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## ARTICLE

### UP IN THE AIR: ANALYZING WHETHER THE CLEAN AIR ACT PREEMPTS STATE COMMON LAW CLAIMS

*Max Birmingham\**

#### I. INTRODUCTION

This Article addresses the question of whether the Clean Air Act (CAA) preempts state common law claims<sup>1</sup> brought by private parties against a pollution source within the state. At issue with preemption is whether Congress undoubtedly exercises this power.<sup>2</sup>

The Supremacy Clause is a stalwart that courts use to impose the preemption doctrine.<sup>3</sup> The Supremacy Clause of the United States Constitution establishes that the Constitution and federal laws are “the supreme law of the land” and that federal law preempts “any state law . . . [that] ‘interferes with or is contrary to federal law.’”<sup>4</sup> The court begins its analysis by interpreting the statutory construction of the law.<sup>5</sup> However, the

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1. For purposes of this Article, the term “state common law claims” shall refer to state common law claims that are pertinent to the coverage of the Clean Air Act, or more specifically negligence, nuisance, and tort.

2. William Cohen, *Congressional Power To Define State Power To Regulate Commerce: Consent and Preemption*, in *COURT AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* 523, 523, 537 (Sandalow & Stein eds., 1982) (“Congress’s power to preempt state laws which affect interstate commerce is . . . unquestioned. . . . With reference to preemption, the problem has been to define the standards for deciding when Congress has in fact exercised that power.” And, “[t]hus, the issue, in pre-emption cases, simply stated, is not what Congress has the power to do, but what Congress has done.”).

3. See, e.g., S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 *CONN. L. REV.* 829 (1992); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 *HASTINGS CONST. L.Q.* 69 (1988).

4. U.S. CONST. art. VI, cl. 2; *Free v. Bland*, 369 U.S. 663, 666 (1962).

5. See, e.g., Case Comment, *Constitutional Law: Congressional Preemption Held To Prevent State from Enforcing Stricter Pollution Standards Against Nuclear Electrical Power Plant*: *N. States Power Co. v. Minnesota*, 55 *MINN. L. REV.* 1223, 1224 (1971) (“Preemption is a doctrine of statutory construction”).

statutory language is rarely clear and unambiguous. Courts may rely on congressional intent by pointing to legislative history to support interpretations of legislative intent that are at odds with the statutory language.<sup>6</sup> In many instances, the issue of preemption is determined through analysis of congressional intent.<sup>7</sup> “When Congress is unclear about its intent to preempt, the courts must then decide whether preemption was intended and, if so, to what extent.”<sup>8</sup> After examining congressional intent, the analysis then turns to the scope of the preemptive law.<sup>9</sup> Congress intends for the CAA to set federal law as the standard and leave no room for state law.<sup>10</sup> In 1970, a summer riddled with “daily air pollution alerts” left “little doubt . . . that the country was facing an air pollution crisis.”<sup>11</sup> A Senate committee found that the problem was “more severe, more pervasive, and growing at a more rapid rate than was generally believed.”<sup>12</sup>

State common law claims brought by private parties against a source of pollution within the state should be preempted by the CAA. The CAA delegates the responsibility for enforcing the National Ambient Air Quality Standards (“NAAQS”) to the states.<sup>13</sup> The CAA mandates that states must each create a State Implementation Plan (“SIP”), which is overseen by the EPA.<sup>14</sup> A state is first divided into Air Quality Control Regions, which are ranked according to their compliance with the NAAQS.<sup>15</sup> For states that are

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6. See generally Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

7. *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone [of preemption analysis].”).

8. 145 CONG. REC. S6857, 6874 (daily ed. June 10, 1999) (statement of Sen. Levin).

9. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86 (1996) (“[A]ny understanding of the scope of a pre-emption statute must rest primarily on a ‘fair understanding of congressional purpose.’” (citing *Cipollone v. Liggett Group*, 505 U.S. 504, 516)).

10. In the 1967 Act, states were given the first opportunity to develop air quality standards. Air Quality Act of 1967, Pub. L. No. 90-148, § 108, 81 Stat. 485, 491–92. Congress included provisions that allowed the Department of Health, Education and Welfare (“Department”) to develop federal air quality standards, where a state failed to do so. *Id.* In the 1970 Act, Congress took away this power from the states and granted the EPA exclusive authority. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1678–79 (amending the existing CAA to create a new section 109).

11. 116 CONG. REC. 42, 381 (1970) (statement of Sen. Muskie).

12. S. REP. NO. 91-1196, at 1 (1970).

13. See 42 U.S.C. § 7410(a) (1994) (requiring every state to establish a “plan which provides for implementation, maintenance, and enforcement of such [National Ambient Air Quality Standards] in each air quality control region (or portion thereof) within such State”).

14. See *id.*

15. See *Id.* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY, 595 (8th ed. 2018).

not in compliance with the NAAQS, fines may be issued in order to compel compliance.<sup>16</sup>

This argument proceeds as follows. Part I provides an introduction. Part II examines the Supremacy Clause and defines the preemption doctrine. Part III provides an overview of the evolution of the Clean Air Act. Part IV distinguishes the Clean Air Act from the Clean Water Act. Part V analyzes the courts that hold that the CAA preempts state common law claims. Part VI analyzes the courts that hold that the CAA does not preempt state common law claims. Part VII identifies how failing to hold that the CAA preempts state common law claims would be subject to *reductio ad absurdum*. Part VIII concludes.

