SUPREME COURT OF THE UNITED STATES

No. 90–1676

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
v. NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 18, 1992]

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

Though I concur in the Court's judgment and with the ultimate conclusion that the state law is pre-empted, I would find express pre-emption from the terms of the federal statute. I cannot agree that we should denominate this case as one of implied pre-emption. The contrary view of the plurality is based on an undue expansion of our implied pre-emption jurisprudence which, in my view, is neither wise nor necessary.

As both the majority and dissent acknowledge, we have identified three circumstances in which a federal statute pre-empts state law: First, Congress can adopt express language defining the existence and scope of pre-emption. Second, state law is pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. And third, "state law is pre-empted to the extent that it actually conflicts with federal law." *English* v. *General Electric Co.*, 496 U. S. 72, 78–79 (1990); *ante*, at 8; *post*, at 1–2. This third form of pre-emption, so-called actual conflict pre-emption, occurs either "where it is impossible for a private party to comply with both state and federal requirements . . . or where state law `stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, *supra*, at 79 (quoting *Hines* v. *Davidowitz*, 312 U. S.

52, 67 (1941)). The plurality would hold today that state occupational safety and health standards regulating an issue on which a federal standard exists conflict with Congress' purpose to "subject employers and employees to only one set of regulations." *Ante*, at 9. This is not an application of our pre-emption standards, it is but a conclusory statement of pre-emption, as it assumes that Congress intended exclusive federal jurisdiction. I do not see how such a mode of analysis advances our consideration of the case.

Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable . . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982); see also *English*, *supra*, at 90 ("The `teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" (quoting *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960)); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 222–223 (1983). In my view, this type of pre-emption should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation.

I do not believe that supplementary state regulation of an occupational safety and health issue can be said to create the sort of actual conflict required by our decisions. The purpose of state supplementary regulation, like the federal standards promulgated by the Occupational Safety and Health Administration (OSHA) is to protect worker safety and health. Any potential tension between a scheme of federal regulation of the workplace and a concurrent, supplementary state scheme would not, in my view, rise to the level of "actual conflict" described in our pre-emption cases. Absent the express provisions of §18 of the Occupational Safety and Health Act of 1970 (OSH), 29 U. S. C. §667, I would not say that state supplementary regulation conflicts with the purposes of the OSH Act, or that it "interferes with the methods by which the federal statute was designed to reach [its] goal." *Ante*, at 13 (quoting *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 494 (1987)).

The plurality's broad view of actual conflict pre-emption is contrary to two basic principles of our pre-emption jurisprudence. First, we begin "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see also *ante*, at 6. Second, "`the purpose of Congress is the ultimate touchstone'" in all pre-emption cases. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963)). A free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.

Nonetheless, I agree with the Court that "the OSH Act pre-empts all state `occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'" *Ante*, at 15 (quoting 29 U. S. C. §667(b)). I believe, however, that this result is mandated by the express terms of §18(b) of the OSH Act. It follows from this that the pre-emptive scope of the Act is also limited to the language of the statute. When the existence of pre-emption is evident from the statutory text, our inquiry must begin and end with the statutory framework itself.

A finding of express pre-emption in this case is not contrary to our longstanding rule that we will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress. *Rice* v. *Santa Fe Elevator Corp.*, *supra*, at 230; *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977); *English*, 496 U. S., at 79. Though most statutes creating express pre-emption contain an explicit statement to that effect, a statement admittedly lacking in §18(b), we have never required any particular magic words in

our express pre-emption cases. Our task in all pre-emption cases is to enforce the "clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, *supra*, at 230. We have held, in express pre-emption cases, that Congress' intent must be divined from the language, structure, and purposes of the statute as a whole. *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. ___, ___ (1990) (slip op., at 3); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987). The language of the OSH statute sets forth a scheme in light of which the provisions of §18 must be interpreted, and from which the express pre-emption that displaces state law follows.

As the plurality's analysis amply demonstrates, *ante*, at 8–12, Congress has addressed the issue of pre-emption in the OSH Act. The dissent's position that the Act does not pre-empt supplementary state regulation becomes most implausible when the language of §18(b) is considered in conjunction with the other provisions of §18. Section 18(b) provides as follows:

> "Any State which . . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . *shall* submit a State plan . . . ." 29 U. S. C. §667(b) (emphasis added).

The statute is clear: When a State desires to assume responsibility for an occupational safety and health issue already addressed by the Federal Government, it must submit a state plan. The most reasonable inference from this language is that when a State does not submit and secure approval of a state plan, it may not enforce occupational safety and health standards in that area. Any doubt that this is what Congress intended disappears when subsection (b) is considered in conjunction with subsections (a), (c),

and (f). *Ante*, at 9–11. I will not reiterate the plurality's persuasive discussion on this point. Unartful though the language of §18(b) may be, the structure and language of §18 leave little doubt that in the OSH statute Congress intended to pre-empt supplementary state regulation of an occupational safety and health issue with respect to which a federal standard exists.

In this regard I disagree with the dissent, see *post*, and find unconvincing its conclusion that Congress intended to allow concurrent state and federal jurisdiction over occupational safety and health issues. The dissent would give the States, rather than the Federal Government, the power to decide whether as to any particular occupational safety and health issue there will exist a single or dual regulatory scheme. Under this theory the State may choose exclusive federal jurisdiction by not regulating; or exclusive state jurisdiction by submitting a state plan; or dual regulation by adopting supplementary rules, as Illinois did here. That position undermines the authority of OSHA in many respects. For example, §18(c)(2) of the OSH Act allows OSHA to disapprove state plans which "unduly burden interstate commerce." The dissent would eviscerate this important administrative mechanism by allowing the States to sidestep OSHA's authority through the mechanism of supplementary regulation. See *ante*, at 10–11. Furthermore, concurrent state and federal jurisdiction might interfere with the enforcement of the federal regulations without creating a situation where compliance with both schemes is a physical impossibility, which the dissent would require for pre-emption. *Post*, at 7; see also Brief for Respondent 32–33. I would not attribute to Congress the intent to create such a hodge-podge scheme of authority. My views in this regard are confirmed by the fact that OSHA has as a consistent matter, since the enactment of the OSH Act, viewed §18 as providing it

with exclusive jurisdiction in areas where it issues a standard. 29 CFR §1901.2 (1991); 36 Fed. Reg. 7006 (1971); Brief for United States as *Amicus Curiae* 12–21. Therefore, while the dissent may be correct that as a theoretical matter the separate provisions of §18 may be reconciled with allowing concurrent jurisdiction, it is neither a natural nor a sound reading of the statutory scheme.

The necessary implication of finding express pre-emption in this case is that the pre-emptive scope of the OSH Act is defined by the language of §18(b). Because this provision requires federal approval of state occupational safety and health standards alone, only state laws fitting within that description are pre-empted. For that reason I agree with the Court that state laws of general applicability are not pre-empted. *Ante*, at 16. I also agree that "a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act," *ante*, at 16–17, and therefore falls within the scope of pre-emption. So-called "dual impact" state regulations which meet this standard are pre-empted by the OSH Act, regardless of any additional purpose the law may serve, or effect the law may have, outside the workplace. As a final matter, I agree that the Illinois Acts are not saved because they operate through a licensing mechanism rather than through direct regulation of the workplace. I therefore join all but Part II of the Court's opinion, and concur in the judgment of the Court.