In other words, the Court effectively deferred to the agency's judgment that preemption was not required to fulfill the statute's objectives, because the Court understood that the agency had not only broad authority to preempt if it deemed necessary, but also critical expertise as to the policy need for preemption, born of its continuing experience with the interplay between local law and federal statutory objectives.

Medtronic is another case finding no preemption but illuminating the relevant principles. In that case, the majority

opinion for the Court held that the *statute itself* did not preempt certain state-law claims, where the FDA regulations also took the view that the statute did not preempt the claims. *See* 518 U.S. at 496-97 & n.16. As Justice Breyer's concurring opinion elaborated more fully, the FDA's broad enforcement responsibility under the statute gave it ample authority to decide whether preemption of state law was necessary to accomplish the statute's objectives. *Id.* at 506. "That responsibility means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives." *Id.* Thus, "in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect." *Id.* at 505. Because the FDA had explicitly chosen *not* to preempt state law, preemption was not appropriate, but if the agency made a different policy choice within the "degree of leeway" afforded by its statutory authority, deference would be proper under Justice Breyer's analysis. *Id.*

Hillsborough and *Medtronic* find no preemption but effectively illustrate the wide breadth of an agency's basic authority to preempt through regulation. *Louisiana PSC* is a case finding non-preemption that exemplifies the limits of that authority. *Louisiana PSC* involved an FCC regulation preempting certain state laws governing intrastate telephone communications. Far from questioning the basic rule of deference to such regulations, the *Louisiana PSC* Court repeatedly endorsed the *Shimer* rule that a federal agency may promulgate regulations preempting state law "when and if it is acting within the scope of its congressionally delegated authority." 476 U.S. at 374; *see id.* at 369 (citing *Crisp* and *de la Cuesta*). The Court simply held, however, that the FCC's preemption determination exceeded its authority un-

der the statute, which explicitly denied the FCC the authority to regulate intrastate service. *Id.* at 369-70. As the Court explained, "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it." *Id.* at 374. Because Congress specifically denied the agency the power to regulate intrastate service, its preemption judgment could not stand, even if the agency thought it would best advance the statute's policies. *See id.*

Louisiana PSC simply underscores the complete identity between the *Shimer* standard of deference applicable to agency policy judgments about preemption and the *Chevron* standard of deference applicable to all other agency policy judgments. A court does not defer under *Chevron* to an agency's judgment that exceeds the scope of its authority under the statute or is plainly contrary to the terms of the statute. *See Chevron*, 467 U.S. at 844; *see also Oregon v. Gonzales*, 126 S. Ct. 904, 918-21 (2006) (Attorney General regulation exceeds scope of delegated authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-42 (2000) (FDA regulation precluded by text and structure of statute). Likewise, *Louisiana PSC* confirms that courts do not defer under *Shimer* to a preemption judgment the agency is plainly not empowered to make.

By contrast, the opposite result must obtain where the agency is given otherwise broad regulatory authority, and there is no affirmative indication in the text or history of the statute that Congress did not to confer on the agency the power to preempt state law. If the agency in that situation determines that preemption is needed to effectuate the statute's objectives, courts must respect and enforce that judgment, as cases from *Shimer* to *de la Cuesta* through *Chevron* to *FERC* have consistently made clear.

II. THE STATE CENTER BRIEF PROVIDES NO SOUND BASIS FOR DISCARDING THE *SHIMER-CHEVRON* FRAMEWORK FOR REVIEW OF AGENCY PREEMPTION JUDGMENTS

Professor Merrill's brief for the State Center in this case urges the Court to adopt a framework for analyzing agency preemption regulations that is radically at odds with the precedents described above and with the sound logic underlying them. Rather than defer to an agency's policy judgment that preemption is needed to effectuate federal objectives within the agency's domain, the brief's novel approach would shift ultimate responsibility for all policy judgments potentially affecting state laws to the courts. SC Br. 19-20. The State Center brief contends that a court should "respectfully" consider an agency judgment – reflected in a duly promulgated regulation with the force of law – that certain state laws must be displaced (*id.* at 2), but that the court itself must ultimately decide whether preemption is actually "required" to effectuate the statute's policy objectives. *Id. at* 3, 6, 14, 27. Accordingly, if the court decides that preemption is not "required," the court would invalidate the preemptive regulation.

