Granted

Nos. 98-1701 and 98-1706

In The Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,
Petitioners,

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,
Respondents.

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

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether it is appropriate for a court to apply a presumption against preemption in an area where (a) the federal government historically has exercised a regulatory role and (b) inconsistent state rules would interfere with interstate and foreign commerce.

2. Whether the court of appeals erred in holding that Congress did not authorize the Secretary of Transportation to issue preemptive regulations relating to the operation of oil tankers.

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INTEREST OF *AMICI CURIAE*

Amicus Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 major manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. PLAC's primary purpose is to file *amicus curiae* briefs in cases involving issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus* briefs in both state and federal courts, including many in this Court.

Amicus Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents more than 2.5 million businesses and organizations, with 140,000 direct members, in every industrial sector and geographic region of the country. The Chamber has filed numerous *amicus* briefs in this Court on the subject of preemption.

This case, which concerns the scope of the preemption doctrine, raises issues of considerable importance to *amici* and their members. The court of appeals took an unduly cramped approach to the doctrine; if applied in other contexts, that court's mode of preemption analysis would lead to the proliferation of varying and often conflicting rules governing the manufacture, distribution, and use of products in different jurisdictions. Because this outcome would impose substantial burdens and expense on manufacturers, sellers, and consumers — and because it often would frustrate the intent of Congress and federal regulatory agencies — we submit this brief to assist the Court in the resolution of this case.[1]

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by *amici* and was written entirely by their counsel.

INTRODUCTION AND SUMMARY OF ARGUMENT

The briefs of the United States and the private petitioner address in detail the language and purposes of the statutes and regulations that govern this case. Rather than duplicate those arguments here, we focus on two more broadly applicable and doctrinally significant aspects of the court of appeals' decision: its use of a presumption against preemption, and its holding that the Secretary of Transportation (the "Secretary") exceeded his authority in issuing preemptive regulations. Both of these elements of the holding below are significantly flawed.

A. There is no basis for the Ninth Circuit's evident assumption that a presumption against preemption applies in all cases, or applies equally in all cases. This Court's earliest Supremacy Clause decisions did not advert to any such presumption, and even in its modern cases the Court often wholly ignores the presumption — a pattern of inconsistent application suggesting that there is less to the presumption than the court of appeals believed. Moreover, a number of logical inconsistencies inhere in any general presumption against preemption: such a presumption would not mesh easily with clear statement rules that the Court applies in other contexts to safeguard constitutional values, and it is difficult to reconcile with the understanding that the fundamental preemption inquiry is one into congressional intent. After all, a presumption that must yield to any discernible indicia of Congress's preemptive purpose has very limited application.

Against this background, a presumption against preemption may have validity only when the statutory purpose regarding preemption is wholly indeterminate and the circumstances suggest that the presumption may serve as a proxy for congressional intent. That may be the case when a statute operates in a field where the States historically have had primacy and the federal interest is not firmly rooted; in

such a setting, it may make sense to presume (in the absence of contrary evidence) that Congress did not intend to displace state law. But such a presumption has no application in areas where Congress historically has been active, where there is a federal interest in uniformity of regulation, or where constitutional values point toward a paramount federal role. And that is true of this case, which involves use of navigable waterways, bears on the United States' foreign relations, and raises the prospect of inconsistent state regulations burdening interstate and international commerce. Against this background, there is no reason to indulge the presumption that Congress intended to preserve state law.

B. In addition, the court of appeals erred by failing to make any inquiry into whether the federal regulations *impliedly* preempt Washington's rules regarding tanker operation. In fact, the Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 174 (1978), establishes that, when the Secretary "has addressed and acted upon [a] question" regarding tanker operation, varying state rules are superseded. In this respect, *Ray* simply applied the broader principle that federal regulations have no less a preemptive effect than, and are subject to the same preemption analysis as, federal statutes.