## II. THE SUPREMACY CLAUSE AND DEFINING THE PREEMPTION DOCTRINE

The root of Congress's power of preemption is the Supremacy Clause of the United States Constitution.<sup>17</sup> The Supreme Court recognizes two types of preemption: express preemption and implied preemption.<sup>18</sup> Express preemption is when "Congress' command [to preempt] is explicitly stated in the statute's language," and implied preemption is when it is "implicitly contained in its structure and purpose."<sup>19</sup>

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To develop an acceptable SIP, each state first has to determine existing and projected levels of the criteria air pollutant in each [Air Quality Control Region] within the state's boundaries. These data are used to determine what emissions reductions are necessary to comply with the NAAQS for the pollutant. The state must inventory sources of emissions and project their expected future growth. It then must confront the politically sensitive task of deciding what control strategies to employ and how to allocate the burden of emissions reductions among sources. Finally, the state must demonstrate to EPA that the measures adopted in its SIP are adequate to attain and maintain compliance with the NAAQS.

16. See 42 U.S.C. § 7604(a), (d), (g)(1) (1994) (permitting for remedies of both injunction and punitive civil penalties, which are payable to the federal treasury).

17. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

18. E.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) ("*Pre-emption may be either expressed or implied*, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'") (emphasis added) (citations omitted).

19. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

A. *Express Preemption*

Express preemption occurs when Congress explicitly states that federal law is the exclusive law and state law is to be disregarded.<sup>20</sup> With regard to express preemption, courts employ textualism and concentrate on the plain meaning of the law.<sup>21</sup> Courts may also consider relevant legislative history.<sup>22</sup>

B. *Implied Preemption*

Under implied preemption, the two main subcategories are field preemption and conflict preemption. Field preemption occurs when a federal regulatory regime is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”<sup>23</sup> or when Congress “touches ‘a field in which [the] federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”<sup>24</sup> With regard to field preemption, state laws do not have jurisdiction regardless of whether they conflict with federal law or frustrate any purpose of Congress.<sup>25</sup> This Article discusses conflict preemption in the following section.

### III. HISTORY OF THE CLEAN AIR ACT

A. *Air Pollution Control Act of 1955*

There are two types of conflict preemption: impossibility preemption and obstacle preemption.<sup>26</sup> Impossibility preemption occurs when a federal law

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20. N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 153 (1917).

21. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 700 (1991); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 566 (1997).

22. Grey, *supra* note 21.

23. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

24. *Id.*

25. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L. J. 2085, 2105 (2000); Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 930 (2007).

26. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. (MTBE Prods. Liab.)*, 725 F.3d 65, 97 (“The Supreme Court has adopted various formulations of the ‘impossibility’ branch of conflict preemption.”). *See also* English v. General Elec. Co., 496 U.S. 72, 79 (“Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found *pre-emption* where it is *impossible* for a private party to comply with both state and federal requirements, *see, e. g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), or where state law ‘stands as an *obstacle* to the accomplishment and execution of the

and a state law are in tension, to the point that complying with one will necessitate violating the other.<sup>27</sup> Impossibility preemption analysis focuses on whether the intent to preempt state law can be inferred from the direct conflict between state and federal law.<sup>28</sup> Obstacle preemption occurs when a state law is preempted because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>29</sup> Obstacle preemption analysis involves (i) examining the purposes and objectives of the federal law, and (ii) examining how the state law frustrates those purposes and objectives.<sup>30</sup> In 1955, Congress passed the first legislation regarding air regulation, which is known as the Air Pollution Control Act of 1955 (the “1955 Act”).<sup>31</sup> Tragic incidents involving air quality, both domestic and foreign, spurred Congress to act.<sup>32</sup>

With regard to the 1955 Act, Congress realized that understanding air quality and air pollution required a standard of scientific technicality and complexity.<sup>33</sup> The legislative history distinctly notes that, before determining regulatory requirements, there was a “need to determine the causes of air pollution, the meteorological factors and chemical elements involved, the effects, and possible preventive measures.”<sup>34</sup> Moreover, Congress understood

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full purposes and objectives of Congress.’ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).”) (emphasis added).

27. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 205 (2000); *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (“Pre-emption may be either expressed or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or *implicitly contained in its structure and purpose*.”) (emphasis added) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525)).

28. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

29. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

30. Goldsmith, *supra* note 27, at 205–206.

31. Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322.

32. S. REP. NO. 84-389, at 2 (1955), reprinted in 1955 U.S.C.C.A.N. 2457, 2457–58 (Report of Committee on Public Works) (“While a few areas have attracted unusual attention because of air contamination[,] the problem is rapidly becoming serious and causing alarm in many places. Tragic results have followed unexplained occurrences of fumes, fog, and murkiness in the past, as in the Meuse Valley in Belgium, in London, in Donora, Pa., and in Poza Rica, Mexico, during present history. Considerable publicity has been given to ‘smog’ sieges in Los Angeles and public officials have indicated fear that like conditions may be developing in such widely separated cities as New York and Cleveland.”).

