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 SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE THOMAS join, dissenting.

The Court holds today that §18 of the Occupational Safety and Health Act of 1970 (Act), 29 U. S. C. §667, pre-empts state regulation of any occupational safety or health issue as to which there is a federal standard, whether or not the state regulation conflicts with the federal standard in the sense that enforcement of one would preclude application of the other. With respect, I dissent. In light of our rule that federal pre-emption of state law is only to be found in a clear congressional purpose to supplant exercises of the States' traditional police powers, the text of the Act fails to support the Court's conclusion.

Our cases recognize federal pre-emption of state law in three variants: express pre-emption, field pre-emption, and conflict pre-emption. Express pre-emption requires "explicit pre-emptive language." See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 203 (1983), citing *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law. 461 U. S., at 204. Finally, there

is conflict pre-emption in either of two senses. The first is found when compliance with both state and federal law is impossible, *ibid.*, the second when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

The plurality today finds pre-emption of this last sort, discerning a conflict between any state legislation on a given issue as to which a federal standard is in effect, and a congressional purpose "to subject employers and employees to only one set of regulations." *Ante*, at 8. Thus, under the plurality's reading, any regulation on an issue as to which a federal standard has been promulgated has been pre-empted. As one commentator has observed, this kind of purpose-conflict pre-emption, which occurs when state law is held to "undermin[e] a congressional decision in favor of national uniformity of standards," presents "a situation similar in practical effect to that of federal occupation of a field." L. Tribe, American Constitutional Law 486 (2d ed. 1988). Still, whether the pre-emption at issue is described as occupation of each narrow field in which a federal standard has been promulgated, as pre-emption of those regulations that conflict with the federal objective of single regulation, or, as JUSTICE KENNEDY describes it, as express pre-emption, see *ante*, at 4 (opinion concurring in part and concurring in judgment), the key is congressional intent, and I find the language of the statute insufficient to demonstrate an intent to pre-empt state law in this way.

Analysis begins with the presumption that "Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981). "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e.g.,* U. S. Const., Art. I, §10; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 358 (1898), `we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). This assumption provides assurance that the `federal-

state balance,' *United States* v. *Bass*, 404 U. S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has `unmistakably . . . ordained,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Jones*, *supra*, at 525. Subject to this principle, the enquiry into the possibly pre-emptive effect of federal legislation is an exercise of statutory construction. If the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.

At first blush, respondent's strongest argument might seem to rest on §18(a) of the Act, 29 U. S. C. §667(a), the full text of which is this:

> "(a) Assertion of State standards in absence of applicable Federal standards
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> ``Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."

That is to say, where there is no federal standard in effect, there is no pre-emption. The plurality reasons that there must be pre-emption, however, when there is a federal standard in effect, else §18(a) would be rendered superfluous because "there is no possibility of conflict where there is no federal regulation." *Ante*, at 10.

The plurality errs doubly. First, its premise is incorrect. In the sense in which the plurality uses the term, there is the possibility of "conflict" even absent federal regulation since the mere enactment of a federal law like the Act may amount to an occupation of an entire field, preventing state regulation. Second, the necessary implication of §18(a) is not

that every federal regulation pre-empts all state law on the issue in question, but only that some federal regulations may pre-empt some state law. The plurality ignores the possibility that the provision simply rules out field pre-emption and is otherwise entirely compatible with the possibility that pre-emption will occur only when actual conflict between a federal regulation and a state rule renders compliance with both impossible. Indeed, if Congress had meant to say that any state rule should be pre-empted if it deals with an issue as to which there is a federal regulation in effect, the text of subsection (a) would have been a very inept way of trying to make the point. It was not, however, an inept way to make the different point that Congress intended no field pre-emption of the sphere of health and safety subject to regulation, but not necessarily regulated, under the Act. Unlike the case where field pre-emption occurs, the provision tells us, absence of a federal standard leaves a State free to do as it will on the issue. Beyond this, subsection (a) does not necessarily mean anything, and the provision is perfectly consistent with the conclusion that as long as compliance with both a federal standard and a state regulation is not physically impossible, see *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 142–143 (1963), each standard shall be enforceable. If, indeed, the presumption against pre-emption means anything, §18(a) must be read in just this way.

Respondent also relies on §18(b), 29 U. S. C. §667(b):

> "(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards
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> ``Any State which, at any time, 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 under section 655 of this title shall submit a State plan for the development of such standards and their enforcement."

Respondent argues that the necessary implication of this provision is clear: the only way that a state rule on a particular occupational safety and health issue may be enforced once a federal standard on the issue is also in place is by incorporating the state rule in a plan approved by the Secretary.