The court of appeals also went astray in holding that the Secretary's regulations could not have preemptive effect because "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." *International Ass'n. of Independent Tanker Owners* v. *Locke*, 148 F.3d 1053, 1068 (9th Cir. 1998). There was no need to search for an affirmative indication that Congress meant to authorize the agency to preempt inconsistent state law; so long as the Secretary acted within the scope of his authority, the relevant preemption question concerns the agency's intent and not that of Congress. By the same token, the court of appeals was wrong in concluding that Section 1018 of the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2718, denies

the federal regulations preemptive force. That provision, which states only that "[n]othing in this Act" affects the authority of the States, does not withhold authority from the agency to issue preemptive regulations under OPA 90 and says nothing about the agency's authority to issue regulations pursuant to *other* statutes.

ARGUMENT

FEDERAL LAW PREEMPTS WASHINGTON'S TANKER REGULATIONS

A. A Presumption Against Preemption Is Not Appropriately Applied In Cases Where There Is A Substantial Federal Interest In Uniformity

1. The court of appeals began its analysis with the declaration that courts must resolve cases like this one by applying a presumption against preemption. Citing to this Court's decision in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the Ninth Circuit opined that "[c]onsideration of preemption issues 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.'" 148 F.3d at 1058-1059 (quoting *Rice*, 331 U.S. at 230) (bracketed material added by the court of appeals). We recognize that the Ninth Circuit is not alone in its application of this presumption; many courts, including this one, have adverted to such a presumption with some frequency. In our view, however, the court of appeals jumped too quickly to its evident conclusion that the presumption applies in *all* preemption cases, and that it applies in the same way in each.

As an initial matter, we note that there is no historical basis for such a conclusion. The Court's earliest Supremacy Clause cases made no mention of any presumption against preemption. See, *e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-344 (1816) ("the legislatures of the

states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States"); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (applying no presumption in case where state criminal law was superseded by treaty). Nor did the Court in these early cases suggest that special treatment was appropriate for state laws involving exercise of the State's traditional police powers. To the contrary, Chief Justice Marshall took pains to explain for the Court that, if state laws "come into collision" with federal law by "interfering with, and being contrary to" acts of Congress,

> it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of [the State] must yield to the law of Congress * * * .

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824). The Court gave no indication that any sort of presumption should govern analysis of the validity of such laws.

In fact, it was not until early in this century that the Court first adverted to a "presumption that state powers * * * survive unless clearly ended by Congress." Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994). See R. David Allnut, Comment, *FIFRA Preemption of State Common Law Claims After* Cipollone v. Liggett Group, Inc., 68 WASH. L. REV. 859, 862 & n.14 (1993) (Court began referring to "a presumption in favor of state regulation" in the 1920s and 1930s). The presumption received its most commonly cited formulation in 1947 in *Rice* — although it is worth noting that in *Rice* itself the Court, having stated the presumption, made no further mention of it and proceeded to hold the challenged state law preempted. In the historical scheme of things, then, the

presumption applied by the court of appeals is a relatively recent creation.

By the same token, the presumption against preemption has been applied by the Court in an inconsistent and haphazard way. Although it is most often said to be applicable to federal laws that touch fields traditionally regulated by the States (see, *e.g.*, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 206 (1983)), the presumption sometimes is said to govern *all* federal legislation (see, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) (presumption that "Congress did not intend to displace state law")).

On the other hand, the presumption often is simply ignored by the Court. To be sure, there are a fair number of cases in which the Court has recited *Rice*'s passage on presumption or has invoked equivalent language.[2] But there are at least as many preemption decisions in which the Court has made no mention of the presumption at all. Justice Scalia thus has noted the substantial body of cases in which the Court "said not a word about 'a presumption against * * * preemption, * * * that was to be applied to construction of the text [of a statutory preemption clause]." *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 546 (1992) (opinion of Scalia, J.).[3] In fact, the decisions in which the Court has wholly disregarded any presumption against preemption

[2] See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

[3] Justice Scalia cited *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Norfolk & Western R. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

include cases involving express preemption,[4] field preemption,[5] and conflict preemption;[6] they include both cases upholding state laws[7] and those finding them superseded.[8] This pattern of inconsistent application suggests that there may be less to the presumption than first meets the eye.

