No. 05-198

In the Supreme Court of the United States

NOKIA INC., ET AL.,

Petitioners,

v.

GARRETT NAQUIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 129 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products and services. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, and has participated in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

STATEMENT

1. Since the advent of commercial radio communications in the United States (used first in wireless telegraphy and then in radio audio transmissions), the federal government has exercised regulatory authority over the new medium. See *NBC* v.

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[1] Letters of consent by the parties to the submission of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6 of the Rules of this Court, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

United States, 319 U.S. 190, 210-12 (1943). As petitioners show (Pet. 5-8), federal regulation of all forms of interstate communication by radio has been – and remains today – plenary and comprehensive.

To preserve the national government's exclusive authority in this field, Congress has enacted a number of provisions expressly preempting state and local authority. One such provision instructs that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3). Congress has also conferred sweeping regulatory powers upon the FCC to regulate radio communications. See, *e.g.*, *id.* §§ 301, 303. Pursuant to that authority, the FCC has issued detailed regulations governing radio frequency ("RF") emissions from cell phones. See, *e.g.*, 47 C.F.R. §§ 1.1307(b), 2.1093(d), 2.803(a). Among other things, the FCC has concluded that there are no known risks from exposure to RF emissions from wireless phones that comply with FCC standards and, accordingly, public safety would not be promoted by requiring headsets to be used or provided with such phones. See Pet. 24. It is "imperative," the FCC has stated, that the States not be allowed to impose "additional requirements" that "could conflict with [federal] standards and frustrate" the uniform "federal scheme for the provision of nationwide cellular service." *Use of the Bands 825-845 MHZ and 870-890 MHZ*, 89 FCC 2d 58, 95 ¶ 81 (1982).

2. This case arises out of five class actions brought by past and future purchasers of cell phones against virtually the entire wireless industry. In the one implicated by the petition for certiorari (see Pet. 1 n.1, 12-13, 15 n.3), a class of Louisiana residents who were not provided headsets with their cell phones and who have not been diagnosed with certain diseases brought suit against multiple cell phone manufacturers and service providers. See Pet. App. 53a-56a & n.4.

In essence, plaintiffs (respondents here) contended that the cell phones provided to them without a headset are unreasonably dangerous because they emit unsafe levels of RF radiation. Respondents advanced a wide array of state-law claims, includ-

ing strict products liability, negligent misrepresentation, breach of implied warranty, and other tort claims. In addition to seeking a determination that their FCC-compliant cell phones were unreasonably dangerous when used without headsets, respondents requested various forms of relief, including compensatory damages for the cost of purchasing the missing headsets, punitive damages, attorneys' fees, an injunction requiring the defendants (petitioners here) to provide cell phones that are compatible with headsets, and an injunction requiring petitioners to provide instructions on the use of headsets as well as warnings about using cell phones without headsets.

3. The district court granted petitioners' motion to dismiss on grounds of federal preemption. Pet. App. 51a-76a. It ruled that respondents' claims were impliedly preempted because they conflict with the judgment reached by the FCC concerning safe levels of RF emissions and frustrate "Congress's objective[] of achieving national uniformity in wireless telecommunications services." *Id.* at 65a. In analyzing the issue of implied preemption, the district court declined to apply a "presumption against preemption." *Id*. at 62a-63a. "That presumption is not triggered," the court explained, "when the state claim falls in an area 'where there has been a history of significant federal presence.'" *Id.* at 63a (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). "Congressional concern for national uniformity of regulation in the field of wireless telecommunications," the court reasoned, "has been clear since the inception of commercial wireless telephone service." *Ibid.* Beyond that, the court explained, "these lawsuits do not involve a traditional claim of compensation for personal injury" where such a presumption might be appropriate (since the plaintiff class "excludes those who have developed" illness and makes "no request for personal injury compensation"). *Ibid.*

4. A divided panel of the Fourth Circuit reversed. Pet. App. 1a-50a. The majority first disagreed with the district court's conclusion "that the presumption against preemption does not apply here." *Id*. at 34 n.4. The lower court's reliance on *Locke*, which involved preemption of the State of Washington's oil

tanker regulations, was "misplaced," the court of appeals said, "because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." Pet. App. 35 n.4. Moreover, the majority reasoned, "[t]he presumption against preemption is even stronger" when "state remedies, like tort remedies," are implicated and "no federal remedy exists." *Ibid.* (internal quotations omitted). Applying this "strong" presumption against preemption (*id.* at 41a), the panel rejected petitioners' arguments for both express and implied preemption. *Id.* at 35a-45a.

INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioners demonstrate, this case satisfies all of the traditional criteria of certworthiness. The Fourth Circuit's decision conflicts with the decisions of other circuits and this Court; it is seriously mistaken; and, if permitted to stand, it will subvert the uniform national regulatory scheme governing wireless communications by allowing judges and lay juries applying state law to second-guess the FCC's judgment about the appropriate level of RF emissions in cellular telephones.

Although those are reasons enough to grant the petition, there is an additional reason why further review is warranted. This case offers an ideal vehicle for clarifying – and reexamining – an important and recurring issue in every preemption case as to which the lower courts are divided: the so-called "presumption" against preemption. See Pet. 26 n.6. This Court should grant review not only to address the confusion in the lower courts over the presumption, but also to reexamine a doctrine whose legitimacy has been the subject, in recent years, of persuasive criticism by judges and legal scholars.

I. The panel majority in the Fourth Circuit disagreed with the district court over whether the presumption against preemption is applicable to this case. In the district court's view, this case falls within a recognized exception to the presumption because there has been a "'history of significant federal presence'" in regulating "commercial wireless telephone service."

Pet. App. 63a (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). Applying a different conception of how to measure a "significant federal presence," the Fourth Circuit reached the opposite conclusion, applied the presumption, rejected petitioners' preemption defense, and reversed.

The Fourth Circuit's interpretation of the *Locke* exception is symptomatic of – and compounds – the conflicts and confusion in the lower courts concerning what the presumption against preemption means and when it applies. The circuits have taken different approaches, for example, to determining when a history of federal regulation qualifies as "significant" and how to define the relevant regulatory "field" in the first place. Applying those divergent approaches, the courts of appeals have also reached conflicting conclusions about whether particular "fields" are covered by the presumption. Beyond that, the Fourth Circuit's suggestion that the presumption comes in an "extra-strength" form is wrong and would "further complicat[e]" principles of preemption law that are "already * * * difficult to apply." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Equally mistaken – and inconsistent with this Court's teaching in *Aetna Health Inc.* v. *Davila*, 124 S. Ct. 2488 (2004), and *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) – is the Fourth Circuit's suggestion that the presumption applies merely because some "state remedies" would be unavailable if the preemption defense were accepted.

II. Review is also warranted to reexamine the presumption against preemption in light of persuasive criticisms leveled in recent years by judges, legal scholars, and prominent practitioners. In addition to the confusion over the presumption's application in the lower courts, recent scholarship and commentary has challenged the assumption – reflected but not explained in some of this Court's opinions – that the presumption finds support in the Constitution's text or structure and in traditional principles of federalism. Scholars have demonstrated that, far from having deep roots in our legal traditions, the presumption was not mentioned in this Court's earliest preemption decisions; it was recognized for the first time in the 1920s and 1930s; and,

in the decade before its creation, this Court applied the opposite presumption (*in favor of* preemption). Still other scholars have suggested, based on historical materials and arguments this Court has never considered, that the presumption should be rejected because it is inconsistent with the text of the Supremacy Clause as that provision would have been understood by eighteenth-century judges. Finally, this Court should take this occasion to reexamine the presumption because it is inconsistent in theory and application with other settled features of preemption law and canons of statutory interpretation.

ARGUMENT

I. This Case Presents An Invaluable Opportunity To Correct Deep Confusion In The Circuits Regarding The Applicability And Meaning Of The Presumption Against Preemption

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Court explained that, when Congress "legislate[s] in a field which the States have traditionally occupied," courts should "start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress." In more recent cases, that starting "assumption" has evolved into a "presumption" disfavoring preemption. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); *United States* v. *Locke*, 529 U.S. 89, 108 (2000); *Cipollone* v. *Liggett Group, Inc*., 505 U.S. 504, 518 (1992).

