No. 06-1498

In The
Supreme Court of the United States

WARNER-LAMBERT COMPANY LLC
and PFIZER INC.,

Petitioners,

v.

KIMBERLY KENT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PUBLIC JUSTICE, P.C., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

Public Justice (formerly Trial Lawyers for Public Justice) is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that tort law fully serves its dual purposes of compensating those injured by wrongful conduct and deterring similar conduct in the future. Public Justice is gravely concerned that, if the tort system is limited excessively through an improper narrowing of the presumption against preemption, neither of these purposes will be served.[1]

SUMMARY OF ARGUMENT

In this state tort action against pharmaceutical manufacturers, the plaintiffs allege that they suffered injuries from Rezulin, a drug marketed and sold for the treatment of Type-2 diabetes. *See Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 88 (2d Cir. 2006). The defendants assert that they are immune from suit under a Michigan statute granting manufacturers immunity from product liability suits when the

[1] *Amicus* is the sole author of this brief. No one other than *amicus* or its members made a monetary contribution to its preparation or submission. The parties have filed letters giving blanket consent to the filing of *amicus* briefs in this case.

Food and Drug Administration (FDA) has approved the drug in question. *See id.* 87-88. Michigan law provides an exception to this immunity, however, where the manufacturer withheld or misrepresented information that would have altered the FDA's approval decision. *See id*. at 87. The defendants argue that this exception cannot be enforced – that it is preempted by federal law – because it would create an "obstacle" to the "full purposes and objectives" of federal drug regulation under this Court's holding in *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). *See, e.g.*, Pet. Br. 29.

Rather than address this theory (which is addressed at length in respondents' brief), Public Justice writes to respond to an *amicus curiae* brief submitted by the Chamber of Commerce ("Chamber") that is devoted exclusively to attacking the "presumption against preemption" – the long-established rule forbidding courts to find federal preemption of state law in the absence of "clear and manifest" congressional intent to preempt. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Chamber's argument against the presumption is radical, urging its abandonment in the precise context where it is needed most – "implied conflict" preemption cases, where courts lack any express congressional command with respect to preemption and instead must embark on an unguided inquiry as to whether state

law might somehow create an "obstacle" to the "full purposes and objectives" of federal law.[2]

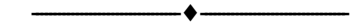
The Chamber's effort to persuade this Court to jettison the presumption against preemption in implied conflict preemption cases is fatally flawed on all counts. First, the Chamber is wrong in contending that this Court has already abandoned the presumption in implied conflict cases. In reality, this Court has applied the presumption in this context from at least the mid-1800s to the present, and even has done so unanimously in recent years. The Chamber's argument to the contrary either ignores or misreads every relevant case on this issue, and should be rejected out of hand.

The Chamber's efforts to derail the presumption against preemption on policy grounds are equally unpersuasive. As this Court has repeatedly recognized, the presumption against preemption is rooted in the bedrock federalism principles on which this country is based. In the preemption context, federalism plays a key role in preserving the historic importance of state tort law in protecting the health and safety of the citizens of this country. Tort litigation often exposes and responds to the dangers of hazardous products far more quickly and efficiently than federal lawmakers or regulators, and it also creates an incentive for manufacturers to make their products safer. And, of course, tort law provides a

[2] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

mechanism for victims to obtain compensation for their often horrific injuries – compensation that federal laws and regulations typically do not provide, precisely because Congress understood that such compensation could be provided by the states.

The presumption against preemption helps ensure that these federalism concerns are not merely empty rhetoric. Determining the intent of Congress is difficult enough in express preemption cases, where Congress has spoken directly to the issue of preemption of state law. But in implied conflict preemption cases, where Congress has been silent on the issue of preemption, courts are faced with the far more difficult task of determining whether state-law damage claims would somehow undermine or "frustrate" federal purposes. Absent the presumption against preemption, there would no guidepost for courts to follow in the event such purposes prove difficult to discern. The result of jettisoning the presumption could be wholesale judicial policymaking of the worst sort – the kind that destroys the myriad benefits of state tort law and, in its place, fosters the improper and inadvertent expansion of federal authority. This Court should reject the Chamber's invitation to embark on such a radical disruption of the federal/state balance.