As the previous section explained, the approach proposed by Professor Merrill on behalf of the State Center is demonstrably contrary to this Court's precedents. In this section, we show that the approach has no logical basis either, as demonstrated by the weakness of the arguments marshaled in support of the theory. We begin, however, by pointing out a fundamental error infecting the entire approach developed in the State Center brief.

A. Agency Judgments About Preemption Are Fundamentally Policy Decisions Within Agencies' Domain, Not Purely Legal Interpretive Questions

The theory of State Center brief starts from the basic premise that "[p]reemption is often characterized as an exer-

cise in statutory interpretation, or as resting entirely on congressional intent." *Id.* at 6. The brief then asserts that finding such statutory or interpretive preemption "requires answering two interrelated questions":

> First, there is the question of interpretation: What does the federal statute or regulation at issue mean? Second, there is the question of displacement: Is federal law, as interpreted, in tension with state law, and is this tension sufficiently severe to require displacement of state law in whole or in part in order to achieve the purposes of federal law?

Id. at 6. The State Center brief argues that Congress itself ideally would answer the latter "displacement" question for every potential situation in the plain text of the statute, but the brief also recognizes that '[g]iven the limits of human knowledge, Congress cannot be expected to resolve all preemption questions through express preemption and savings clauses." *Id.* at 7. As the brief quite effectively explains:

> Congress is severely hampered in resolving preemption controversies by the fact that legislation ordinarily operates prospectively. The limits of human knowledge make it virtually impossible for Congress to anticipate all relevant issues before they arise. Congress would have to analyze the common law and statutory rules of fifty different States, including not just those in existence at the time the federal legislation was enacted, but those that might be passed in the future. . . . This is clearly beyond the capacity of even the most far-sighted legislative body.

Id. Recognizing that some "institution" other than Congress must be responsible for addressing preemption issues arising in the course of administering and enforcing the statute, the State Center brief posits agencies and courts as the potential alternatives. *Id.* at 7-8. It concludes that courts should be the arbiters of all preemption issues that might arise, and in-

deed of all interpretive issues of *any* kind that could potentially lead to preemption. *Id.* at 8, 19-20.

The theory of the State Center brief, in short, rests entirely on the premise that judicial review of an agency preemption regulation requires discerning whether *Congress itself* intended the *statute* to preempt state law in the situation addressed by the agency regulation. But this framing of the issue ignores the brief's own important insight: Congress *cannot*, and therefore often *does not*, decide in advance whether, when, and to what extent a given federal statutory scheme should displace state law. Indeed, as this Court's cases have repeatedly observed, *see supra* at 4-10, Congress may well have no particular intent one way or the other with respect to the preemption of specific state laws within the statute's compass.

In enacting a federal statute, however, Congress at least has spoken implicitly to the possibility of preemption, because by establishing federal law in the area and authorizing an agency to administer and enforce the details of federal regulatory goals, Congress necessarily has determined that state law on the subject is *not* sufficient and that there is a need for federal response. In that situation, what Congress expects – unless it affirmatively indicates otherwise – is that the agency will "monitor, on a continuing basis, the effects on the federal program of local requirements." *Hillsborough*, 471 U.S. at 721; *accord Medtronic*, 518 U.S. at 506 (Breyer, J., concurring) ("That [continuing enforcement] responsibility means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives."). And what Congress also expects is that when the agency identifies potentially "conflicting policies," it will make whatever "accommodation" the agency decides is appropriate, based on its experience

and judgment, including the extent to which state law should give way to federal regulatory objectives. *Shimer*, 367 U.S. at 383.

Accordingly, as this Court has repeatedly and correctly held, the correct focus in review of an agency preemption regulation is not the intent of *Congress*, as the State Center brief asserts, but of the *agency* itself. The intent of Congress matters, but only as to whether Congress affirmatively intended to deny the agency the power to issue regulations that preempt state laws within the agency's regulatory domain. *See supra* at 5-13. Absent affirmative indications in the text or history that the agency lacks the power to preempt, courts must assume that Congress intended agencies to resolve the policy issues that inevitably arise in the form of potential conflicts between state laws and the federal objectives the agency is to enforce and promote. Resolution of those policy issues, of course, typically requires close familiarity with, *inter alia*, the varying details of potentially fifty different state schemes; the nature, frequency, and breadth of their application; the state of empirical knowledge on the subject being regulated; experience with different types of regulatory schemes; and the philosophical approach to regulation preferred by the Executive in office. *See infra* at 28-29 (noting policy bases for preemption regulations at issue in this case). Given the non-judicial, quintessentially *policy* nature of such questions, it is no surprise that this Court has so long and so firmly established that "even in the area of preemption" agencies must be given wide latitude in deciding what policy accommodations are appropriate under the particular factual and legal circumstances involved. *New York v. FCC*, 486 U.S. at 64.[3] Nor is it a surprise that in applying this *Shimer*-

