

No. 25-419

IN THE
Supreme Court of the United States

SHELBY COUNTY, IOWA, ET AL.,
Petitioners,
v.
WILLIAM COUSER, ET AL.,
Respondents.

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

AMICUS BRIEF OF MINNESOTA, ARIZONA,
MICHIGAN, NEW MEXICO, OREGON, AND
VERMONT IN SUPPORT OF PETITIONERS

KEITH ELLISON
Attorney General
State of Minnesota
ELIZABETH KRAMER
Solicitor General
Counsel of Record
OLIVER J. LARSON
RYAN V. PETTY
Assistant Attorneys General
445 Minnesota Street, Suite 600
St. Paul, Minnesota 55101-2125
(651) 757-1265
liz.kramer@ag.state.mn.us

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INTERESTS OF AMICI STATES¹

Amici States² have a strong interest in ensuring their traditional powers to regulate land use are respected. Amici States have a long history of enacting laws concerning environmental protection, land reclamation, and zoning. These regulations serve critical functions that benefit the health, welfare, and economic security of the citizens of State Amici, and preserve the use and enjoyment of their citizens' properties. Such land use regulations are traditional exercises of state sovereign police powers, and are often carried out by local governmental units, including counties and cities.

Congress recognized the importance of state sovereignty over land use by adopting only limited preemption provisions in the Pipeline Safety Act. Congress chose to preempt state and local regulations concerning the operation of a pipeline but chose not to preempt state and local regulations concerning where a pipeline could be routed. Multiple Courts of Appeals have found the Pipeline Safety Act does not preempt state and local land use regulations relating to pipeline routes, contrary to the decision of the Eighth Circuit. Amici States seek to ensure that the balance struck by Congress in the Pipeline Safety Act—providing uniform safety standards while respecting local land use regulations—is preserved.

¹ All counsel of record received timely notice of Amici States' intent to file this amicus brief under Rule 37.2.

² Amici States are the States of Minnesota, Arizona, Michigan, New Mexico, Oregon, and Vermont.

SUMMARY OF THE ARGUMENT

This Court should review the Eighth Circuit's decision ("the Decision") in this important case for three main reasons:

1. The Eighth Circuit adopted an unworkable test for preemption that contravenes the plain text of the Pipeline Safety Act by holding that preemption of local land use regulations turns on an inquiry into the subjective intent of the local lawmakers. The Decision ignores the clear Congressional choice to limit the preemptive scope of the Pipeline Safety Act to safety standards, leaving decisions about the routing of pipelines to the states.

2. Certiorari is required to resolve a circuit split created by the Decision. Both the Fifth and Fourth Circuits previously concluded that setback ordinances are not preempted by the Pipeline Safety Act. Those courts correctly applied the express non-preemption provision and respected state sovereign powers over land use. The Eighth Circuit's decision to the contrary now produces a patchwork of states in which setback ordinances are permissible, and other states where they are not. The Court should resolve this issue and provide predictability to state and local lawmakers.

3. Certiorari is also necessary to clarify the law on how courts analyze preemption. In 2019, a plurality of this Court emphasized that the intent of a state or local legislative body was not relevant to the preemption inquiry; only the text mattered. The plurality's warning that relying on intent could produce inconsistent results has come to fruition.

Substantively identical setback ordinances in the Eighth and Fifth Circuits have resulted in different preemption results under the Pipeline Safety Act. This Court should grant certiorari to reaffirm that the intent of state and local legislators is not a relevant consideration for preemption.

ARGUMENT

I. WHETHER THE PIPELINE SAFETY ACT PREEMPTS ROUTING DECISIONS AND LAND USE—POWERS TRADITIONALLY RESERVED FOR THE STATES—IS AN IMPORTANT QUESTION

This Court should grant the petition and reverse the Decision’s holding that setback ordinances are preempted by the Pipeline Safety Act. At issue here are the important rights of Iowa, through Shelby and Story Counties (“the Counties”), to exercise its traditional powers to regulate land use. Those powers are qualitatively different from regulating how a pipeline operator must design, construct, maintain, test, and operate the pipeline, which are the sort of acts Congress intended to preempt as safety standards.