2. That conclusion is confirmed by what appear to be a number of logical inconsistencies that inhere in any general

[4] See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990); *Louisiana Public Service Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

[5] See, *e.g.*, *Wisconsin Dep't. of Industry, Labor and Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

[6] See, *e.g.*, *Freightliner Corp.*, *supra*; *Gade* v. *National Solid Wastes Management Ass'n.*, 505 U.S. 88 (1992) (plurality opinion); *Louisiana Public Service Comm'n, supra*; *Wisconsin Dep't. of Industry, Labor and Human Relations*, *supra*; *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Brown* v. *Hotel and Restaurant Employees and Bartenders Int'l. Union Local 54*, 468 U.S. 491 (1984); *Capital Cities Cable, Inc.*, *supra*; *United States* v. *Shimer*, 367 U.S. 374 (1961); *McDermott* v. *State of Wisconsin*, 228 U.S. 115 (1913).

[7] See, *e.g.*, *Freightliner Corp.*, *supra*; *Louisiana Public Service Comm'n*, *supra*; *Brown*, *supra*.

[8] See, *e.g.*, *American Airlines, Inc.*, *supra*; *FMC Corp.*, *supra*; *Capital Cities Cable, Inc.*, *supra*; *Hines*, *supra*.

presumption against preemption. *First*, the presumption often is said to rest on "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (Blackmun, J.). But this special solicitude for important state interests is in tension with other aspects of preemption doctrine, which regard the importance of the state interest at stake as wholly *irrelevant* to the analysis. Thus, it has long been settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). Indeed, even where the State has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our preemption doctrine is derived, any state law, * * * clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade* v. *National Solid Wastes Management Ass'n.*, 505 U.S. 88, 108 (1992) (plurality opinion) (internal quotation marks and citations omitted). See, *e.g.*, *Brown* v. *Hotel and Restaurant Employees and Bartenders Int'l. Union Local 54*, 468 U.S. 491, 503 (1984); *DeCanas* v. *Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Second, the presumption against preemption does not function in a way that meshes easily with the clear statement rules that the Court has applied in other contexts to safeguard constitutional interests. As Justice Scalia has noted:

> To be sure, [the Court's] jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. * * * But none of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved by sheer implication, with no express statement of intent at all.

Cipollone, 505 U.S. at 546-547 (Scalia, J.). After all, such clear statement rules ordinarily are applied to guarantee that Congress *actually* has focused on achieving a particular result.[9] But that is not required in the preemption context. To the contrary, the Court will hold that federal laws have preemptive effect even "[w]here Congress likely did *not* focus specifically on the matter," so long as a ruling against preemption would produce an "anomalous result." *Medtronic, Inc.*, 518 U.S. at 504 (Breyer, J.) (emphasis added). And needless to say, Congress could not have expressly considered the question when *implied* preemption is at issue.

Third, application of a presumption against preemption often is difficult to reconcile with the central, universally acknowledged rule governing preemption cases: "[p]re-emption fundamentally is a question of congressional intent."

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[9] See, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (Court will find that Congress waived the sovereign immunity of the United States only where the intent to do so is "unequivocally expressed"); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause") (citation omitted); *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (Court will find that Congress intended to abrogate state sovereign immunity only if that intention is made "'unmistakably clear in the language of the statute'") (citation omitted).

English, 496 U.S. at 78-79.[10] Even decisions that have forcefully stated the presumption have gone on to recognize that the Court's

> analysis of the scope of [a] statute's pre-emption is guided by [the] oft-repeated comment, initially made in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." * * * As a result, any understanding of the scope of a pre-emptive statute must rest primarily on "a fair understanding of congressional purpose."