[3] The State Center brief accurately explains why agencies are generally better positioned to make the policy judgments that arise during administration of a federal scheme: "Agencies charged with the administration of statutes often have a better understanding of the nuances of a regulatory regime than do courts. And insofar as the resolution of ambi-

Chevron standard of broad deference, the Court has made clear that agencies may choose to preempt as a matter of policy even when preemption is not strictly "required" by the statute, as Professor Merrill's theory would demand. *See supra* at 4-7 (noting that *Shimer*, *de la Cuesta*, and *Crisp* all upheld preemption regulations even while observing that agency was not required to preempt).

The State Center brief, in short, misconstrues the nature of much agency preemption regulation, which is not strictly "statutory" or "interpretive" in the sense the brief posits, but is instead a policy *choice* of the kind agencies are *expected* to make (again, absent contrary statutory indications). As we will show below, most of the brief's analysis founders on this misconception. To be clear, however, the analysis is equally wrong when applied to agency preemption regulations that purport to "interpret" ambiguous statutory terms related to preemption. As shown above, *supra* at 7-8, the *Chevron* standard of deference applicable to an agency's statutory interpretation is functionally identical to, and indeed drawn directly from, the *Shimer* standard of deference applicable to an agency policy regulation. For the same reason that a court accords full deference under *Chevron* to any statutory interpretation by an agency, a court must accord full deference to a preemption interpretation: the presumption in both instances is that by leaving a statutory term imprecise, Congress implicitly intended to leave that definitional gap for the agency to fill based on *its* assessment of which construction would best advance the statute's *policies*. And as just discussed, a decision to preempt is no less a pol-

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guities in statutes and regulations entails making policy judgments, agencies are more accountable policymakers than courts." SC Br. 2; *see also id*. at 8 (noting that "agencies have intimate familiarity" with making "judgment[s] about the requirements of individual federal regulatory schemes"). As explained in the text, the brief simply errs in failing to appreciate why preemption judgments entail the same type of policy determinations.

icy decision than any other regulatory judgment, and indeed may be a policy determination of significantly greater consequence than others to the fulfillment of the statute's objectives. It makes no sense to accord broad deference to agency policy regulations preempting state law, but *not* to accord such deference when an agency makes the exact same policy determination in the context of construing a statutory provision relating to preemption. In either situation, so long as the agency's judgment is within its statutory authority and not contrary to the statute, the agency's policy judgment should control.

B. The State Center Brief's Specific Objections To Applying *Shimer-Chevron* Deference To Agency Preemption Regulations Are Meritless

The State Center brief suggests four specific reasons a court should not accord full deference to an agency's preemption regulation. None has merit.

1. *The Fact That Preemption Regulations Implicate The Supremacy Clause Is Irrelevant*

The first reason proposed for discarding *Shimer-Chevron* deference to agency preemption judgments is that preemption presents an issue of constitutional law under the Supremacy Clause, and "the judiciary has a unique competence to resolve questions of constitutional law." SC Br. 8-9. But a preemption determination is not a judgment about *the meaning of the Constitution*. *Cf. Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1998) ("The federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution."), *quoted in* SC Br. 9. It is, rather, a quintessentially *policy* determination about whether a federal regulatory scheme will operate more effectively in the absence of supplementary or potentially conflicting state regulation. And once that policy decision is made and manifested in a statute or regulation, the targeted state laws be-

come invalid simply as a consequence of the Constitution's *operation*, not its *interpretation*.