ARGUMENT

I. THIS COURT HAS APPLIED THE PRESUMPTION AGAINST PREEMPTION IN IMPLIED CONFLICT CASES FOR OVER ONE HUNDRED YEARS.

A. The Presumption Against Preemption Is Deeply Rooted in This Court's Implied Conflict Preemption Jurisprudence.

The Chamber's principal argument is that this Court has *already* abandoned the presumption against preemption in implied conflict cases. But this is simply wrong. In addition to this Court's recent affirmation that the presumption against preemption applies "*[i]n all pre-emption cases*, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added) (quoting *Rice*, 331 U.S. at 230), the Court has applied the presumption in implied conflict cases for well over one hundred years.

In *Savage v. Jones*, 225 U.S. 501 (1912), for example, this Court applied the presumption in rejecting a claim of conflict preemption, citing several prior instances of its use. *See id*. at 533-39. Among them is *Sinnot v. Davenport*, 63 U.S. 227 (1859), which held:

> [I]n the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict

> should be direct and positive, so that the two acts could not be reconciled or consistently stand together. . . .

Id. at 243.[3]

Since *Savage*, this Court has continuously applied the presumption in implied conflict cases, often *unanimously*. In 1997, for example, the Court unanimously applied "our normal presumption against pre-emption" in rejecting a claim that the federal policy of permitting interlocutory appeals under 42 U.S.C. § 1983 preempted a state rule denying the same right of appeal. *See Johnson v. Fankell*, 520 U.S. 911, 918 (1997). In *English v. General Electric Co.*, 496 U.S. 72, 87 (1990), the unanimous Court stated that it "must look for special features warranting pre-emption" when determining "whether . . . petitioner's claim conflicts with particular aspects of" federal law, *id*. at 90, and re-affirmed the "teaching of this Court's decisions enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Id*. at 90. In *California v. ARC America Corp.*, 490 U.S. 93 (1989), the unanimous Court stated in an implied conflict case that "appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States." *Id*. at 101. And, in *Hillsborough County v. Automated*

[3] This contrasts sharply with the Chamber's claim that the Court did not recognize the presumption until 1947. *See* Chamber Br. 9 (citing *Rice*, 331 U.S. at 230).

Medical Laboratories, Inc., 471 U.S. 707 (1985), the unanimous Court held that "Appellee must thus present a showing of . . . conflict between a particular local provision and the federal scheme . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Id*. at 716.

The Chamber has no serious response to these cases. It fails to mention *Johnson* at all. It cites *English* but never mentions that the case addressed a claim of implied conflict preemption and applied the presumption in that context. *See* Chamber Br. 8 n.4, 10 n.5, 17, 18. It discounts both *ARC America Corp*. and *Hillsborough* by stating that each case gave a mere "nod" to the presumption without relying on it in the implied conflict preemption analysis. *Id*. 11. But implied conflict was the *sole* issue in *ARC America Corp*. *See* 490 U.S. at 102 ("Appellees' only contention is that state laws . . . pose an obstacle to the accomplishment of the purposes and objectives of Congress."). And *Hillsborough* expressly states that the presumption applies to implied conflict questions. 471 U.S. at 716 (requiring "a showing of . . . conflict . . . that is strong enough to overcome the presumption").

In addition to these cases, a majority of current justices have joined opinions written precisely to emphasize the applicability of the presumption to implied conflict questions. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 905-12 (2000) (Stevens,

J., dissenting, joined by Souter, Thomas, & Ginsburg, JJ.); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring); *id.* at 115-16 (Souter, J., dissenting, joined by Blackmun, Stevens, & Thomas, JJ.). The Chamber ignores this as well.

Support for the presumption in implied conflict cases is even stronger given their marked similarity to "field" preemption cases – which even the Chamber concedes are subject to a presumption against preemption. *See, e.g.*, Chamber Br. 6.[4] This Court has repeatedly emphasized that the categories of preemption "are not 'rigidly distinct,'" and that "field preemption may be understood as a species of conflict preemption." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English*, 496 U.S. at 79-80 n.5).[5] Indeed, it should be the rare

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[4] *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice*, 331 U.S. at 230.