A. The Presumption Against Preemption is Heightened in Areas of Historic State Police Powers, Like Land Use

The preemption doctrine derives from the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2. Under this doctrine, a federal law can supersede a state law, but *only* if Congress intended it to do so. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (“[R]espect for the states

as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt state [] law.” (cleaned up)). County ordinances are analyzed identically to state law under the Supremacy Clause. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

In determining Congressional intent, courts “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.” *Id.* (citation omitted). The presumption against preemption is heightened “where federal law is said to bar state action in fields of traditional state regulation.” *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

“Regulation of land use . . . is a quintessential state and local power.” *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). Stretching back a century, this Court has upheld zoning and other land use regulations as exercises of traditional state police powers. *See, e.g., Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386-90 (1926); *Murr v. Wisconsin*, 582 U.S. 383, 401-02 (2017); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 334-35 (2002). Indeed, “this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or control to enhance the quality of life by preserving the character and desirable aesthetic features of a city[.]” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) (collecting cases). It is for these reasons that courts are hesitant to “permit[] federal encroachment upon a traditional state power,”

like land use regulation. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001).

B. The Pipeline Safety Act's Express Preemption of Safety Standards Is Narrow and Further Limited by the Express Non-Preemption of Routing Decisions

The Decision incorrectly concluded that the Counties' setback requirements were safety standards preempted by the Pipeline Safety Act.

The Pipeline Safety Act's preemption of safety standards is narrow and must be read in conjunction with the Act's express reservation of routing decisions to the states. The Pipeline Safety Act expressly preempts "safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). But recognizing traditional state sovereignty over their lands, the Pipeline Safety Act "does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 U.S.C. § 60104(e). Confirming that express non-preemption of routing decisions, a House Committee Report contemporaneous with passage of the Act confirms that interstate oil pipelines "are subject to the routing and environmental assessment requirements of the individual states they traverse." H.R. Rep. No. 102-247, pt.1, at 13-14 (1991).

Courts have understood that Congress did *not* intend the Act to preempt traditional state and local authority over land use. See *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) ("[T]he [Pipeline Safety Act] itself only

preempts *safety* standards.”); *Portland Pipe Line Corp. v. City of S. Portland*, 288 F.Supp.3d 321, 430-31 (D. Me. 2017).

**C. The Counties’ Setback Ordinances
Are Not Safety Standards and Are
Thus Not Preempted by the Pipeline
Safety Act**

The express preemption clause under the Pipeline Safety Act does not apply to the Counties’ setback ordinances. Instead, the express *non*-preemption provision applies. “Under their police power, states and localities retain their ability to prohibit pipelines altogether in certain locations.” *Portland Pipe Line*, 288 F.Supp.3d at 430 (citation omitted). The Counties here sought to control the location and routing of the pipeline, not to impose a “safety standard.”

The setback ordinances at issue address the *location* of the pipeline—not the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, or maintenance of the pipeline. The express preemption clause does not include location or routing concerns.

Express preemption exists if the federal law expressly states that it intends to preempt state or local laws on the same subjects. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). But “[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.” *Id.* The presumption against preemption applies even to express preemption. *See id.* at 77. But the Decision’s preemption analysis did

not give proper deference to the Counties' traditional powers over land use.

Moreover, even if § 60104(e) did not place routing issues explicitly outside of the Pipeline Safety Act, the setback ordinances cannot fairly be characterized as a "safety standard" as that term is used in the Act's express preemption clause. As noted above, preemption clauses are to be read narrowly in light of the presumption against the preemption of state police power regulations. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 519 (1992). A narrow reading of this clause would not allow for the conclusion that the Counties are attempting to "adopt or continue in force safety standards." 49 U.S.C. § 60104(c); Pet. at 20-24.