This point can be seen clearly in the operation of a preemption power that even the State Center brief agrees is inherent in all agencies: the power to preempt state laws by promulgating regulations that either mandate conduct prohibited by state law or prohibit conduct required by state law. SC Br. 5. Because compliance with state law in that situation is literally impossible, such a regulation preempts the conflicting state laws by its necessary operation. Such a regulation by definition reflects an agency's judgment that the federal regulation should be exclusive of state laws, which constitute unsound policy that should not be enforced. Yet nobody contends that the promulgation and review of such legislative regulations implicates "constitutional" questions – if the regulation is otherwise valid (i.e., within the agency's authority and not contrary to the statute), the contrary state laws simply give way as a matter of course under the Supremacy Clause. The situation is no different when an agency establishes supreme federal law not simply by defining its substance, but by expressly declaring through legislative regulation which state laws represent unsound policy in conflict with federal law. In both circumstances the agency is making a policy judgment, not interpreting a constitutional provision.

2. *Agency Preemption Decisions Are Based Primarily On Policy Judgments, Not On Abstract Application Of Judicially Developed Doctrine*

The next argument advanced in the State Center brief is that agency preemption determinations require the application of legal doctrines developed by courts and thus better applied by them. SC Br. 9-11. But when an agency decides that preemption is warranted, it does not simply apply this Court's preemption precedents and decide, as a court would, what the "correct" legal result should be. As already dis-

cussed, agencies typically make a policy *choice*, one the agency deems appropriate given an evident or potential policy conflict, but not necessarily compelled under existing doctrines. This Court's preemption doctrines are only the starting point for the agency, in other words, they are not themselves solely dispositive.[4] To say that agencies must be denied deference because courts are better at acting like courts is to miss the point of *Shimer* deference entirely: *courts cannot act with policy discretion*, which is critical in deciding whether, when, and to what extent state laws are interfering with, or could interfere with, federal objectives.

3. *The Truism That Preemption Involves Federalism Does Not Undermine* Shimer-Chevron *Deference*

The State Center brief's third argument is that courts should assess the need for preemption independently because federal agencies are not sufficiently accountable to the states for their own preemption decisions. SC Br. 11-12. This is little more than an attack on *Chevron* itself. As the Court recognized in *Chevron*, there are a variety of political constraints on executive agency action:

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[4] In the Preamble to one of preemptive regulations involved in this case, the agency noted that it believed the regulation was consistent with the result a court would reach. *See Investment Securities; Bank Activities and Operations; Leasing*, 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). As the agency has explained, that statement did *not* indicate that the agency chose to preempt state law only because it read this Court's cases as *requiring* preemption under the statute. U.S. Pet. Br., *Burke v. Wachovia Bank, N.A.*, No. 05-431, at 9 n.4 ("U.S. *Burke* Br.") Rather, the statement appears in a section of the Preamble explaining why the agency believed its policy choice to preempt raised no concerns under Executive Order No. 13,132, 3 C.F.R. § 206 (2000), which requires agencies to consider the federalism impacts of new regulations. U.S. *Burke* Br. 9 n.4 The agency has explained that the Preamble statement simply expressed the agency's view that its new regulation did not implicate Executive Order No. 13,132 because it was merely clarifying and reinforcing an earlier regulation that already preempted state law under settled preemption doctrine. *Id.*

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.

467 U.S. at 865. This Court has recognized that when agencies make decisions with the force of law, states – no less than other interested entities – generally "will participate in the process." *United States v. Locke*, 529 U.S. 89, 117 (2000). Notice and comment rulemaking thus serves as a "procedural bridge across the political accountability gap between state and administrative agencies." *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861, 908-09 (2000) (Stevens, J., dissenting); *see id.* at 912. As shown above, this Court's framework for deference to agency preemption decisions prevailed long before *Chevron* itself, and there is no evidence whatsoever that state regulatory authority has been unduly constricted as a consequence. To be sure, various agencies have exercised their authority to preempt various state laws in various ways, but despite almost 50 years of broad judicial deference to those decisions, the State Center brief cites no example of any federal agency becoming the sort of a "runaway engine of preemption" it purports to fear. SC Br. 27.