[5] *See also* Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW § 6-28, at 1176-77 (3d ed. 2000) (stating that categories of preemption are "anything but analytically air-tight" and that field preemption "may fall into any of . . . three categories"); Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 576 (2007) ("[T]he line distinguishing field preemption from other forms of federal preemption is notoriously blurry. . . ."); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 775 (1994) (arguing that all preemption can be characterized as conflict preemption). Numerous cases illustrate the fluidity between categories of preemption. For example, *CSX Transportation* could be viewed as an "express," "field," or "conflict" preemption case. There, the Court held that an express

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litigant who asserts that Congress has impliedly preempted an entire field and fails to argue in the alternative that state law also creates an "obstacle" to or "frustrates" some particular aspect of federal policy.[6] Regardless of the label applied, each preemption question requires ascertaining congressional intent. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("Accordingly, '"[t]he purpose of Congress is the ultimate touchstone"' of pre-emption analysis." (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978))). Just as the presumption helps to ensure that the Court does not over-read preemptive intent in "field" cases, it performs the same service in "conflict" preemption cases, for in each type of case, congressional intent must be inferred.

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preemption provision gave rise to field preemption, 507 U.S. at 662-63, and then rejected preemption of one claim because the relevant federal regulation did not apply to the particular facts at hand – an analysis that the Court stated disposed of "conflict" preemption claims, *id*. at 672-73 & n.12.

[6] *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (stating that, where Congress has not "completely occupied the field," preemption should be found only as a result of "irreconcilable conflict").

B. Contrary to the Chamber of Commerce's Claim, This Court Has Never "Avoided" Applying the Presumption Against Preemption in Implied Conflict Preemption Cases.

Given the absence of affirmative support for its position in the case law, the Chamber resorts to an argument from the negative, claiming that this Court rarely applies the presumption in conflict cases. But this argument either ignores or misreads every relevant case.

Foremost, the Chamber errs badly in characterizing *Gade*, 505 U.S. 88, as an instance in which "the Court . . . avoided reliance on the presumption when addressing claims of conflict preemption." Chamber Br. 10 & n.7. To the contrary, the majority of justices *supported* application of the presumption in *Gade*. *See id*. at 110; (Kennedy, J., concurring); *id.* at 115-16 (Souter, J., dissenting, joined by Blackmun, Stevens, Thomas, JJ.) In fact, Justice Kennedy concurred rather than joined the plurality precisely because he objected to the plurality's "undue expansion of our implied preemption jurisprudence," 505 U.S. at 109, which he deemed "contrary to" the presumption against preemption. *Id*. at 110.

Equally baseless is the Chamber's claim that "in *Crosby*, decided in 2000, the Court recognized that the applicability of the presumption in the conflict preemption context remained an open question." Chamber Br. 11 (citing 530 U.S. at 374 n.8). *Crosby*

concerned whether a Massachusetts law sanctioning entities for doing business with Burma interfered with federal enactments on Burma policy. Thus, the relevant "context" of *Crosby* for preemption purposes was *foreign affairs*, an area in which federal interests overwhelmingly eclipse those of the states. This is clear from *Crosby*'s citation, in the very passage on which the Chamber relies, to *United States v. Locke*, 529 U.S. 89 (2000). *Locke* decided a question of implied conflict preemption in the area of "national and international maritime commerce," *id.* at 108, where the Court stated that "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" because Congress has long-standing "authority . . . to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 99. *Crosby* provides no indication that "the applicability of the presumption in the conflict preemption context" is "an open question." Chamber Br. 11.[7]

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[7] The Chamber engages in similar sleight-of-hand regarding *Engine Manufacturers Association v. South Coast Air Quality Management Dist.*, 541 U.S. 246 (2004). The Chamber attempts to cast doubt on the presumption's validity even in the context of *express* preemption by quoting *Engine Manufacturers* as stating, in the context of an express preemption analysis, that " 'not all Members of this Court agree' on the 'application' of the 'presumption against pre-emption.' " Chamber Br. 10 (citing 541 U.S. at 256). But the Court made clear that the "methods" on which "not all Members of this Court agree" are using the presumption against preemption "to determine the *scope* [– as

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To the contrary, *Crosby* supports rather than undermines the presumption's continuing application in implied conflict cases. If the presumption did not apply in implied conflict cases, then surely *Crosby* would have stated so or declined to mention the issue at all. Instead, the Court acknowledged that the presumption *might apply* and justified its conclusion under the assumption that it did. *See* 530 U.S. at 374 n.8 ("Assuming, *arguendo*, that some presumption against preemption is appropriate, we conclude . . . that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives . . . to find it preempted."). This discussion does not remotely resemble a holding that casts doubt on the presumption in implied conflict cases more generally. To the contrary, the Court's solicitousness toward the presumption in a foreign affairs case only bolsters its validity in areas where it is firmly established, such as the exercise of state police powers.