33. *Id.* at 5.

34. *Id.* at 1–2.

that, in order to pragmatically implement air regulation, coordination among various agencies was *sine qua non*.<sup>35</sup>

Congress knew that it had to find a way to legislate through a constitutional power.<sup>36</sup> To satisfy this requirement, Congress employed the Commerce Clause and claimed that air pollution resulted in “injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation.”<sup>37</sup>

The 1955 Act was groundbreaking with regard to the powers it granted to the Secretary of Health, Education, and Welfare (Secretary), as well as to the Surgeon General of the Public Health Service (Surgeon General).<sup>38</sup> The 1955 Act authorized the Surgeon General to:

- (1) [E]ncourage cooperative activities by State and local governments for the prevention and abatement of air pollution;
- (2) collect and disseminate information relating to air pollution and the prevention and abatement thereof;
- (3) conduct in the Public Health Service, and support and aid the conduct by State and local government air pollution control agencies, and other public and private agencies and institutions of, technical research to devise and develop methods of preventing and abating air pollution; and
- (4) make available to State and local government air pollution control agencies, other public and private agencies and institutions, and industries, the results of surveys, studies, investigations, research, and experiments relating to air pollution and the prevention and abatement thereof.<sup>39</sup>

The 1955 Act also required the Surgeon General to occasionally publish reports of the “surveys, studies, investigations, research, and experiments made under the authority of this Act.”<sup>40</sup> The “dangers to the public health

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35. *Id.* at 4 (“[T]he program which would be made possible by this legislation should stimulate State and local agencies as well as aid them in dealing with phases of the problem with which they are most immediately concerned. The problem of research into the causes and ultimate elimination of air pollution is so complex and vast that it is not realistic to expect a solution through uncoordinated efforts of a multitude of agencies.”).

36. *Id.* (“The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties, or cities.”).

37. Air Pollution Control Act of 1955, Pub. L. No. 84-159 § 1, 69 Stat. 322.

38. § 1, 69 Stat. at 322.

39. § 2(b), 69 Stat. at 322.

40. § 4, 69 Stat. at 322.

and welfare” phrasing is what would ultimately shape how Congress addresses air regulation to the present day.<sup>41</sup> This was a major shift from the previous approach to air pollution, which centered around the common law, specifically torts and negligence claims.<sup>42</sup>

B. *Clean Air Act*

In response to a message to Congress by President John Fitzgerald Kennedy in February 1963,<sup>43</sup> Congress passed the “Clean Air Act” (the “1963 Act”) in December 1963<sup>44</sup> with the intent to replace the 1955 Act.<sup>45</sup> Consistent with the purposes stated by President Kennedy, Congress stated the purposes of the legislation were to:

- (1) protect the Nation’s air resources . . . ;
- (2) to initiate and accelerate a national research and development program . . . ;
- (3) to provide technical and financial assistance to State and local governments in connection with . . . air pollution prevention and control programs; and
- (4) to encourage . . . regional air pollution control programs.<sup>46</sup>

The 1963 Act further mandates that the Secretary establish a national air pollution control program.<sup>47</sup> Establishing a national program illustrates the intent of Congress to occupy the field.<sup>48</sup> Congress may delegate the power of

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41. § 1, 69 Stat. at 322.

42. VICTOR SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ’S TORTS 531 (11th ed. 2005) (“Proof of damages is an important part of plaintiff’s cause of action, whether based on intentional conduct, negligence, or strict liability.”).

43. Press Release, John F. Kennedy, Special Message on Improving American Health (Feb. 7, 1963) (available at <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/052/JFKPOF-052-013>).

44. Clean Air Act, Pub. L. No. 88-206, § 14, 77 Stat. 392, 401 (1963).

45. H.R. REP. NO. 88-508, at 4 (1963), *reprinted in* 1963 U.S.C.C.A.N. 1260, 1262 (“This legislation would replace the Air Pollution Control Act (act of July 14, 1955, Public Law 159, 84th Cong., as amended) with a new version, a ‘Clean Air Act.’ The new act constitutes a complete revision of existing law by strengthening and making more explicit the authority of the Department of Health, Education, and Welfare with respect to its activities in air pollution research, training, and demonstrations.”).

46. § 1(b), 77 Stat. at 393 (internal quotation marks omitted).

47. § 3, 77 Stat. at 394–95 (Research, Investigations, Training, and Other Activities).