Medtronic, 518 U.S. at 485-486 (quoting *Cipollone*, 505 U.S. at 530 n.7 (Stevens, J.)). See, *e.g.*, *New York State Conference of Blue Cross and Blue Shield Plans* v. *Travelers, Inc.*, 514 U.S. 645, 655 (1995); *Gade*, 505 U.S. at 116 (Souter, J., dissenting). And since the Court's "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole" (*Gade*, 505 U.S. at 98 (plurality opinion)) — an inquiry that "'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'" (*FMC Corp.*, 498 U.S. at 57 (citation omitted)) — it appears that the presumption must yield to any discernible indicia of Congress's pre-emptive intent. See generally *Cipollone*, 505 U.S. at 544 (Scalia, J.) ("Under the Supremacy Clause, * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."). Indeed, we are not aware of any decision in which the Court found evidence of congressional

[10] See, *e.g.*, *Gade*, 505 U.S. at 96 (plurality opinion); *Cipollone*, 505 U.S. at 545 (Scalia, J.); *FMC Corp.*, 498 U.S. at 56; *Allis-Chalmers*, 471 U.S. at 208; *Hillsborough County*, 471 U.S. at 714; *Brown*, 468 U.S. at 500; *Malone*, 435 U.S. at 504.

intent that would have been held sufficient in other contexts but was rejected because it did not overcome the presumption against preemption.

3. Against this background, we believe that such a presumption may have validity only in limited circumstances: where the statutory language is wholly ambiguous and the statutory purpose regarding preemption completely indeterminate, *and* where the circumstances suggest that a presumption may serve as a proxy for congressional intent. Thus, if a wholly ambiguous statute operates in a field where state regulation has had "historic primacy" (*Medtronic*, 518 U.S. at 485) — that is, where the federal government traditionally has not acted and the federal interest in a uniform rule is not firmly rooted — it may make sense to presume that Congress did not intend to displace state law.

But such a presumption regarding congressional intent has no application in areas where Congress often has been active, where there is a federal interest in uniformity of regulation, or where federal primacy is rooted either in tradition or in constitutional values. There is nothing novel in the conclusion that there is no place for a presumption in favor of state regulation in such circumstances. The court has long recognized that "the respective relation of federal and state power to the general subject matter" is relevant to the preemption inquiry. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 772 (1947). Indeed, the Court consistently has applied what amounts to a presumption *in favor of preemption* in cases where the interest in federal primacy and uniformity was manifest. See, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 63, 68 (1941) (foreign relations and regulation of aliens); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942) (same). Cf. *Brown*, 468 U.S. at 502-503 (recognizing "presumption of federal pre-emption" in areas within the primary jurisdiction of the NLRB). This is only logical: it makes no sense to presume that Congress would

have wanted to preserve state laws that intrude on paramount federal interests, or that subject interstate or international commerce — commerce that, by hypothesis, already is subject to federal regulation — to inconsistent and possibly conflicting state rules.

In this case, these considerations suggest that application of a presumption against preemption is wholly inappropriate. The regulations at issue here involve use of the navigable waterways of the United States and affect "commerce on the high seas," matters in which there is a clear "federal interest in uniform regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 187 (1978) (Stevens, J.). The existence of many international agreements in the area confirms that the disputed Washington regulations touch on the nation's foreign relations, obviously "a matter of national moment." *Hines*, 312 U.S. at 73. And, of course, "it should be recognized that this initial burden [on commerce imposed by Washington's regulations] is subject to addition and multiplication by similar action in other States." *Ray*, 435 U.S. at 189 (Stevens, J.). In such circumstances, it is not "plausible that Congress meant" to preserve state law (*American Airlines Inc.* v. *Wolens,* 513 U.S. 219, 232 (1995)) — and the Court surely should not indulge a presumption to that effect.