In addition to *Crosby*, *Locke*, and *Gade*, the Chamber cites eight other cases to support its claim that "the Court almost without exception has avoided reliance on the presumption when addressing claims of conflict preemption." Chamber Br. 10 & n.7. Seven

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opposed to the existence –] of pre-emption" and also "delv[ing] into legislative history." 541 U.S. at 256 (emphasis in original). This passage casts no doubt on whether the presumption applies in express preemption cases as a general matter, especially when determining the existence of preemption in the first instance.

of these eight fail to fit that characterization for rather obvious reasons. Five were instances in which the Court had no reason to rely on the presumption, nor any reason to "avoid" it, because the preemption question was easily resolved. In these cases, either there was no relevant federal enactment with which state law might conflict;[8] or federal authorities expressly disclaimed preemption;[9] or a party conceded the issue of conflict.[10] Another case cited by the

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[8] *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2000) (finding no preemption where Coast Guard had not regulated the matter at issue); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) ("[I]t is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with."); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 374 (1986) (finding no preemption where Congress had expressly denied the federal agency power to issue the regulations at issue). The Chamber's citation to *Silkwood*, 464 U.S. 238, which the Chamber labels a "field" preemption case, *see* Chamber Br. 10 n.5, is not to the contrary, because the Court had no reason to invoke the presumption there given its conclusion that Congress manifested an intent *not* to preempt. *See* 464 U.S. at 251-52, 255.

[9] *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984) (finding no preemption where "Congress has . . . disclaimed any intent to pre-empt"); *see also Sprietsma*, 537 U.S. at 68 ("[T]he Solicitor General, joined by . . . the Coast Guard, has informed us that the agency does not view the 1990 refusal to regulate or any subsequent regulatory actions by the Coast Guard as having any pre-emptive effect.").

[10] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698 (1984) (finding preemption where respondent conceded the existence of a conflict but argued that powers reserved to the

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Chamber bore only indirectly on preemption because it simply determined that a particular state law fell within the definition of matters that had been held preempted long before.[11] The final case cited by the Chamber is inapposite because it arose under a specialized area of law that employs an expansive rule of conflict preemption.[12] In each of these cases, the presumption could not have served any purpose, and it is therefore unremarkable that the Court did not "rely" on it.

This leaves *Geier* as the Chamber's sole example in which the Court ordinarily would apply the presumption but did not do so. Yet here too the Chamber mis-characterizes the Court's holding. In reality, the *Geier* majority expressly stated that it "certainly

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States by the Twenty-First Amendment saved the statute "notwithstanding the conflict").

[11] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (holding state-law claim preempted because it arose out of a collective bargaining agreement under long-settled precedent that state-law claims arising out of collective bargaining agreements are preempted). The same is true of *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), where the Court held that the term "interest" included late-payment fees. Because federal preemption of state law on "interest" had been established in an earlier decision, the Court explained that the case concerned not preemption, but rather the substantive meaning of a statute that had already been deemed preemptive. *Id*. at 737, 744.

[12] *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) (finding conflict under rule designed to prevent "conflict in its broadest sense," which requires preemption even where federal law only "arguably" reaches the conduct at issue).

accept[ed] the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict," 529 U.S. at 885, relying on the passage in *English* that "enjoins seeking out conflicts between state and federal regulation where none clearly exists." 496 U.S. at 90 (brackets omitted). Thus, far from rejecting the principle that evidence of congressional intent to preempt must be "clear and manifest," *Rice*, 331 U.S. at 230, the *Geier* majority explained that "we find such evidence here," 529 U.S. at 885.