Instead, the setback ordinances are a typical routing ordinance. The Decision, however, looked past the plain text of the ordinances and delved into the "motivation" of the Counties' legislators in conflict with this Court's longstanding precedent that prohibits such an analysis. Pet. App. at 9a; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403-404, n. 6 (2010); cf. *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters."). All setback ordinances necessarily impact safety, but that safety impact cannot be used to nullify express non-preemption.

The Decision also incorrectly found that because the ordinance applied to both "economically developed and remote areas," then the ordinance must be directed to safety. But people who live in "economically developed" and "remote areas" possess an equal right not to have the eyesore and disruption

that a pipeline can have on the use, enjoyment, and value of their lands. So too with the setbacks for specific facilities like churches, schools, nursing homes, and the like. These ordinances instead “fit comfortably within a local land use ordinance” that are not preempted by the Pipeline Safety Act. Pet. App. at 22a (Kelly, J., dissenting in part).

Prohibiting state and local governments from enacting setbacks would have myriad detrimental effects. Pipelines require regular maintenance, accompanied by heavy equipment and vehicles that can damage roads. This is a particular concern for smaller municipalities that may not have the same resources to regularly repair their roads used by residents and visitors. And the impacts on property values and, by extension, tax bases can worsen the financial strain of these local governments.

Pipelines can also impact municipal services. Above ground pipelines restrict where roads can be built, and thus where emergency services, waste/recycling collection, buses, and the like may operate. Similarly, below ground pipelines can restrict where electricity, water, sewer, and other infrastructure may exist. Setback ordinances help to protect these vital municipal services.

Setbacks also serve valuable aesthetic and environmental purposes to preserve the character of communities and natural resources. *Washington Gas Light Co. v. Prince George’s Cnty. Council*, 711 F.3d 412, 421 (4th Cir. 2013) (citing *Texas Midstream Gas Servs. v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010); *Pine Cnty. v. State, Dept. of Nat. Res.*, 280 N.W.2d 625, 629-30 (Minn. 1979)). These goals would be disrupted by the presence of a pipeline within certain distances.

Simply put, the Pipeline Safety Act neither preempts nor otherwise conflicts with Iowa’s sovereign power—exercised through the Counties—to dictate the *location* of pipelines that cross its lands, including where pipelines may *not* cross.

* * *

The setback ordinances passed by the Counties are not “safety standards” but are instead typical location and routing provisions that are not preempted by the Pipeline Safety Act. Such decisions have been, and continue to be, the traditional role of the states in regulating land use.

II. THE EIGHTH CIRCUIT’S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ADDRESSING SIMILAR ROUTING ORDINANCES

The Decision has created a circuit split that this Court should resolve. Standing alone on one side is the Eighth Circuit, which has found setback ordinances to be preempted. On the other side are the Fifth and Fourth Circuits, which have correctly found that such traditional land use regulation is not preempted by the Pipeline Safety Act.

The Fifth Circuit in *Texas Midstream Gas Servs., LLC v. City of Grand Prairie* held that a setback ordinance was not a safety standard, and thus not preempted by the Pipeline Safety Act. 608 F.3d at 211-12. As Petitioner correctly identifies, the County ordinances, even as characterized by the Decision, are indistinguishable from the Grand Prairie ordinance in *Texas Midstream*. Compare Pet. App. at 6a-8a with *id.* at 135a-136a; Pet. at 17.

The Fourth Circuit’s *Washington Gas Light Co. v. Prince George’s Cnty. Council* decision, in upholding a setback ordinance, forcefully reaffirmed that “the power to impose a zoning requirement” was a traditional power of the states and “includes the power to preclude any proposed usage of the zoned area that cannot comply with such requirement.” 711 F.3d at 421. The Eighth Circuit’s decision to the contrary therefore conflicts with earlier decisions by other Courts of Appeals, and this Court should grant the petition to resolve this Circuit split.