The Court has also recognized an exception to this presumption. In *Locke*, the Court observed that the passage quoted above from *Rice* was "followed by extensive and careful qualifications" and declined to apply the "artificial" presumption against preemption to the question whether Washington State's oil tanker regulations were preempted by federal law. 529 U.S. at 107. No such presumption "is triggered," Justice Kennedy's opinion for the Court explained, "when [a] State regulates in an area where there has been a history of significant federal presence." *Id.* at 108. Because the Washington tanker

regulations involved "interstate navigation" and "maritime trade" – areas "where the federal interest has been manifest since the beginning of our Republic" and Congress has "creat[ed] an extensive federal statutory and regulatory scheme" – the presumption against preemption was inapplicable. *Id.* at 99, 108; see also *Buckman*, 531 U.S. at 347, 353 (declining to apply presumption because "[p]olicing fraud against federal agencies" is "hardly" an area of traditional state authority and because plaintiffs' "fraud-on-the-agency" claims did not rely on "traditional state tort law").

In this case, the panel majority and the district court sharply disagreed over the meaning and applicability of the *Locke* exception. In the district court's view, this case fell squarely within the *Locke* exception because "[c]ongressional concern for national uniformity of regulation in the field of wireless telecommunications has been clear since the inception of commercial wireless telephone service." Pet. App. 63a. For that reason, and because "these lawsuits do not involve a traditional claim of compensation for personal injury" (*ibid.*), the district court refused to apply any presumption against preemption. In contrast, the panel not only held that the *Locke* exception was inapposite but also applied a "strong" variant of the presumption. *Id*. at 34 n.4, 41. The district court was wrong to rely on *Locke*, the Fourth Circuit reasoned, "because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." Pet. App. 35 n.4. A "strong" version of the presumption against preemption must be applied, the Fourth Circuit added, because the case implicated "state remedies, like tort remedies," and "no federal remedy exists." *Ibid.* (internal quotations omitted).

This case illustrates the great difficulty the lower courts have had in applying the presumption against preemption and the exception recognized in *Locke*. Indeed, as we next explain, the Fourth Circuit's analysis raises at least four questions about the meaning of the presumption and the *Locke* exception.

1. *When is a history of federal presence sufficiently "significant" to trigger the exception?* The lower courts have

had difficulty determining when a history of federal regulation attains the level of significance required to escape the presumption against preemption. At least in theory, the federal government's regulatory role could be evaluated quantitatively (how long?), qualitatively (how extensive?), or in both ways. In addition, the quantitative measurement could be viewed in absolute terms (how many years?) or in relative terms (how long in relation to either the federal government's lifespan or the age of the regulated technology?).

The district court in this case took the eminently sensible view that the duration of the federal government's involvement should be measured relative to the underlying technology being regulated. Accordingly, the district court emphasized that Congress's "concern for national uniformity of regulation in the field of wireless telecommunications has been clear *since the inception of commercial wireless telephone service*." Pet. App. 63a (emphasis added). The Fourth Circuit, however, took a different approach to measuring the federal government's historical role, concluding that "there is not *the same federal presence* in the wireless telecommunications area as there is in the area of maritime commerce." *Id.* at 35a n.4 (emphasis added). To the extent that the Fourth Circuit was relying on how long the federal government has regulated the underlying subject matter (wireless telecommunications) in comparison to the government's existence, its reasoning suffers from a glaring flaw. It should be obvious why federal regulation of cell phones is of more recent origin than regulation of seagoing ships: radio communications and cell phones are only a hundred years old and thirty years old, respectively, whereas commercial shipping predates the founding of the Republic. It is simply illogical to compare the proportion of the federal government's lifespan that has been spent regulating cell phones with the proportion spent regulating shipping.