4. Shimer-Chevron *Deference Permits – Indeed Requires – Courts To Enforce Statutory Limits On Agency Authority*

The final argument in the State Center brief for discarding *Shimer-Chevron* is that preemption determinations are a species of agencies' judgments about their own jurisdiction, to which no deference should attach. SC Br. 12-15. Leaving aside the point that many precedents of this Court have ap-

plied *Chevron* deference "even to an agency's interpretation of its own statutory authority or jurisdiction," *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) (citing cases), there is no basis for concern on this issue, as the State Center brief itself establishes. To prove its point, the brief relies primarily on *Louisiana PSC*, in which, as discussed above, *supra* at 12-13, this Court held that the FCC exceeded its authority by preempting state laws in the face of a clear statutory limitation on its power to preempt such laws. But *Louisiana PSC* provides no evidence that courts applying *Shimer-Chevron* cannot keep agencies cabined within their statutory boundaries; rather, it proves *exactly the opposite point*: it demonstrates that *Shimer-Chevron* provides a fully sufficient framework for courts to constrain agency preemption of state laws when such preemption is beyond the authority Congress statutorily invested in the agency. *Louisiana PSC* thus illustrates both the clear limits of *Shimer-Chevron* and the enforceability of those limits by courts.[5]

C. The State Center Brief Misreads This Court's Agency Preemption Cases

In an attempt to create room for its novel approach to review of agency preemption determinations – and to obscure the extent of its departure from longstanding precedent – Professor Merrill's brief for the State Center contends that this Court's decisions reflect "a variety of propositions about the role of administrative agencies in determining questions of preemption." SC Br. 21. They do not – the Court's cases consistently reflect the rule set forth almost 50 years ago in *Shimer*. In arguing otherwise, the State Center brief misreads virtually every case it cites.

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[5] Other cases Professor Merrill cites in this discussion also contradict his point in the same way. *See Brown & Williamson*, 529 U.S. at 159 (agency exceeded authority); *Gonzales*, 126 S. Ct. at 916-22 (same).

After correctly citing *New York v. FCC* as a case requiring "strong deference to agencies' views about pre-emption," the State Center brief cites *Louisiana PSC* as a case "suggest[ing] the question should be decided *de novo*" by courts. SC Br. 21. But as just explained, *Louisiana PSC* held that the FCC regulation was invalid because the statute explicitly prohibited the regulation – exactly the manner in which *Shimer* and *Chevron* both work. The brief also points to *Geier v. American Honda Motor Co.*, 529 U.S. at 881, as "contemplat[ing] an intermediate degree of deference," SC Br. 21, but *Geier* did *not* involve an expressly preemptive regulation, and thus the Court necessarily was called upon to determine for itself the preemptive scope of the agency's regulations, with the agency's views stated only in an *amicus* brief. 529 U.S. at 883. Even then, the majority gave the agency's views substantive weight in its analysis, not just the "respectful consideration" proposed in the State Center brief. *See id.* at 883-86. And the dissenters in *Geier* made clear that they would have deferred fully to an expressly preemptive regulation if the agency had promulgated one through formal notice-and-comment procedures. *See id.* at 908-10, 912 (Stevens, J., dissenting).[6]

The State Center brief also asserts that *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), "unequivocally reserved, without deciding, the question presented in this case." SC Br. 22. Not so. First of all, it bears emphasis that in the passage on which the brief relies, the *Smiley* Court squarely *rejected* the argument that *Chevron* deference does not apply to an agency's substantive interpretation of a statute that could *result* in preemption through operation of a statutory express preemption provision (*see* 517 U.S. at 743-

[6] Professor Merrill misreads *Medtronic* essentially the same way he misreads *Geier*. SC Br. 24-25. Like *Geier*, *Medtronic* did not involve an express preemptive regulation, and the opinions in that case made clear that if it had, the Court would have accorded the regulation full deference. *See supra* at 11-12.

44) – precisely the argument advanced in the State Center brief. SC Br. 19-20. "This argument," the Court explained, "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." 517 U.S. at 744. As to the former question, the Court held that *Chevron* plainly applies, despite its consequences for preemption. *Id.* at 744-45. Because *Chevron* applied to the agency's interpretation of the *substantive* provision, which was dispositive of the matter, the Court simply noted that it could "assume (without deciding) that the latter question [the statute's 'pre-emptive meaning'] must always be decided *de novo* by the courts." *Id.* at 744. That comment can hardly be taken as a strong indication that the question was truly an open one; rather, the Court simply indicated that the question was *so irrelevant to the issue at hand* that no matter what answer one assumed, the agency would still deserve deference on the regulation at issue. Perhaps more important, the question ostensibly reserved in *Smiley* is *not* the question raised by the agency regulations at issue here. If those regulations are valid under the agency's broad grant to statutory enforcement authority, the question of the statute's *own* "pre-emptive meaning" simply does not arise.[7]