In short, there is no support for the Chamber's argument that this Court has already abandoned the presumption against preemption in implied conflict cases. As we now explain, there are compelling constitutional and policy reasons why this Court should decline the Chamber's invitation to do so now.

II. THERE ARE POWERFUL CONSTITUTIONAL AND POLICY REASONS TO APPLY THE PRESUMPTION AGAINST PREEMPTION IN IMPLIED CONFLICT PREEMPTION CASES.

A. Long-recognized Federalism Principles Support Applying the Presumption Against Preemption in All Preemption Cases, But Especially in Implied Conflict Cases.

1. This Court's long-standing application of the presumption against preemption in implied conflict preemption cases is deeply rooted in the federalism

principles that lie at the core of this nation's constitutional framework. These values are not mere abstractions. Limiting federal power to its proper scope advances and preserves democratic governance, for citizens can participate in local government more easily than in national government.[13] Moreover, states can produce better law for a greater number of citizens, for uniform federal law may fail to satisfy regional differences in circumstances and attitudes.[14] Retaining a strong role for state authority also enables the states to continue in their role as "laboratories" for developing and testing policies that might one day be adopted more broadly[15] while preserving

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[13] *See, e.g.*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (expressing "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy."); *see also* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 756-57 (2004).

[14] *See* Mendelson, 102 MICH. L. REV. at 756-57 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (discussing federalism benefits); Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 774 (1995); Evan H. Caminker, *Judicial Solicitude for State Dignity*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 89 (discussing "structural values" of federalism); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) (arguing that the best reason to care about federalism is "because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking")).

[15] *See id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as

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the states' historic role in protecting the health and safety of their citizens.

Most relevant to this case, federalism counsels the preservation of state tort law, which provides a necessary supplement to federal regulation and often even outperforms it. As this Court and numerous commentators have often recognized, tort litigation can expose and respond to health and safety hazards more quickly and efficiently than federal lawmakers or regulators.[16] Tort law also gives manufacturers an

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"laborator[ies]"); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113 (1997)).

[16] *See, e.g.*, *Bates v. Dow Agrosciences*, 544 U.S. 431, 451 (2005) (stating that "tort suits can serve as a catalyst" in the "process" of developing better labeling laws) (citing *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541-42 (D.C. Cir. 1984) ("By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides . . . a state tort action . . . may aid in the exposure of new dangers associated with pesticides. Successful actions . . . may lead manufacturers to petition EPA to allow more detailed labelling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits.")); *see also* David C. Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg*, 31 SETON HALL L. REV. 631, 635, 640 (2001); Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts*, 9 KAN. J. L. & PUB. POL'Y 456, 457-58 (2000) ("Private litigants in America . . . do more effectively, much of what is in other industrial states done by . . . an administrative bureaucracy."); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.Jn. 693, 700 (2007); David C. Vladeck, *Presumption and Regulatory Failure*, 33 PEPP. L. REV. 95 (2005).

incentive to take adequate safety precautions, fostering innovation and promoting market freedom by reducing some of the need for centralized regulation.[17] Finally, tort law provides much-needed compensation to victims, something federal regulations typically do not address.[18]

2. By helping to ensure that courts do not subvert state regulation in the absence of clear and manifest congressional intent, the presumption against preemption has long safeguarded the benefits of state law against improper or inadvertent federal encroachment.[19] Indeed, the doctrine is one of many

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[17] *See, e.g.*, *Bates*, 544 U.S. at 450 ("This history [of tort litigation] emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items."); *id*. at 451 (citing *Ferebee*, 736 F.2d at 1541-42 ("[T]he specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement.")).

[18] *See, e.g.*, *Sprietsma*, 537 U.S. at 64 ("It would have been perfectly rational for Congress not to pre-empt common-law claims, which – unlike most administrative and legislative regulations – necessarily perform an important remedial role in compensating accident victims.").

[19] *See, e.g.*, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1025 (1989) ("[T]he rule against preemption of traditional state functions is often the occasion for the Court to protect important local values from inadvertent federal interference."); *see also* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687-88 (1991) (noting that preemption risks displacing local law on "environmental damage, nuclear power

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long-standing, sound policies against reading conflicts into the law, motivated by concerns of institutional competence, federalism, comity, and democratic governance.[20] But the concerns animating these doctrines – and the presumption against preemption in particular – are only heightened in cases such as this one, where a state law is not alleged to conflict with any express congressional command, but rather is said to create an "obstacle" to or "frustrate" the "full purposes and objectives" of federal law.[21] This inquiry is so open-ended that it carries great risk of the improper expansion of federal power into areas that are better left to the states – and that citizens have chosen to leave to the states.