There is another problem with the Fourth Circuit's simplistic comparison to the duration of federal regulation of "maritime commerce" in *Locke*. In *Locke*, this Court gave no hint that the necessary "history of significant federal presence" must rival

that of maritime commerce before the presumption against preemption will be avoided. By viewing maritime-like federal regulation as *necessary* to trigger the *Locke* exception, rather than as merely *sufficient* in that case to do so, the Fourth Circuit misunderstood the teachings of *Locke*. See also Pet. 25-26.[2]

The Fourth Circuit's approach to *Locke* conflicts with *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir.), cert. denied, 540 U.S. 811 (2003). There, the question was whether a California consumer-protection law was preempted by the Communications Act of 1934, the same statute implicated in this case. The Ninth Circuit concluded that "the long history of federal presence in regulating long-distance telecommunications" brought the case within the *Locke* exception (*id.* at 1136), making clear that – unlike the Fourth Circuit – it thought a 70-year "history of significant federal presence" was sufficient to vitiate any presumption against preemption. See also *Maier* v. *FCC*, 735 F.2d 220, 224 (7th Cir. 1984) (noting that Communications Act "provided a comprehensive scheme of federal regulation of * * * radio communication"). The Court should grant review if for no other reason than to resolve the conflict between the Fourth and Ninth Circuits over the meaning of the *Locke* exception and whether it covers the important area of interstate telecommunications by wire or radio.

Under the Fourth Circuit's view, even if federal regulations have governed a recently developed technology since its introduction, state laws that intrude on the federal regulatory structure might nevertheless enjoy a presumption against preemption merely because the tradition of federal regulation of the innovative technology is "not the same" as that over maritime commerce. For example, any effort by the FCC to regulate satellite radio through rules that preempt state and local law would face an extra hurdle and have to overcome a "presumption" before they would be given the effect desired by the agency. The

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[2] As petitioners note (Pet. 25-26), even if measured in absolute terms the federal government's comprehensive regulation of wireless communications actually *predates* the maritime statutes that were at issue in *Locke*.

Court should take this opportunity to clarify that the *Locke* exception does not require that federal regulation have been "manifest since the beginning of our Republic" (529 U.S. at 99), and that the proper frame of reference is not absolute, but relative, to the history of the technology or field of law.

2. *At what level of generality should the relevant "field" of federal regulation be defined?* In *Locke*, this Court explained that the presumption against preemption will not apply "when the State regulates in an *area* where there has been a history of significant federal presence." 529 U.S. at 108 (emphasis added). This Court did not, however, provide guidance on how courts should go about identifying the relevant "area" of regulation. The lower courts have struggled with that threshold question.

This case provides a good example of the need for clarification. Is the proper field of regulatory activity in this case (as the district court believed, see Pet. App. 63a (emphasis added)) "*commercial* wireless telephone service"? Is it "wireless telecommunications" generally, as the Fourth Circuit appeared to believe? *Id.* at 35 n.4. Alternatively, should the lower courts have confined themselves to the narrower field of technical standards for wireless service, which, as the district court noted (*id.* at 67a), has been an exclusively federal province? The threshold definition a reviewing court selects will drive the analysis and, in many cases, determine whether or not the *Locke* exception applies.

The lack of guidance from this Court on this issue has contributed to conflicting results in the lower courts. For example, in *Union Pacific Railroad* v. *California Public Utilities Comm'n*, 346 F.3d 851 (2003), cert. denied, 540 U.S. 1104 (2004), the Ninth Circuit held that the *Locke* exception does not apply to state laws regulating railroad safety, because the Federal Railroad Safety Act was passed only in 1970 and, "[p]rior to that time," "*railroad safety* was largely regulated by the states." *Id.* at 858, 864 n.17 (emphasis added). In contrast, the D.C. Circuit in *CSX Transportation, Inc.* v. *Williams*, 406 F.3d 667 (2005), held that the *Locke* exception *does* apply to railroad safety laws, observing that "just as Congress has

regulated ships and vessels since the beginning of the Republic," it has long regulated "our Nation's rail system." *Id.* at 673 (quoting *CSX Transp., Inc.* v. *City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000)). These conflicting results are at least partly traceable to disagreements over the proper level of generality at which the *Locke* inquiry should be conducted.