Finally, the State Center brief misreads essentially the entire line of *Shimer* deference cases from *de la Cuesta* forward. Notably, the brief ignores *Shimer*'s discussion of the standard, treating the rule as if it suddenly sprung to life in mature form in *de la Cuesta*. But even leaving aside *Shimer* itself, the reading of *Shimer*'s progeny advanced in the State Center brief cannot be reconciled with either the language or the holdings of those cases. The brief contends that *de la Cuesta* correctly held that to uphold an agency's preemptive

[7] If the hypothetical question raised in *Smiley* were both open and relevant here, we submit that the answer can be found in *Chevron* itself, as explained above, *supra* at 7-8.

regulation, a court must find "[1] agency intent to preempt and [2] agency action within the scope of its delegated authority." SC Br. 27. The brief contends that *de la Cuesta*'s reasoning went awry, however, in suggesting that these two criteria are the only criteria that must be satisfied. The brief contends that a "third requirement" should have been recited: "whether displacement of state law is required under traditional preemption doctrine." *Id.* It contends that *de la Cuesta*, *Crisp*, and *New York v. FCC* all wrongly omitted this requirement, but, the brief asserts, none of them would need to be "overruled" under its theory because they all reached the right result under traditional preemption doctrine. *Id.* at 28. Again, not so.

In each of these cases the Court *specifically* noted that the agency's decision to preempt was *not* required, *see supra* at 5-7, 8-9; the preemption decision in each case was nevertheless permissible only because, as the Court explained, under the *Shimer-Chevron* deference standard, the agency has the policy discretion to *choose* whether to preempt state laws within the sphere of its authority unless Congress clearly says otherwise. Absent the agency's regulatory choice to preempt in those cases, in other words, the statute itself would not have provided a basis for finding that preemption was "required," as the standard proposed in the State Center brief would demand.

There is, in sum, no room in either logic or precedent for the theory Professor Merrill has developed in the State Center brief. This Court would be forced to overhaul nearly 50 years of its own precedents, not to mention the countless lower court precedents and agency decisions that have been made in reliance on agency authority to preempt state laws as needed in the agency's judgment to advance federal regulatory schemes. And all of that simply to force courts into an ill-suited role as substantive policymakers, deciding for themselves whether, when, how, and to what extent federal

policy objectives should supersede state laws. Such policymaking should remain the business of the policymaking branches – Congress and those in the Executive Branch to whom Congress delegates policymaking authority.

III. THE LOWER COURT'S DECISION ILLUSTRATES THE PROPER OPERATION OF *SHIMER-CHEVRON* DEFERENCE

For all the foregoing reasons, the Sixth Circuit did not apply an erroneous standard of review to the Office of the Comptroller of Currency ("OCC") regulations at issue here, as the State Center brief asserts. SC Br. 28. The court specifically invoked the *Shimer-Chevron* standard as articulated by this Court in *de la Cuesta*: A "'pre-emptive regulation's force does not depend on express congressional authorization to displace state law,'" the court noted, and because the agency here explicitly intended to preempt state law, the "only question" remaining is "whether the Comptroller 'has exceeded [its] statutory authority or acted arbitrarily.'" Pet. App. 7a (quoting *de la Cuesta*, 458 U.S. at 154); *see id.* ("We . . . focus on whether the Comptroller has exceeded its authority or acted arbitrarily. We do so through the framework established by *Chevron* . . . .").

The court's opinion further reveals a straightforward application of the *Shimer-Chevron* rule. First, as the opinion explains, the preemption regulations at issue here are well within the sphere of the OCC's broad regulatory authority under the National Bank Act ("NBA"). The NBA confers on national banks both enumerated powers and all "incidental powers . . . necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), which includes all powers "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972). The NBA in turn empowers the OCC to issue "rules and regulations" enforc-

ing the NBA, 12 U.S.C. § 93a, through which the OCC exercises "primary responsibility for surveillance of 'the business of banking'" under the NBA. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). This Court accords full *Chevron* deference to OCC regulations interpreting and enforcing the NBA's "business of banking" provisions. *See Smiley*, 517 U.S. at 738.