48. *See, e.g.*, Federal Preemption and State Regulation of the Department of Education’s Federal Loan Programs and Federal Student Loan Servicers: *United States v. Scholnick*, 606 F.2d 160, 164 (6th Cir. 1979) (holding that “in any consideration of remedies available upon



preemption to a federal agency by passing enabling legislation.<sup>49</sup> Additionally, part of this mandate entails that the Secretary provide financial assistance to state air pollution control agencies.<sup>50</sup> The complexity of the CAA, combined with the financial investments it makes, strongly suggests that it intends to occupy the field, which is field preemption.<sup>51</sup> Moreover, the CAA does not mandate that the state governments take action, but it does mandate that the federal government take several actions.<sup>52</sup>

The 1963 Act mandates that the Secretary research “the harmful effects on *the health or welfare of persons* by the various known air pollution agents (or combinations of agents).”<sup>53</sup> The language of “health or welfare of any

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default of a federally held or insured loan, federal interest predominates over state interest” because of “an overriding federal interest in protecting the funds of the United States and in securing federal investments”); *United States v. Wells*, 403 F.2d 596, 597–98 (5th Cir. 1968) (“The national loan program of the Veterans Administration cannot be subjected to the vagaries of the various state laws which might otherwise control all or some phases of the loan program.”). *Banking/Debt Cancellation: Edwards v. Macys*, No. 14 Civ. 8616 (CM), 2016 U.S. Dist. LEXIS 31097 (S.D.N.Y. 2016) (Express preemption under Section 37; field preemption due to comprehensive regulatory scheme governing enrollment, eligibility, and fees.); *Gordon v. Kohls Dept. Store*, 172 F. Supp. 3d 840 (E.D Pa. 2016) (citing 12 C.F.R. § 37 (National banks debt cancellation contracts are governed by this part, and not by State law.)).

49. *See, e.g.*, 47 U.S.C. § 253 (2012) (FCC preemption expressly delegated).

50. § 3(a)(2), (b)(3) 77 Stat. at 394.

51. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1209–11 (1995). *See, e.g.*, 45 Fed. Reg. 81,746–47 (Dec. 12, 1980) (cutting off federal highway funds to California when the state failed to adopt federally approved inspection and maintenance programs for used cars). *See* 42 U.S.C. § 7409 (1994) (the EPA defines the pollution standards for all of the other air pollution programs as well); *id.* § 7411 (new source performance standards); *id.* § 7412 (hazardous air pollutants); *id.* § 7470–7479 (setting the standards preventing significant deterioration in attainment areas).

52. H.R. REP. No. 88-508, at 9 (1963), reprinted in 1963 U.S.C.C.A.N. 1260, 1267 (“The committee believes that the procedures provided constitute a reasonable balance between the primary rights of the States to control air pollution within their boundaries and the rights of States seriously affected by pollution from another State to have available to them a practical remedy.”). Also, a state or local government authority may make a request to the Secretary of Health, Education, and Welfare (“Secretary”) regarding intrastate air pollution. The Secretary is then obligated to issue a notice of a conference, but only if there was “alleged air pollution which is endangering the health or welfare of persons” § 5(c)(1)(A)–(B), 77 Stat. at 396 (whenever a state or local government made a request to the Secretary concerning “air pollution which is alleged to endanger the health or welfare of persons in a State other than that in which the discharge . . . originate[d],” the Secretary was required to issue a notice of a conference). This pairing of a mandatory obligation—the obligation to call a conference—with a discretionary determination—a determination that there is endangerment—was similar to the approach of requiring the Department to publish air quality criteria if it determined there was a particular air pollutant causing harmful effects on human health.

53. Clean Air Act, Pub. L. No. 88-206 § 3(c)(1), 77 Stat. 392, 395 (1963) (emphasis added).

persons” is reflective of the common law concept of harm.<sup>54</sup> This language of “health or welfare of any persons” would transform to “endangerment,” which is a statutory concept.<sup>55</sup>

Continuing from the 1955 Act, the 1963 Act further facilitated the transition from the common law approach of air pollution to a codified regulatory scheme.<sup>56</sup> The 1963 Act maintains that air pollution, which “endangers the health, or welfare of any persons,” was subject to abatement.<sup>57</sup> Injunctions are a common-law remedy for private nuisance and public nuisance.<sup>58</sup>

The 1963 Act cemented congressional oversight on state laws with regard to air quality. Congress recognized that different sources, specifically urbanization, industrial development, and motor vehicles, are major sources

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54. See, e.g., S. REP. NO. 91-1196, at 16, 20 (1970) (the terms “danger” and “endangerment” are used in terms such as “danger to public health or welfare” and “endangerment of public health and welfare”). Compare Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 (“*dangers to the public health and welfare*”), with Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1684 (1970) (requiring the EPA Administrator to publish a list of sources that “may contribute significantly to air pollution which causes or contributes to the *endangerment of public health or welfare*”), and *id.* at § 1685, 84 Stat. at 1676 (granting the EPA Administrator with the authority to grant a waiver of permit requirements for two years so long as the waiver is necessary to “assure that the health of persons will be protected from imminent *endangerment*”), and *id.* at § 1705, 84 Stat. at 1676 (granting the EPA Administrator authority to bring suit against a source that is “presenting an imminent and substantial *endangerment to the health of persons*”) (emphasis added).