III. THE DECISION’S MOTIVATION-BASED APPROACH TO PREEMPTION DISINCENTIVIZES PUBLIC DEBATE FOUNDATIONAL TO OUR SYSTEM OF GOVERNMENT

The Decision’s preemption analysis hinged on the purported intent of the Counties in passing the setback ordinances. Pet. App. at 9a. But preemption turns on “*what* the State did, not *why* it did it.” *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 774 (2019) (plurality) (Op. of Gorsuch, J.). And “for good reasons.” *Id.* at 775. If federal courts routinely inquire into the intent and motivations of state lawmakers when analyzing preemption, that would “stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge.” *Id.*

To allow such free-roaming inquiry into intent “would inhibit the sort of open and vigorous legislative debate that our Constitution recognizes as vital to testing ideas and improving laws.” *Id.* Under the Eighth Circuit’s improper analysis, city councils, county boards, and state legislatures would be incentivized to say as little as possible in debates and

in the texts of the ordinances, codes, and laws that they pass. That would be to the detriment of the public and their ability to engage with the legislative process. For Amici States, it is robust legislative debate and public engagement that produces the best laws to serve our people.

Relying on the intent of legislators creates another key problem: differing preemptive results for substantively identical laws. *Shady Grove*, 559 U.S. at 404. As members of this Court have warned “federal courts would risk subjecting similarly situated persons to radically different legal rules as judges uphold and strike down materially identical state regulations based only on the happenstance of judicial assessments of the ‘true’ intentions lurking behind them.” *Virginia Uranium*, 587 U.S. at 775-76 (Op. of Gorsuch, J.). This concern is not hypothetical; it happened here.

As Petitioner identifies, the setback ordinances that the Decision concluded were preempted by the Pipeline Safety Act mirror the setback ordinances that the Fifth Circuit upheld as not preempted. Pet. at 17. The only apparent difference is that the Counties deigned to mention the word “safety” in their debates and the preambles to their ordinances. Pet. App. at 42a. But that distinction has no impact on the preemption inquiry. *Virginia Uranium*, 587 U.S. at 775-76 (Op. of Gorsuch, J.); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983).

As noted above, the plurality opinion in *Virginia Uranium* provides a thorough accounting of the very real dangers that accompany probing into state and local legislative intent when analyzing

preemption. That decision, however, only garnered plurality support. This case serves as an ideal vehicle for the Court to clarify and reaffirm that state and local legislative intent is not a relevant consideration for preemption. Instead, courts should start and end with the text.

State Amici and their local governments should not be subject to different preemptive legal results for identical substantive laws. A preemption analysis that looks solely at the content of state and local laws provides predictability that guides lawmakers as they seek to address similar issues in their own jurisdictions.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KEITH ELLISON

Attorney General

State of Minnesota

ELIZABETH KRAMER

Solicitor General

Counsel of Record

OLIVER J. LARSON

RYAN V. PETTY

Assistant Attorneys General

445 Minnesota Street, Suite 600

St. Paul, Minnesota 55101-2125

(651) 757-1265

liz.kramer@ag.state.mn.us

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ADDITIONAL AMICI STATES

KRISTIN K. MAYES
Attorney General
State of Arizona
 2005 N. Central Ave.
 Phoenix, AZ 85004

DANA NESSEL
Attorney General
State of Michigan
 P.O. Box 30212
 Lansing, MI 48909

RAÚL TORREZ
Attorney General
State of New Mexico
 408 Galisteo St.
 Santa Fe, NM 87501

DAN RAYFIELD
Attorney General
State of Oregon
 1162 Court Street NE
 Salem, OR 97301

CHARITY R. CLARK
Attorney General
State of Vermont
 109 State St.
 Montpelier, VT 05609