B. Validly Promulgated Regulations Have Preemptive Force Equivalent To That Of Statutes

Moving beyond the invocation of a presumption against preemption, there were two elements to the court of appeals' holding that the Secretary's regulations do not have preemptive effect. The court reasoned that the *regulations* could not preempt the field of tanker operation (or, presumably, work "conflict" preemption) because it read this Court's holding in *Ray* to stand for the proposition that the relevant federal *statutes* preempted only the field of tanker design and construction. See 148 F.3d at 1064-1067. And

the Ninth Circuit held that the Secretary's regulations — some of which do expressly preempt state law — could not be given effect because, in its view, "Congress did not expressly or impliedly delegate to the Coast Guard the authority to preempt state law." *Id.* at 1068. These conclusions, however, rested on a fundamental misunderstanding of the rules governing the preemptive effect of regulations.

1. The court of appeals appears to have understood this Court's decision in *Ray* as holding that the Ports and Waterways Safety Act of 1972 ("PWSA"), Pub. L. No. 92-340, 86 Stat. 424, preempted the field of tanker *design and construction* (see 148 F.3d at 1064-1066) and that regulations addressing tanker *operation* could have preemptive force in this context only if they *expressly* preempted state law. See *id.* at 1067 (after discussing whether PWSA preempted state regulation, court turned to the question "whether any of the [state] Regulations are expressly preempted by federal law"; *Ray* "teaches that once a court has determined that state tanker regulations are not subject to implied preemption as 'design and construction' requirements, the court still must examine whether the state regulations are expressly preempted"). But this analysis misreads both *Ray* and the broader preemption principles on which that decision rested.

It is true that the Court in *Ray* read Title II of the PWSA to "show[] that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates * * * that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." 435 U.S. at 163. The Court therefore held that "[e]nforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers" (*id.* at 165), making it

"clear that Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted." *Id.* at 168.[11]

But that was not the end of the Court's analysis. The Court went on to discuss *Title I* of the PWSA, which authorized the Secretary to issue regulations involving tanker *operation*. Addressing a Washington State rule requiring that tankers entering Puget Sound be escorted by tug boats, the Court held:

> The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all. It does not appear to us that he has yet taken either course. * * * It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but *until that occurs*, the State's requirement need not give way under the Supremacy Clause.

435 U.S. at 171-172 (emphasis added).

The Court reached a different conclusion under Title I regarding a Washington regulation that excluded large tankers from Puget Sound. On this point, the Court again found that "[t]he pertinent inquiry * * * [is] whether the Secretary,

[11] Although the court of appeals regarded *Ray* as involving preemption of the field of oil tanker design and construction, it is not entirely clear whether *Ray* actually involved field rather than conflict preemption. And in the circumstances here, it is doubtful that the distinction makes much difference. "[F]ield preemption may be understood as a species of conflict preemption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or implied) to exclude state regulation." *English*, 496 U.S. at 79 n.5. See *Gade*, 505 U.S. at 104 n.2 (plurality opinion).

through his delegate, has addressed and acted upon the question of size limitations." 435 U.S. at 174. Because the Secretary *had* addressed the question of tanker size without categorically excluding large tankers from the Sound (the federal regulations prohibited the passage of more than one large vessel through the Rosario Strait at any given time, see *id.* at 174-175), the Court held "that in this case the Secretary's failure to promulgate a ban on the operations of [large] oil tankers" takes on "'the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.'" *Ibid.* (quoting *Bethlehem Steel Co.*, 330 U.S. at 774). This meant that "States are not permitted to use their police power to enact such a regulation." *Ibid.* (quoting *Bethlehem Steel Co.*, 330 U.S. at 774). *Ray* thus stands squarely for the proposition that federal regulations dealing with tanker operation may *impliedly* preempt state law when the federal rule "ha[s] indeed dealt with the issue" (*id.* at 175), and that it was only the absence of *any* federal regulatory activity that saved Washington's tug-escort rule. That holding, of course, is dispositive here: as the petitioners' briefs demonstrate, the Secretary's regulations do deal pervasively with tanker operation.[12]