55. Modern statutory language usually uses the term “endangers,” rather than “endangerment.” See 42 U.S.C. § 7408(a)(1)(A) (2012) (necessitating Administrator publicizing each air pollutant, “emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to *endanger public health or welfare*”) (emphasis added); § 7521(a)(1) (requiring EPA to prescribe “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to *endanger public health or welfare*”) (emphasis added). When the Congress wants to give rise to a common law remedy, such as abatement or another form of injunctive relief, it usually uses the term “endangerment,” see § 7412(r)(9)(A) (allowing the EPA to seek the relief of abatement of an accidental release of a regulated substance when it is “imminent and substantial endangerment to the human health or welfare or the environment”); § 7419(d)(1)(A)–(B)(ii) (authorizing the EPA to require actions by primary nonferrous smelters “to avoid an imminent and substantial endangerment to health of persons”); § 7603 (granting the EPA emergency powers to seek abatement of air pollution that “is presenting an imminent and substantial endangerment to public health or welfare, or the environment”).

56. See, e.g., § 5(b), 77 Stat. at 396; § 8(a), 77 Stat. at 400; § 10(a), 77 Stat. at 401.

57. § 5(a), 77 Stat. at 396.

58. DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 613 (6th ed. 2009).

of air pollution.<sup>59</sup> Moreover, Congress acknowledged that some of these sources may travel across state lines.<sup>60</sup> This complexity led Congress to the pragmatic reason that cooperation among the states is imperative to successfully implementing laws, but it still must maintain control. As such, the 1963 Act allows states to enter into interstate agreements that are subject to congressional approval.<sup>61</sup> If Congress did not intend to preempt state tort law claims with regard to air, then it would not have stated that agreements amongst states are subject to congressional approval.

### C. *Clean Air Act Amendments of 1965*

In 1965, Congress amended the 1963 Act to control the emission of motor vehicle pollutants, among other things (the “1965 Act”).<sup>62</sup> Congress noted that California already had emissions requirements, and nevertheless sought to create a national standard and preempt state law.<sup>63</sup> In response to President Lyndon Baines Johnson,<sup>64</sup> a significant amendment of the 1965 Act is that it allows the Secretary to take action preemptively, rather than wait and take

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59. § 1(a)(2), 77 Stat. at 392–93 (“[T]he growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to *the public health and welfare*”) (emphasis added).

60. § 1(a)(1), 77 Stat. 392.

61. § 2(c), 77 Stat. at 393.

62. Clean Air Act Amendments of 1965, Pub. L. No. 89-272, 79 Stat. 992 (1965).

63. H.R. REP. NO. 89-899, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3608, 3611–12 (“The technical knowledge and skills needed to achieve a significant reduction in motor vehicle pollution are now available. The automobile industry has indicated that equipment has been developed for reducing tailpipe emissions, which account for the major share of motor vehicle pollution, and that this equipment will be supplied on cars for distribution in California beginning with the 1966 model year, in compliance with the laws of that State. Furthermore, in testimony before the Subcommittee on Public Health and Welfare, representatives of the automobile manufacturers indicated that similar equipment could be supplied on all new cars manufactured in the United States by the 1968 model year, *if such measures were mandatory under Federal law.*”) (emphasis added).

64. *Id.* at 3621, 3623 (“We recommend an amendment to the Clean Air Act—not contained in any of the bills—to carry out the recommendation in the President’s message on natural beauty that the act “be improved to permit the Secretary of Health, Education, and Welfare to investigate potential air pollution problems before pollution happens, rather than having to wait until the damage occurs, as is now the case, and to make recommendations leading to the prevention of such pollution.” (quoting President Johnson)).

action retroactively to air pollution problems.<sup>65</sup> This remedy applies to air pollution that “endanger[s] the health or welfare of any persons.”<sup>66</sup>

As part of the amendment, Congress created the Motor Vehicle Air Pollution Control Act (the MVAPCA).<sup>67</sup> It requires the Secretary to set automobile emissions standards that limit “air pollution which endangers the health or welfare of any persons.”<sup>68</sup> The MVAPCA mandated that vehicles conform with regulations<sup>69</sup> in order to be in the stream of commerce of the United States market.<sup>70</sup> It is a requirement that the Secretary issue a certificate of conformity to confirm the vehicle complies with the MVAPCA.<sup>71</sup> For those who violate the law, Congress authorizes the United States to pursue legal remedies by allowing suits to be in Federal District Court.<sup>72</sup> Creating a uniform set of regulations for vehicles, issuing a certificate from the Secretary, and enacting enforcement provisions with federal legal remedies are all indicators that Congress intended to preempt state laws with regard to motor vehicle pollution control.

The 1965 Act also extended the abatement provisions to pollution “endangering to the health or welfare of persons” in a foreign country, provided that said foreign country gives reciprocity to the United States.<sup>73</sup> This beacons the doctrine of international comity, which is “the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.”<sup>74</sup> In

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65. §§ 209(b), 103(e), 79 Stat. at 995–96 (“If, in the judgment of the Secretary, an air pollution problem of substantial significance may result from discharge or discharges into the atmosphere, he may call conference concerning this potential air pollution problem to be held in or near one or more of the places where such discharge or discharges are occurring or will occur.”).

66. §§ 209(b), 102(f)(1), 79 Stat. at 995–96.

67. § 201, 79 Stat. at 992.