To dispel this confusion, this Court's guidance is needed. Defining the relevant field of federal regulation too narrowly risks making the *Locke* exception an irrelevance, because, with the ever-increasing rate of technological complexity and innovation, litigants frequently will be able to distinguish a new product, technology, or field from one that has come before (thus rendering legally irrelevant any prior history of federal regulation). Conversely, if courts define the area broadly, it will usually be possible to point to some prior federal laws or regulations that could trigger the *Locke* exception. Only this Court can eliminate the confusion in the lower courts about how *Locke* should be understood and applied. See also Pet. 26 n.6.[3]

3. *Is there a "strong" version of the presumption against presumption – and of the* Locke *exception?* The Fourth Circuit not only declined to apply the *Locke* exception but also applied an especially "strong" version of the presumption against preemption because "no federal remedy exists." Pet. App. 35 n.4 (internal quotations omitted). In stark contrast, the D.C. Circuit has suggested, in *CSX Transportation, Inc.* v. *Williams*, *supra*, that if the *Locke* exception applies it is the argument *for* pre-

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[3] This Court faced a very similar problem – and need to give the lower courts guidance – in its cases involving qualified immunity. In those cases, the critical issue is whether a government official's conduct violated a right that was "clearly established" at the time the conduct occurred. *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). But "[t]he operation of this standard * * * depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id*. at 639. In recent years, this Court has taken a series of cases in order to make that point as well as to clarify for the lower courts how the qualified immunity analysis must be conducted. See, *e.g.*, *Groh* v. *Ramierz*, 540 U.S. 551 (2004); *Hope* v. *Pelzer*, 536 U.S. 730 (2002).

emption – not the presumption *against* – that must be treated as "particularly strong." 406 F.3d at 673.

The Fourth Circuit's suggestion that the presumption against preemption comes in both regular and super strengths is mistaken. The only authority the court cited – its prior decision in *Abbot* v. *American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.), cert. denied, 488 U.S. 908 (1988) – purported to draw that principle from *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 250-51 (1984). But, as this Court has since made clear, *Silkwood* does not stand for any such broad principle; rather, it turned on "specific evidence" of Congress's intent to preserve state-law remedies under the Price Anderson Act and other statutes relating to nuclear power plants. *Buckman*, 531 U.S. at 351-52.

In contrast, the D.C. Circuit's suggestion that courts should approach some cases with a presumption *in favor of* preemption *does* find substantial support in this Court's decisions. The Court has long applied that rule where Congress has legislated in an area of "dominant" federal interests. For example, in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Court held that the Alien Registration Act of 1940, embodying a comprehensive federal system of alien registration, preempted a Pennsylvania law regulating the same subject. Given the uniquely national nature of "the general field of foreign affairs, including power over immigration," the Court explained, state authority to act concurrently in this area must be "restricted to [its] narrowest limits." *Id*. at 68. At the same time, however, this competing presumption *in favor of* preemption typically is not combined with the *Locke* exception. Whether or not such a combination is appropriate, these circuit decisions further underscore the need for clarification by this Court.

4. *When do state-law "remedies" and claims grounded in tort law fall within a traditional area of state authority?* This Court's decisions in *Buckman* and in *Aetna Health Inc.* v. *Davila*, 124 S. Ct. 2488 (2004), make clear that not every lawsuit advancing claims nominally based on state tort law falls within an area of traditional state authority. In *Buckman*, this

Court pointedly contrasted the plaintiffs' novel "fraud-on-the-FDA claims" with "traditional state law tort principles." 531 U.S. at 352; accord *id.* at 353. Following this Court's lead, the district court declined to apply the presumption against preemption in part because respondents' lawsuit "do[es] not involve a traditional claim of compensation for personal injury" (but is rather, at bottom, a challenge to the FCC's judgment that headsets are unnecessary, dressed up in the garb of a tort lawsuit). Pet. App. 63a. The Fourth Circuit, however, ignored this consideration and even suggested that the presumption should apply to any case where "state remedies, like tort remedies," might be preempted. *Id.* at 35a n.4.