All preemption questions turn on the intent of Congress.[22] The task of discerning this intent is by

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safety, divestment from South Africa, rent control, drug testing, education and testing standards, banking and thrift regulation, employment discrimination, and hostile takeover regulation").

[20] Courts avoid statutory interpretations that create conflicts with traditional executive powers, the inherent powers of the courts, *see* Eskridge, 137 U. PA. L. REV. at 1023, the Constitution, *see, e.g.*, *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001), treaties, international law, the laws of other nations, *see* Eskridge, 137 U. PA. L. REV. at 1026-27, and even prior congressional statutes. Like state laws, the courts will deem prior federal statutes displaced only if congressional intent is "clear and manifest." *Rodriguez v. U.S.*, 480 U.S. 522, 524 (1987).

[21] *Hines*, 312 U.S. at 67.

[22] *Cipollone*, 505 U.S. at 516 (" 'The purpose of Congress is the ultimate touchstone' of pre-emption analysis." (quoting

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definition more difficult in implied preemption cases, where Congress has not codified its intent expressly. But it is most difficult in "obstacle" or "frustration of purpose" cases, which often arise under broad congressional mandates ordering administrative agencies to set minimum safety standards or labeling requirements.[23] In this context, neither the statutes nor their legislative histories provide much – if any – useful evidence regarding congressional intent on preemption. In such cases, courts must undertake the difficult task of attempting to discern the "full purposes and objectives" embodied in a statute or even a *regulatory framework* that does not speak directly to the issue of preemption – a controversial inquiry in which judges have scant guidance. And even if it were possible to ascertain the full purposes of a law or regulation, this Court has recognized that no law is intended to pursue its purposes at all costs.[24] Thus,

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Malone, 435 U.S. 497 at 504)); *see also English*, 496 U.S. at 78-79 ("Preemption fundamentally is a question of congressional intent. . . ."); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996) (stating that the question of preemption "is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?").

[23] *See, e.g.*, *Bates*, 544 U.S. 431; *Sprietsma*, 537 U.S. 51; *Geier*, 529 U.S. 861.

[24] *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez*, 480 U.S. at 525-26 ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – *and it frustrates rather than effectuates*

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even in a case where a court is able to ascertain the federal purposes underlying a particular statute or regulation, notwithstanding the absence of an express congressional command, the question whether those purposes would be so deeply undermined by state tort law as to require the obliteration of victims' rights to seek compensation for their injuries requires a delicate inquiry that risks undermining the core federalism principles on which this country was based.

The broad range of potential intentions regarding a law's potential costs – including the obliteration of state law through preemption – only counsels further in favor of the presumption.[25] Courts have little basis on which to discern whether statutes or regulations that do not speak to preemption were intended to supplement state law, to preempt state law, or neither, and they lack the expertise to determine what would be best as a matter of policy. Apparently recognizing this problem, this Court's most recent decisions properly rejected arguments that statutes and regulations preempt state tort law absent clear evidence of a direct conflict with federal purposes. *See Bates*, 544 U.S. at 449-51; *Sprietsma*, 537 U.S. at 64, 65.

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legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.") (emphasis added)).

[25] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses. . . .").

The vital importance of the presumption against preemption is underscored by another recent development: Federal agencies have embarked on an unprecedented attempt to influence the courts by voicing positions on preemption either in litigation or in preambles to regulations.[26] In many cases – particularly where the agency has previously argued that state law is *not* inconsistent with federal purposes (and thus is not preempted) – these positions are demonstrably unstable and politicized, therefore failing to represent the faithful, considered interpretation of congressional intent and regulatory needs.[27] For example, in *Bates*, this Court rejected preemption arguments by the Solicitor General that flatly contradicted the EPA's position in the California Supreme

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[26] *See generally* William Funk, et al., *The Truth About Torts: Using Agency Preemption to Undercut Consumer Health and Safety*, White Paper No. 704, at 6-9 (2007), *available at* http://www.progressivereform.org/articles/Truth_Torts_704.pdf.