68. Clean Air Act Amendments of 1965, Pub. L. No. 89-272 § 202(a), 79 Stat. 992, 992–93 (“The Secretary shall by regulation, giving appropriate consideration to technological feasibility and economic costs, prescribe as soon as practicable standards, applicable to the emission of any kind of substance, from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause or contribute to, or are likely to cause or to contribute to, air pollution which endangers the health or welfare of any persons, and such standards shall apply to such vehicles or engines whether they are designed as complete systems or incorporate other devices to prevent or control such pollution.”).

69. § 203(a)(1), 79 Stat. at 993.

70. *Id.*

71. § 206, 79 Stat. at 994.

72. § 204, 79 Stat. at 994.

73. § 209, § 102(c)(D)–(f)(1), 79 Stat. at 995–96.

74. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 41 (2nd ed. 2003).

two cases before the Supreme Court,<sup>75</sup> the Court asserts that there is a constitutional argument for a “self-executing exclusion of state authority” from foreign affairs.<sup>76</sup> Even assuming *arguendo* that this argument is not considered, the United States cannot reasonably expect a foreign country to give reciprocity to a patchwork of state laws, some of which conflict with United States federal law.<sup>77</sup> Thus, if state common law claims are not preempted, it would render this provision of the CAA superfluous, which violates the Rule Against Surplusage.<sup>78</sup>

#### D. *Clean Air Act Amendments of 1967*

In 1967, Congress amended the 1963 Act (the 1967 Act).<sup>79</sup> Congress emphasized the blurred jurisdictional lines concerning air pollution and held

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75. *Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

76. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1630 (1997).

77. *ADEQ Moving Forward with New Air Testing Law Despite Concerns*, ARK. NEWS BUREAU (June 10, 2013), <https://www.arkansasnews.com/article/20130610/NEWS/306109876> (“Thomas Diggs, associate director for air in EPA’s Region 6 office in Dallas, wrote in a June 5 letter to Mike Ross, chief of ADEQ’s air division, that Act 1302 ‘will affect ADEQ’s current air permit program and we would like to remind the ADEQ and its legal obligations under the Clean Air Act and the Arkansas State Implementation Plan to protect human health and the environment.’”).

78. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoted in *Corley v. United States*, 556 U.S. 303, 314 (2009)); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting word “law” broadly could render word “regulation” superfluous in preemption clause applicable to a state “law or regulation”; statutes should be construed so as to avoid rendering superfluous any statutory language); *Astoria Fed. Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (Courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”). *See also* *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”) (rejecting interpretation that would have made “uses” and “carries” redundant in statute penalizing using or carrying a firearm in commission of offense). In a case analyzing the significance of the adjective “applicable” in a provision of the Bankruptcy Code, the majority opinion relied on the presumption against superfluity to hold that “applicable” had a limiting effect, whereas Justice Scalia, in dissent, observed that “[t]he canon against superfluity is not a canon against verbosity. When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with.” *Compare* *Ransom v. FIA Card Servs.*, 562 U.S. 61, 69–74 (2011) and *Ransom v. FIA Card Servs.*, 562 U.S. at 81 (Scalia, J., dissenting).

79. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (Stating its purpose is “[t]o amend the Clean Air Act to authorize planning grants to air pollution control agencies; expand research provisions relating to fuels and vehicles; provide for interstate air pollution control

that state lines are no longer the best approach to determine boundaries.<sup>80</sup>

Continuing with the theme of preempting state law, the 1967 Act mandates that the Secretary set “jurisdictional boundaries, urban-industrial concentrations, and other factors including atmospheric areas necessary to provide adequate implementation of air quality standards.”<sup>81</sup> This may be interpreted as Congress knew that it needed to set air quality standards to cover multiple states. If this were not the case, Congress would have simply used state boundaries instead of “jurisdictional boundaries.”<sup>82</sup> If air pollution control laws are not preempted, significant argument will arise over the applicable state law when air pollution crosses state boundary lines. This will likely open the floodgates to civil lawsuits over damages and costs.

The 1967 Act also states that the Secretary can issue air quality criteria concerning public health and welfare to the states.<sup>83</sup> The criteria may include factors that may permute the effects on public health or welfare, in addition to agents that may interact with other agents and result in an unpropitious effect on public health or welfare.<sup>84</sup> Additionally, the 1967 Act<sup>85</sup> amendment furthered the provision of the 1963 Act mandate that decreed air pollution, “which endangers the health or welfare of any persons,” was subject to abatement.<sup>86</sup> The 1967 Act provides that an air quality standard program needs to be established.<sup>87</sup> If the air quality standards are violated, there is an enforcement provision that allows the Secretary to use abatement, similar to previous iterations of the CAA.<sup>88</sup>

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agencies or commissions; authorize the establishment of air quality standards, and for other purposes.”).

80. § 107(a)(2), 81 Stat. at 490–91.

81. *Id.*

82. H.R. REP. NO. 90-728, at 10 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1945 (Report of Committee on Interstate and Foreign Commerce) (“Such regions could include parts of two or more States or could lie entirely within a single State. In either case, each one would include a group of communities affected by a common air pollution problem.”).