But this Court has never suggested that any case involving state "remedies" is subject to the anti-preemption presumption, and the Fourth Circuit's refusal to look behind the labels to the true nature of respondents' tort claims simply ignores *Buckman*'s teachings. Likewise, in *Davila*, the Fifth Circuit had pointed out that the preemptive federal statute (ERISA) did not furnish tort-type remedies and held that the plaintiffs' pursuit of such remedies under state law was a reason to hold their claims not preempted. This Court unanimously rejected that reasoning as "erroneous" (124 S. Ct. at 2498), explaining that a federal decision *not* to provide a tort remedy can itself have strong preemptive effect. The Fourth Circuit's decision is inconsistent with *Davila* as well as *Buckman*.

II. The Court Should Take This Opportunity To Reexamine The Presumption Against Preemption

In recent years, the "presumption against preemption" has come under attack from a variety of judges, legal scholars, and prominent practitioners. These critics have challenged the presumption's historical pedigree, its logical compatibility with the rest of preemption law, its consistency with the text of the Supremacy Clause, and its validity in light of the Constitution's structure. This Court has not yet considered most of these potent criticisms. The Court should use this case to conduct such a reexamination.

1. Some Members of this Court have suggested, without elaboration, that the presumption against preemption is rooted in fundamental principles of federalism embodied in the Constitution. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 533 & n.1 (1992) (Blackmun, J., concurring). In recent years, however, that view has been persuasively challenged by legal scholars and prominent practitioners. For example, Professor Viet Dinh has argued that, "[c]ontrary to the prevailing wisdom and the unexplored assumptions of Supreme Court dicta, the constitutional structure of federalism does *not* admit to a general presumption against federal preemption of state law." Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087 (2000) (emphasis added). Solicitor General Paul Clement has advanced the same argument, see Clement & Dinh, *When Uncle Sam Steps In*, LEGAL TIMES, June 19, 2000, at 66, as has Professor Jack Goldsmith. See Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. CT. REV. 175, 182 (presumption is "difficult to justify" on constitutional grounds).

As these commentators have explained, the presumption against preemption finds no support in the text or the structure of the Constitution. The text doesn't support it because the Supremacy Clause *displaces* state authority, in marked contrast to other provisions that serve as the basis for other clear-statement rules (such as the Tenth and Eleventh Amendments, which explicitly *preserve* state power). Nor can support for the presumption be derived from the Constitution's structure:

> The question in pre-emption cases is not whether Congress has the authority to enact a law, but simply whether federal legislation ought to be exclusive. Thus a presumption *against* pre-emption would not be a presumption against federal laws in areas of traditional state concern, but rather a presumption *in favor of overlapping and potentially conflicting regulations* at federal, state, and local levels. Nothing in the Constitution indicates any particular solicitude for federal laws that duplicate state laws without displacing them.

Clement & Dinh, *supra*, at 66 (emphasis added).

Drawing on the history of the Constitutional Convention, scholars have also argued persuasively that Congress's power to preempt derives from the enumerated powers in Article I, Section 8, including the Necessary and Proper Clause, rather than from the Supremacy Clause in Article VI. See Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 803-07 (1996); Dinh, *supra*, 88 GEO. L.J. at 2088. Under this view, the Supremacy Clause is properly regarded as a "constitutional choice of law rule, one that gives federal law precedence over conflicting state law" – but one that comes into play "only at the post-enactment stage, where a state law conflicts to some degree with a federal law." Dinh, *supra*, 88 GEO. L.J. at 2090; accord Gardbaum, *supra*, 74 TEX. L. REV. at 804. "Given this constitutional structure," Professor Dinh explains, "questions of constitutional policy in preemption * * * were answered by the framers with the specific enumerations and limitations of federal legislative power in Article I." Dinh, *supra*, 88 GEO. L.J. at 2092. Thus, when Congress has enacted legislation that is

> consistent with its limited, enumerated powers, the question ceases to be one about the vertical distribution of powers between federal and state governments – after all, the Constitution gave Congress the power to legislate, and Congress has exercised that power. Rather, the question becomes one of horizontal division of federal governmental functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law – in short, the task of statutory construction. If, in performing this task, the Court were to systematically favor one result over another, it would disrupt the constitutional division of power between federal and state governments, rewrite the laws enacted by Congress, or both. Such actions * * * risk an illegitimate expansion of the judicial function.

