

No. 05-1342

IN THE
Supreme Court of the United States

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

v.

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

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

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

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INTEREST OF AMICI CURIAE

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