[27] *See, e.g.*, Vladeck, 33 PEPP. L. REV. at 123 ("There is no dispute that the FDA's new position on the scope of the MDA preemption provision represents a 180-degree shift of position for the agency."). It is also unclear that administrative agencies have the authority to speak directly to preemption unless Congress has granted them that authority, and further unclear that Congress can grant them that authority without violating the separation of powers under the Constitution. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (arguing that congressional rather than administrative decision making on preemption is "an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress").

Court just four years earlier. *See* 544 U.S. at 437 & n.7; *id*. at 448-49 (rejecting Solicitor General's arguments as "particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today."). The ubiquity of these new regulatory preemption efforts – which have occurred across numerous agencies and subject matters, without regard to whether Congress has altered the underlying statutes[28] – evidences a broad program of preemption by the executive branch that has nothing to do with congressional intent – and often directly undermines it. The presumption against preemption helps to ensure that courts will not rely on these or other improper arguments for the expansion of federal authority by instructing them to find preemption only when it is the "clear and manifest" intent of Congress.

For all of these reasons, the doctrine of "obstacle" or "frustration of purpose" preemption is fraught with potential for improper expansions of federal power and curtailment of the states' historic power to protect their citizens. The presumption against preemption serves as a crucial counterweight.

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[28] *See generally* Funk et al., *The Truth About Torts*, at 6-9.

B. The Chamber of Commerce's Policy Arguments Against the Presumption Are Overreaching and Unpersuasive.

1. The Chamber's claim that the presumption is not supported by federalism concerns, *see* Chamber Br. 6, 15-16, contradicts this country's core political values and the consistent teachings of this Court. For the reasons discussed above, the presumption against preemption is grounded in sound federalism policy dating back hundreds of years. In contending the opposite, the Chamber relies on a handful of law review articles and selective quotes from opinions that actually *support* the presumption. For example, the Chamber quotes *DeCanas v. Bica*, 424 U.S. 351 (1976), for the proposition that "even state regulation designed to protect vital state interests must give way to paramount federal legislation." Chamber Br. 16 (citing 424 U.S. at 357). But the very next sentences in that case reaffirm the presumption, stating, "[b]ut we will not presume that Congress . . . intended to oust state authority. . . . Only a demonstration that complete ouster of state power including . . . laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' would justify that conclusion." 424 U.S. at 357. Indeed, *DeCanas* endorses perhaps the strongest form of the presumption, stating that "the proper approach is to reconcile 'the operation of both statutory schemes with one

another rather than holding (the state scheme) completely ousted.'" *Id*. at 358 (citation omitted).[29]

The Chamber engages in similarly selective reading of the commentators. For example, it relies heavily on Professor Caleb Nelson's argument against the presumption. *See* Chamber Br. 17, 19 (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 293, 238-44, 254-60, 300, 302 (2000)). But it does not mention that Professor Nelson's argument addresses *express* preemption. *Id*. at 293-94. Even more telling, the Chamber fails to note that Professor Nelson rejects the doctrine of "obstacle" preemption outright, *id*. at 265-90 – a position that would compel resounding defeat for the petitioner here.

2. The Chamber also argues that the presumption is unnecessary in implied conflict cases because, in such cases, courts need only determine the "substance" of a federal statute – which the Chamber believes has nothing to do with preemption – and then determine whether the substance of federal law

[29] The Chamber also relies on a dissenting opinion that endorses the presumption, disputing only whether it should apply to questions regarding the *scope* of express preemption provisions. *Compare* Chamber Br. 14 (citing *Cipollone*, 505 U.S. at 544 (Scalia, J.) [*sic*]) *with Cipollone*, 505 U.S. at 545 (Scalia, J., dissenting) (endorsing the "traditional principles" of preemption, which include the requirement that congressional intent to preempt be "clear and manifest," then critiquing the majority's use of the presumption not to determine whether an express preemption is preemptive, but rather to determine the *scope* of the provision).

conflicts with state law. In the Chamber's view, this inquiry is different from those regarding field or express preemption questions because it does not require discerning congressional intent. The Chamber is deeply mistaken.