Ibid. Accordingly, constitutional structure strongly suggests that "there should be no general systematic presumption against or in favor of preemption." *Ibid*.

2. Professor Caleb Nelson of the University of Virginia Law School has reached the same conclusion by a different route. Relying on a detailed analysis of long-overlooked historical materials, Professor Nelson has shown that the presumption against preemption *is contrary to the text of the Supremacy Clause*. See Nelson, *Preemption*, 86 VA. L. REV. 225, 235-64, 292-93 (2000). According to Professor Nelson,

> The final phrase in the Supremacy Clause – "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" – is a "non obstante" clause. Although such clauses are no longer familiar to us, legal draftsmen in late eighteenth-century America used them to acknowledge that a statute might contradict some other laws and to instruct courts *not* to apply the traditional presumption against implied repeals. When a statute contained a non obstante clause, courts did not have to struggle to harmonize the statute with prior laws; they could give the statute *its natural meaning* and let it displace whatever law it contradicted.
>
> The presence of a non obstante provision in the Supremacy Clause * * * establishes an important rule of construction. The non obstante provision tells courts that even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation. It follows that courts should *not* automatically seek "narrowing" constructions of federal statutes solely to avoid preemption.

Id. at 232 (emphasis added; footnote omitted); see also Goldsmith, *supra*, 2000 S. CT. REV. at 184 (agreeing with Nelson that "the Supremacy Clause's non obstante clause * * * was designed precisely to eliminate any residual presumption").

This Court has not yet considered Professor Nelson's compelling criticism of the presumption against preemption based on the text of the Supremacy Clause. Cf. *Geier* v. *American*

Honda Motor Co., 529 U.S. 861, 908 n.22 (2000) (dissenting opinion) (alluding to argument but declining to address it).[4]

3. Other recent scholarship has refuted the assumption that the "presumption against preemption" is deeply rooted in the Nation's history or in principles of federalism. This Court's earliest preemption cases make no mention of any such presumption. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-44 (1816); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). In fact, the presumption (or "assumption") was not recognized by this Court until the 1920s and 1930s. See Davis, *Unmasking The Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 973-83 (2002); Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785-808 (1994).

What is more, in the first several decades of the twentieth century this Court recognized a strong generalized presumption *in favor of* preemption. Thus, the preemption doctrine

> has evolved * * * from one based on an assumption of congressional legislative exclusivity and almost certain preemption of state regulation to a doctrine, in the mid-part of the century, based on a search for congressional intent to preempt so that state laws, particularly those based on historical police powers, would not be needlessly displaced.

Davis, *supra,* 53 S.C. L. REV. at 971. Accord Gardbaum, *supra*, 79 CORNELL L. REV. at 801-08.

The Court's "official shift from automatic preemption to an intent-based test during the 1930s," Professor Gardbaum explains, was closely tied to "the enlargement of the commerce power" during this time period, and originated in the concern that without such a shift Congress's expanded powers "would otherwise have threatened to preempt too much state power."

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[4] Professor Nelson's article also contends, based on a separate line of argumentation and separate grounds, that this Court should abandon obstacle preemption. PLAC disagrees with that contention, as did this Court in *Geier*.

Gardbaum, *supra*, 79 CORNELL L. REV. at 808. Although that practical concern may well justify the abandonment of a generalized presumption in favor of preemption whenever *any* federal law exists, it hardly supports the use of a presumption against preemption in the form adopted in *Cipollone* – as a rule that all express preemption clauses must be narrowly construed.