Although the NBA itself does not expressly authorize national banks to conduct business through operating subsidiaries, the OCC, pursuant to its broad authority to regulate "the business of banking," determined that national banks could operate more efficiently and effectively if they could conduct certain aspects of the business of banking through operating subsidiaries.[8] Accordingly, the OCC promulgated a regulation authorizing the use of operating subsidiaries: "A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking." 12 C.F.R. § 5.34(e)(1).

The OCC also concluded that operating subsidiaries should be subject to the same laws as the national banks themselves. Because operating subsidiaries are limited to banking activities that the parent national banks themselves could engage in, and they "often have been described as the equivalent of departments or divisions of their parent banks,"

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[8] According to the OCC, operating subsidiaries allow the parent national bank to "control[] operations costs, improv[e] effectiveness of supervision, [provide for] more accurate determination of profits, decentraliz[e] management decisions [and] separat[e] particular operations of the bank from other operations." *Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation*, 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966). Operating subsidiaries thus "enhance the safety and soundness of conducting new activities ... and allow[] more focused management and monitoring of [the bank's] operations." *Rules, Policies, and Procedures for Corporate Activities*, 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996).

the OCC determined that they should operate under the same conditions that would apply to the national bank if it engaged in the same business directly. *Investment Securities; Bank Activities and Operations; Leasing*, 66 Fed. Reg. at 34,788. Thus, in the regulation that authorized the creation of operating subsidiaries, the OCC provided that operating subsidiaries would conduct their activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3). And in a later-promulgated regulation explicitly designed to clarify the agency's preemptive intent with respect to state laws regulating operating subsidiaries, the OCC further provided that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

As the court below held, those regulations on their face are both reasonable and well within the OCC's general authority to regulate the manner and means by which national banks carry on the "business of banking." Nobody questions that a national bank *itself* may conduct the banking activity at issue here free from state regulation. *See* 12 U.S.C. § 484 (prohibiting states from exercising visitorial powers over national banks). The OCC regulations do nothing more than provide that national banks may conduct that same banking activity through an operating subsidiary equally free from state regulation. *See* Pet. App. 8a-9a. Nothing in the statute precludes that result.

There certainly are no statutory indications that Congress intended to deny the OCC the power to preempt state laws. *Cf. Louisiana PSC, supra*. To the contrary, although an affirmative delegation of power to preempt is not necessary under *Shimer* and its progeny, in this case there *is* affirmative evidence that Congress knew the OCC would be exercising the power to preempt. In 12 U.S.C. § 43, Congress required

the OCC to follow formal notice and comment procedures "[b]efore issuing any opinion letter or interpretive rule" concluding that "Federal law preempts the application to a national bank of any State law regarding . . . consumer protection." Such procedures, of course, are already required for the issuance of a formal rule; what § 43 simply adds is that if the OCC seeks to exercise the power to preempt state law through more informal means, *see Hillsborough*, 471 U.S. 717-18 (noting that agency may preempt state law through "regulations, preambles, interpretive statements, and responses to comments"), the agency must employ the procedures normally applicable only to formal rulemaking. It necessarily follows that where, as here, the OCC *does* employ full notice and comment procedures, the agency is acting within authority expressly contemplated by Congress.[9] *See also* 15 U.S.C. §§ 6701(d)(2)(C)(i) & 6714(e) (similarly acknowledging general OCC preemption authority while limiting deference due in insurance context).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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[9] The State Center brief tries to dismiss § 43 by noting that it "imposes a *limitation* on any pre-existing agency authority with regard to preemption" by requiring notice-and-comment even for informal preemption statements. SC Br. 18. That is of course true, but in so doing § 43 also unambiguously *confirms* the existence of that pre-existing authority, which the State Center brief does not and cannot deny. Likewise, the statement in the Conference Report that § 43 was "'not intended to confer upon the agency any new authority to preempt'" (SC Br. 18 (quoting H.R. Rep. No. 103-651, at 55, *reprinted in* 1994 U.S.C.C.A.N. 2068, 2076)), is both accurate and irrelevant: § 43 does not create "new authority" to preempt, it limits *and necessarily confirms* pre-existing authority to preempt through formal regulation.

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November 3, 2006