In this respect, the decision in *Ray* simply applied the broader principle that "[f]ederal regulations have no less pre-

[12] In fact, the case for preemption has become considerably stronger since the decision in *Ray*. While that case addressed only the Secretary's authority under the PWSA, Congress has since enacted the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471. That statute directs the Secretary to issue regulations addressing tanker design and operation. It was intended to "provide the Secretary * * * with broader and more extensive authority, stated more explicitly, to address these problems" (H.R. REP. NO. 95-1384, pt. 1, at 2 (1978)), and to encourage "the development and application of uniform international standards for such vessels." H.R. REP. NO. 95-1384, pt. 2, at 3-4 (1978).

emptive effect than federal statutes" (*Fidelity Federal*, 458 U.S. at 153) — and are subject to the same preemption analysis as are statutes — so long as they are validly promulgated pursuant to an authorizing law.

> The Supremacy Clause of the Constitution gives force to federal action * * * by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. The phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, * * * "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.

City of New York v. *Federal Communications Comm'n*, 486 U.S. 57, 63-64 (1988) (quoting *Louisiana Public Service Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355, 369 (1986)). The controlling question in this case accordingly is whether the Secretary's regulations either expressly or impliedly preempt state law.

2. In fact, the court of appeals seemingly acknowledged that various federal regulations do expressly preempt certain of Washington's rules.[13] But the court held that the regulations could not have preemptive effect because "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." 148 F.3d at 1068. To the contrary, the court continued, "§ 1018 of OPA 90 establishes that nothing in OPA 90 may be construed

[13] For reasons explained by petitioners, it is plain that *all* of the challenged Washington rules are impliedly preempted by federal regulations, statutes, and international agreements.

as impairing the ability of the states to impose their own oil-spill requirements" and, "[i]n view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so." *Ibid.* This holding, however, was wrong on several levels.

First, the court of appeals erred in believing that it had to search for some affirmative indication that Congress intended to authorize the preemption of state law by a federal agency. In fact, the Court has

> emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141, 154 (1982). 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. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area.

City of New York, 486 U.S. at 64.[14] See *Hillsborough County* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 713-714 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984); *Shimer*, 367 U.S. at 383.

Indeed, the notion that Congress would give an agency plenary authority to issue regulations while simultaneously denying those regulations preemptive effect leads to perverse results. It would mean, for example, that state laws would not be preempted even when they frustrated the manifest federal purpose. And it would leave private parties obligated to comply with a patchwork of irreconcilable federal and state rules. Absent the clearest statement from Congress, there is no reason to believe that it meant to erect such a bizarre regulatory structure. Just as the "repeal of [preemptive federal] regulation [does] not leave behind a pre-emptive grin without a statutory cat" (*Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)), so the promulgation of a regulatory cat ordinarily must *give rise* to the preemptive grin.

Second, the court of appeals was plainly wrong in concluding that the Secretary's regulations are denied preemptive force by OPA 90 § 1018, which provides that "[n]othing in this Act" affects the authority of States or their political subdivisions to impose "additional requirements"

[14] The Court added that "[i]t has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by 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.'" *City of New York*, 486 U.S. at 63 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