83. § 107(b)(1), 81 Stat. 485, 491 (“[S]uch criteria of air quality as in his judgment may be requisite for the protection of the public health and welfare.”).

84. § 107(b)(3), 81 Stat. 485, 491 (“Such criteria shall include those variable factors which of themselves or in combination with other factors may alter the effects on public health and welfare of any subject agent or combination of agents, including, but not limited to, atmospheric conditions, and the types of air pollution agent or agents which, when present in the atmosphere, may interact with such subject agent or agents, to produce an adverse effect on public health and welfare.”).

85. § 108, 81 Stat. 485, 491–97 (Air Quality Standards and Abatement of Air Pollution).

86. § 108(a), 81 Stat. 485, 491.

87. § 108(b)–(c)(1), 81 Stat. 485, 491–92.

88. *See, e.g.*, § 108(c)(4) 81 Stat. 485, 493; § 108(d)–(h), 81 Stat. 485, 494–96.

Congress allowed states to have the first opportunity to set their respective air quality standards.<sup>89</sup> However, a recipient of delegated Congressional authority would have the final say and hold ultimate approval.<sup>90</sup> Congress was cognizant of the scenario of transporting air pollution from one state to another.<sup>91</sup> Notwithstanding, Congress was aware that if it did not hold final approval, states may set forth their own air quality standards that would be in tension with the standards of other states, which would create (or make) toothless regulations or open a floodgate of litigation with states suing each other.<sup>92</sup>

E. *Clean Air Act Amendments of 1970*

In 1970, Congress enacted the Clean Air Amendments of 1970 (1970 Act).<sup>93</sup> Earlier in the year, President Richard Milhous Nixon created the Environmental Protection Agency (EPA). The EPA usurped powers from the Departments of Agriculture, Education, Health, Interior, and Welfare.<sup>94</sup> The purpose was to strengthen environmental laws by enabling enforcement to be taken without being impeded by bureaucracy at the aforementioned agencies.<sup>95</sup>

The 1970 Act shifted authority from the states to the federal government in several sections. Sections 108 and 109 of the 1970 Act granted exclusive authority to the EPA to develop air quality standards, and thus repealed the provision of the 1967 Act that gave states the first opportunity to do so.<sup>96</sup>

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89. H.R. REP. NO. 90-728, at 1939.

90. *Id.* at 1946–47 (“In all cases, the standards and plans for implementation would be submitted to the Department for evaluation.”).

91. *Id.* at 1952 (“The provisions relating to the adoption of air quality standards are the heart of the legislation.”) (Congress was aware that there may be concern that some states may implement inadequate standards and plans for implementations, and thus place an undue burden on other states. *Id.* at 1945. Some pollutants escape state borders, and degrade the air quality of other states and do not provide any sort of benefit. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 495 (2014). Thus, while states were given the first opportunity to set their respective air quality standards, Congress retained power of oversight to ensure fairness and practicality.)

92. *Id.* at 1953 (“Where a designated air quality control region includes portions of two or more States, the possibility exists that the respective States may adopt differing standards of air quality. It is the committee’s view that no State should be permitted to set air quality standards which, even if fully implemented, would impair air quality in any portion of another State below the standards set by that other State.”).

93. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

94. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623–25 (Oct. 6, 1970), *reprinted in* 5 U.S.C. app. at 208 (2012).

95. § 1, 84 Stat. 1676, 1676.

96. Sec. 4(a), § 108(a)–(b)(1), 84 Stat. 1676, 1678–80; *see* 42 U.S.C. §§ 7409, 7410.

Section 108 mandated that the EPA Administrator promulgated all pollutants that “in his judgment ha[ve] an adverse effect on public health or welfare[,] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.”<sup>97</sup> Section 109 required the EPA to promulgate air quality standards for air pollutants recognized under Section 108.<sup>98</sup> Thus, Congress abolished the right of states to establish air quality standards and bestowed this right to the EPA.<sup>99</sup>

Section 111 granted power to the EPA to set standards for individual sectors.<sup>100</sup> Under this power, the EPA sets emission standards for individual facilities, based upon each sector.<sup>101</sup> Section 112 authorized the EPA to enact regulations regarding “hazardous air pollutants.”<sup>102</sup> These shifts of authority signify the intent of Congress to have federal law be the source of air pollution control and strip away the authority of the states concerning this matter.<sup>103</sup>

Throughout the history of the CAA, Congress has continually and consistently shifted rights from the states to the federal government. The basis of the CAA is the EPA’s desire for a national standard in air quality.<sup>104</sup> The EPA has unrestricted power when determining the appropriate level of regulation, which is statutorily defined as “the attainment and maintenance of which *in the judgment of the Administrator* . . . are requisite to protect the public health.”<sup>105</sup> This is a clear indication that Congress intends for the CAA to preempt state common law claims.

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97. Sec. 4(a), § 108(a)(1)(A)–(B), 84 Stat. 1676, 1678.

98. § 109(a)(2)–(b), 84 Stat. 1676, 1679–80.

99. §§ 108(a)–(b), 109, 84 Stat. 1676, 1678–80.