In reality, discerning congressional intent is as important in implied conflict cases as it is in all other preemption cases, for congressional intent is the "touchstone" of preemption.[30] The major difference between express and implied preemption cases is that intent is much more difficult to discern in the latter – providing only a stronger justification for the presumption.[31]

The Chamber is also mistaken in believing that the "substance" of federal laws can be disentangled easily from their preemptive effect. There is a vast difference between a federal regulatory regime that sets a minimum safety standard and is silently intended to be supplemented by tort litigation and one that sets both a "floor" and a "ceiling" with regard to safety and is silently intended to displace tort law, leaving all injured victims with no compensation. This difference is surely one of "substance," yet it also goes to the core of the preemption analysis. Put another way, a federal law may be intended to incorporate state law; to be supplemented by state law without incorporating it; to operate without

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[30] *Cipollone*, 505 U.S. at 516.

[31] *See supra* § II.A.

preemption even when superceded by state law; to preempt only conflicting state law; or to preempt all state law in the area. To call these aspects of a law something other than "substance" is to engage in little more than wordplay.[32] In effect, the Chamber's proposed preemption framework improperly assumes away the question, for it omits the possibility that Congress might have intended to incorporate, accommodate, or leave state law undisturbed.[33]

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[32] Countless federal provisions could be labeled either "substantive" or "preemptive." Professor Nelson explains, for example, that the Supreme Court has labeled "substantive" § 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (2008), which states that a written arbitration agreement in a "contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). But one could draft a nearly identical express preemption provision, stating that "no state or local government shall adopt or enforce any law or policy that makes a written arbitration agreement in a contract evidencing a transaction involving commerce invalid, revocable, or unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Nelson, 86 VA. L. REV. at 299.

[33] Indeed, the Chamber attempts to support this argument primarily by citing a case that did not even decide a preemption question. *See* Chamber Br. 18, 19 (citing *Smiley*, 517 U.S. at 744). *Smiley* explained that the question whether the statute at issue was preemptive had been decided long ago, in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). Therefore, the Court explained, *Smiley* itself concerned only the substantive meaning of the statute – in particular, the definition of the term "interest." *See* 517 U.S. at 744. In light of the Comptroller of the Currency's regulation on

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3. Finally, it is noteworthy that the Chamber's arguments apply not just to implied conflict preemption, but to all preemption cases. Its sweeping dismissal of "the free-form concept 'federalism concerns,'" Chamber Br. 6; *see also id*. 15-16, cannot be limited to implied conflict cases. If federalism is insufficient justification for applying the presumption in implied conflict cases, where Congress has not even made its intentions clear, then states' rights should be accorded even less respect in cases where Congress has exerted federal power more clearly. Similarly, the Chamber's argument that courts should abandon the presumption and instead simply read the substance of federal law, and then call conflicts as they see them, applies *more* readily to express and field preemption than to implied conflict preemption. (Regarding express preemption, the logical outgrowth of the Chamber's argument is that there is no need for a presumption because the intent of Congress is explicit, and therefore courts should read its words without biasing the inquiry.[34] Regarding field preemption, the argument would be that there is no need for a presumption because courts need only discern the content of federal

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the matter, the Court answered this question with an ordinary *Chevron* analysis. *Id*. at 744-45.

[34] This type of strict-construction argument of course carries the corollary that there should be *no* "obstacle" preemption, which by definition entails finding preemption from sources other than the text of statutes or regulations. *See, e.g.*, Nelson, 86 VA. L. REV. at 265-90.

law to determine the "field" it covers, and then hold that any conflicting state law is void.)

That the Chamber's argument for jettisoning the presumption against preemption applies to all preemption cases may be unsurprising given the malleability of preemption categories. *See supra* n.5. But it is noteworthy, for it reveals the astonishing breadth and novelty of the Chamber's position. Although the Chamber claims to challenge the presumption merely in implied conflict cases, its arguments inevitably amount to an attack on the presumption in *all* preemption cases – an argument wildy divergent from this nation's long-established law and values. In essence, the Chamber advocates federal judicial overreaching that would dramatically frustrate democratic governance and uproot the states' historic power to protect the health and safety of their citizens. These arguments should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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