As both the plurality and JUSTICE KENNEDY acknowledge, however, that is not the necessary implication of §18(b). See *ante,* at 9 (plurality opinion); *ante,* at 5 (opinion concurring in part and concurring in judgment). The subsection simply does not say that unless a plan is approved, state law on an issue is pre-empted by the promulgation of a federal standard. In fact it tugs the other way, and in actually providing a mechanism for a State to "assume responsibility" for an issue with respect to which a federal standard has been promulgated (that is, to pre-empt federal law), §18(b) is far from pre-emptive of anything adopted by the States. Its heading, enacted as part of the statute and properly considered under our canons of construction for whatever light it may shed, see, e.g., *Strathearn S.S. Co.* v. *Dillon*, 252 U. S. 348, 354 (1920); *FTC* v. *Mandel Brothers*, 359 U. S. 385 (1959), speaks expressly of the "development and enforcement of State standards to preempt applicable Federal standards." The provision does not in any way provide that absent such state pre-emption of federal rules, the State may not even supplement the federal standards with consistent regulations of its own. Once again, nothing in the provision's language speaks one way or the other to the question whether promulgation of a federal standard pre-empts state regulation, or whether, in the absence of a plan,

consistent federal and state regulations may coexist. The provision thus makes perfect sense on the assumption that a dual regulatory scheme is permissible but subject to state pre-emption if the State wishes to shoulder enough of the federal mandate to gain approval of a plan.

Nor does the provision setting out conditions for the Secretary's approval of a plan indicate that a state regulation on an issue federally addressed is never enforceable unless incorporated in a plan so approved. Subsection (c)(2) requires the Secretary to approve a plan when in her judgment, among other things, it will not "unduly burden interstate commerce." 29 U. S. C. §667(c)(2). Respondent argues, and the plurality concludes, that if state regulations were not pre-empted, this provision would somehow suggest that States acting independently could enforce regulations that did burden interstate commerce unduly. Brief for Respondent 17; see *ante*, at 10. But this simply does not follow. The subsection puts a limit on the Secretary's authority to approve a plan that burdens interstate commerce, thus capping the discretion that might otherwise have been read into the congressional delegation of authority to the Secretary to approve state plans. From this restriction applying only to the Secretary's federal authority it is clearly a *non sequitur* to conclude that pre-emption must have been intended to avoid the equally objectionable undue burden that independent state regulation might otherwise impose. Quite the contrary; the dormant Commerce Clause can take care of that, without any need to assume pre-emption.

The final provision that arguably suggests pre-emption merely by promulgation of a federal standard is §18(h), 29 U. S. C. §667(h):

> "(h) Temporary enforcement of State standards
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> ``The Secretary may enter into an agreement with a State under which the State will be

> permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier."

This provision of course expired in 1972, but its language may suggest something about the way Congress understood the rest of §18. Since, all are agreed, a State would not have had reason to file a plan unless a federal standard was in place, §18(h) necessarily refers to a situation in which there is a federal standard. Respondent argues that the provision for agreements authorizing continued enforcement of a state standard following adoption of a federal standard on the issue it addresses implies that, absent such agreement, a State would have been barred from enforcing any standard of its own.

Once again, however, that is not the necessary implication of the text. A purely permissive provision for enforcement of state regulations does not imply that all state regulations are otherwise unenforceable. All it necessarily means is that the Secretary could agree to permit the State for a limited time to enforce whatever State regulations would otherwise have been pre-empted, as would have been true when they actually so conflicted with the federal standard that an employer could not comply with them and still comply with federal law as well. Thus, in the case of a State wishing to submit a plan, the provision as I read it would have allowed for the possibility of just one transition, from the pre-Act state law to the post-Act state plan. Read as the Court reads it, however, employers and employees in such a State would have been subjected first to state law on a given issue; then, after promulgation of a federal standard, to that standard; and then, after approval of the plan, to a new state regime. One enforced readjustment would

have been better than two, and the statute is better read accordingly.[1]

In sum, our rule is that the traditional police powers of the State survive unless Congress has made a purpose to pre-empt them clear. See *Rice,* 331 U. S., at 230. The Act does not, in so many words, pre-empt all state regulation of issues on which federal standards have been promulgated, and respondent's contention at oral argument that reading subsections (a), (b), and (h) could leave no other "logical" conclusion but one of pre-emption is wrong. Each provision can be read consistently with the others without any implication of pre-emptive intent. See *National Solid Wastes Management Assn.* v. *Killian,* 918 F. 2d 671, 685–688 (CA7 1990) (Easterbrook, J., dubitante). They are in fact just as consistent with a purpose and objective to permit overlapping state and federal regulation as with one to guarantee that employers and employees would be subjected to only one regulatory regime. Restriction to one such

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[1]The plurality also relies on §18(f), 29 U. S. C. §667(f), which deals with withdrawal of approval of a state plan. See *ante*, at 10–11. The section provides that "the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan." The plurality is mistaken in concluding that §18(f) "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn." *Ante,* at 11. At most it assumes that the State loses its capacity to enforce the plan (except for pending cases). It says nothing about state law that may remain on the books exclusive of the plan's authority, or about new law enacted after withdrawal of the Secretary's approval.

regime by precluding supplemental state regulation might or might not be desirable. But in the absence of any clear expression of congressional intent to pre-empt, I can only conclude that, as long as compliance with federally promulgated standards does not render obedience to Illinois' regulations impossible, the enforcement of the state law is not prohibited by the Supremacy Clause. I respectfully dissent.