respecting the discharge of pollutants. 33 U.S.C. § 2718(a), (c). In reaching this conclusion, the court relied on *Louisiana Public Service Comm'n*. See 148 F.3d at 1068. But that decision provides no support for the Ninth Circuit's holding here. In *Louisiana Public Service Comm'n*, the Court addressed a statutory regime in which Congress had "explicitly limited [the agency's] jurisdiction, so as to prohibit it from pre-empting state law." *City of New York*, 486 U.S. at 66. See *Louisiana Public Service Comm'n*, 476 U.S. at 370 (noting "express jurisdictional limits on [the agency's] power"). This meant that the "agency ha[d] literally no power to act, let alone pre-empt the validly enacted legislation of a sovereign State." *Id.* at 374. Here, in contrast, OPA 90 contains no equivalent jurisdiction-limiting provision. Moreover, even if Section 1018 somehow were read to deny the Secretary authority to issue preemptive regulations pursuant to OPA 90, the provision would say nothing about the Secretary's authority to issue regulations under the many *other* federal laws that permit him to act in this area — statutes that he in fact invoked in promulgating the relevant regulations and that give him "plenary authority to issue regulations governing" tanker operation. *Fidelity Federal Savings & Loan*, 458 U.S. at 161.[15]

It may be added that the court of appeals misunderstood the plain import of OPA 90 § 1018. When Congress enacted OPA 90, "it acted against a background of federal preemption on this particular issue." *City of New York*, 486 U.S. at 66. In this setting, when Congress specifically provided in Section

[15] In addition to OPA 90, the statutes invoked by the Secretary in promulgating the regulations at issue here include, among others, the PWSA; the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3927; and the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471. These statutes are codified at various points in Titles 38 and 46 of the United States Code.

1018 that "[n]othing in *this* Act" displaces state law, it must be understood to have intended to preserve the preemptive authority of existing statutes — a conclusion that is confirmed by the declaration in its legislative history that OPA 90 "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990).[16] And more broadly, "the natural implication" of Congress's decision to enact a savings provision stating that *OPA 90* does not have preemptive effect is that Congress believed other statutes and regulations *did* preempt state law; that Congress found it necessary to specifically preserve state law against preemption by a particular enactment "presupposes a background of preemption." *Gade*, 505 U.S. at 100 (plurality opinion). See generally *Ray*, 435 U.S. at 174 (where some state laws expressly permitted, statute "impliedly forbids higher state standards").

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[16] In fact, at the time of the decision in *Ray* there were a number of statute-specific savings clauses that were very similar to the one now in OPA § 1018. See Deepwater Port Act of 1974, Pub. L. No. 93-627, § 19(a)(2), 88 Stat. 2126 (1975) (codified at 33 U.S.C. § 1518) ("Except as otherwise provided by this Act, nothing in this Act shall in any way alter the responsibilities and authorities of a State or the United States within any of the territorial seas of the United States."); Trans-Alaska Pipeline Authorization Act Pub. L. No. 93-153 § 204(c)(9), 87 Stat. 584 (1973) (codified at 43 U.S.C. § 1653) ("This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements"); Federal Water Pollution Control Act of 1972, Pub. L. 92-500 (codified at 33 U.S.C. § 1251(b)) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution * * * ."). Needless to say, the Court in *Ray* did not regard these provisions as having any bearing on the issues in that case.

The court of appeals' only response to these points was its assertion that Section 1018 "shapes the 'full purposes and objectives' of Congress * * * with respect to the entire legislative field of oil-spill prevention" — and that it does so even though it "expressly applies only to OPA 90." 148 F.3d at 1068 n.15. But even apart from the textual implausibility of the court's conclusion, its mode of analysis is insupportable. The notion that Congress should be deemed to have impliedly revoked the plenary regulatory authority granted the Secretary in many pre-existing statutes cannot be reconciled with the rule that implied repeals are disfavored. The Ninth Circuit's approach also would create paralyzing uncertainty about the regulatory power of federal agencies whenever Congress enacts a clause saving state authority in specified circumstances. And if a clause like Section 1018 may be read to displace regulatory authority in a wide and unpredictable range of settings, "surely only the most sporting of Congresses will dare say anything" expressly preserving state law. *Cipollone*, 505 U.S. at 548 (Scalia, J.). As a result, the court of appeals' approach could have the perverse effect of discouraging Congress from expressing its intentions regarding preemption in the statutory text, an outcome that is not in anyone's interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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