This recent scholarship undercuts any suggestion that the presumption against preemption has deep historical roots in our legal traditions or in the federalism principles animating the Constitution. Instead, the presumption is of relatively recent origin; it was preceded by a contrary presumption favoring preemption; and it was developed out of pragmatic concerns that do not justify its current function.[5]

4. The presumption against preemption is also difficult to reconcile with other, well-settled principles of preemption law and statutory interpretation. It is at odds logically, for example, with the universally acknowledged principle that "[p]re-emption fundamentally is a question of congressional intent." *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). If preemption turns on what Congress intends, it is difficult to see why an inquiry into intent should be systematically distorted by a threshold assumption. Two Members of this Court have strenuously objected, on precisely this ground, to the use of the presumption in cases involving express preemption. See *Cipollone*, 505 U.S. at 544 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (Court's "job is to interpret Congress' decrees of pre-emption neither narrowly nor broadly, but in accordance with their

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[5] Professor Goldsmith has also shown that the presumption against preemption cannot sensibly be justified based on a prediction about how Congress "usually" acts, or on the need to provide "notice" to the States (because "*any* default rule will put the states on notice as long as the rule is clear"), or on the ground that it safeguards the political checks of federalism against judicial usurpation (because erroneous judicial decisions *denying* preemption are no less of an affront to the will of the political branches). Goldsmith, *supra*, 2000 S. CT. REV. at 183-87 (emphasis added).

apparent meaning"). Nor is it easy to see why it would make sense, under a "purpose-based" approach to statutory interpretation, for courts automatically to presume that a "reasonable member of Congress" intended either no preemption, or only limited preemption, where Congress *itself* has chosen to include an express preemption clause in a statute. S. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88, 97-101 (2005); *id*. at 99 (criticizing excessive reliance on "canons" as obscuring Congress's true purpose).[6]

The presumption against preemption also coexists uneasily with the settled principle that the importance of a State's interest underlying a law that is allegedly preempted is *irrelevant* to the preemption analysis. See, *e.g.*, *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("These principles [governing preemption] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law.'") (emphasis added) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)); *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.").

Nor does the presumption against preemption fit comfortably within the class of federalism-based "substantive" canons of statutory construction used by this Court "to harmonize statutory meaning with policies rooted in the * * * Constitution." W. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 329-30 (2000); see, *e.g.*, *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute.") (emphasis added). For one thing, as

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[6] The judicially created "presumption" makes no more sense when applied to forms of "implied" preemption, where it has the effect of allowing greater conflict with (or frustration of the purposes of) federal law by state law than the Supremacy Clause would otherwise permit.

explained above, the presumption against preemption is *not* rooted in principles of federalism. For another, as Justices Scalia and Thomas correctly noted in *Cipollone*, in "none" of these other settings does a clear-statement rule "exist[] 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." 505 U.S. at 547 (emphasis in original). And in none of these other settings does a clear-statement rule coexist with the *opposite* presumption (such as the established presumption *in favor of* preemption in areas, such as foreign affairs, where federal interests are "dominant"). Only in the law of federal preemption does this "novel regime" exist. *Ibid.*

5. This Court has acknowledged that the principles governing federal preemption are "already * * * difficult to apply" and, accordingly, it has pointedly declined to "complicat[e]" this important area of law "further" by adopting new presumptions and special burdens that would create "practical difficulties" for litigants and lower courts alike. *Geier*, 529 U.S. at 873. The same salutary objective of clarifying and rationalizing preemption law supports using this case to reconsider, and perhaps abandon or limit, the flawed presumption against preemption.

Finally, further review would bring the added benefit of dispelling confusion that may have been caused by this Court's own inconsistent treatment of the presumption against preemption, which PLAC has previously documented. See Br. of PLAC As *Amicus Curiae*, *United States* v. *Locke*, Nos. 98-1701 & -1706, at 5-7; see also *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (relying on "natural[] read[ing]" of express preemption clause without any mention of presumption); *Engine Manufacturers Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) ("not all Members of this Court agree" on the use of a "presumption against preemption").

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation

Deere & Company
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.

Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
Tyson Foods, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.