100. § 111, 84 Stat. 1676, 1683–84.

101. *E.g.*, 40 C.F.R. § 60.40 (2013) (Standards of Performance for Fossil-Fuel-Fired Steam Generators); 40 C.F.R. § 60.90 (2013) (Standards of Performance for Hot Mix Asphalt Plants); 40 C.F.R. § 60.100 (2013) (Standards of Performance for Petroleum Refineries).

102. Sec. 4(a), § 112, 84 Stat. 1676, 1685 (defining a “hazardous air pollutant” as an air pollutant that “may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness”). *Compare* sec. 4(a), § 112, 84 Stat. 1676, 1685 *with* § 112, 84 Stat. 1676, 1678–79 (discussing a “criteria pollutant” which merely must have an “adverse effect on public health or welfare”).

103. *See* Air Quality Act of 1967, Pub. L. No. 90-148, Title I, 81 Stat. 485, 485–99 (modeling this after an approach to stationary sources that acknowledges that states have primary authority).

104. 42 U.S.C. § 7409(a) (1970).

105. 42 U.S.C. § 7409(b)(1) (emphasis added); *see also* Clean Air Amendments of 1970, Pub. L. No. 91-604 § 4(a), 84 Stat. 1676, 1678 (referencing the statute which requires the EPA Administrator to “*in his judgment ha[ve] an adverse effect on public health or welfare[,] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources . . .*” (emphasis added)).



## IV. CONTRASTING THE CLEAN AIR ACT WITH THE CLEAN WATER ACT

One federal district court laid down the challenge and stated that if preemption does exist in the CAA, it must be found on its own accord.<sup>106</sup> We begin by looking at the language of the CAA.<sup>107</sup> In *Jackson v. General Motors Corp.*, a federal district court held that Section 209(a) of the CAA preempts state common law claims.<sup>108</sup> In *Jackson*, current and former New York Metropolitan Transportation Authority workers alleged state common law tort claims for exposure to diesel particulates and fumes.<sup>109</sup> When analyzing Section 209(a), the court noted that the key phrase “[n]o State . . . shall adopt or attempt to enforce” means that state tort law claims premised upon emission standards are preempted.<sup>110</sup> Therefore, the court concluded that the CAA preempts state tort law claims premised upon emissions standards.<sup>111</sup> The Clean Water Act (CWA) contains language, which the CAA does not contain, that enables states to impose stricter standards.<sup>112</sup> The aforementioned language is “with respect to the waters (including boundary waters) of such Stat[es].”<sup>113</sup> The Court in *Ouellette* indicated that most state standards were preempted, and that the only standards permitted were those regulating water discharges *solely* within the state.<sup>114</sup> Correspondingly, since the CAA does not allow states to impose stricter standards, it may be inferred that the CAA does preempt state common law claims. Moreover, if the reasoning in *Ouellette* were applied to the CAA, there would be a greater likelihood of conflict between state and federal law.<sup>115</sup> The *Ouellette* Court was concerned “over [a significant] policy issue—[whether] the imposition of

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106. *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 701 (D.N.J. 1982).

107. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989))).

108. *Jackson v. Gen. Motors Corp.*, 770 F. Supp. 2d 570, 572–73 (S.D.N.Y. 2011).

109. *Id.* at 572.

110. *Id.* at 573–74.

111. *Id.* at 577.

112. 33 U.S.C. § 1370 (Section 510(1) of the statute explicitly preserves the right for state authority to regulate water pollution so long as state standards are at least as stringent as the federal standards they are supplanting.).

113. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987); see also Jason J. Heinen, Note, *How the Constitution Draws a “Line in the Sand” for the Extent of Federal Control over Non-Navigable Waterways*, 5 LIBERTY U. L. REV. 115 (2010) (discussing how the federal government is increasing its oversight over water through environmental regulation).

114. *Ouellette*, 479 U.S. at 493.

115. *Id.* at 498–500.

one state's liability law on an out-of-state source might trammel with the policy choices made in said out-of-state's implementation plan."<sup>116</sup>

In *American Electric Power Company v. Connecticut*,<sup>117</sup> the Supreme Court blazoned that the CAA preempts federal common law claims.<sup>118</sup> Justice Alito, joined by Justice Thomas, wrote that the preemption of federal common law, in this case, is premised upon "the interpretation of the Clean Air Act . . . adopted by the majority in *Massachusetts v. EPA*."<sup>119</sup> In *Massachusetts*, the Court delivered a 5–4 decision that the EPA does have authority under the CAA to regulate carbon dioxide emissions from new motor vehicles, but the Court disavowed that it was directing the EPA as to if and how it must regulate such emissions.<sup>120</sup> The CAA maintains that the EPA Administrator has the authority to set the standards for "any air pollutant from . . . motor vehicles which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>121</sup> In *American Electric Power Company*, Justice Ginsburg explained, "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law."<sup>122</sup> Justice Ginsburg further elaborated that if the EPA passed inadequate regulations, or even went so far as to "decline to regulate carbon-dioxide emissions altogether," it would be inconsequential to the preempting of federal common law.<sup>123</sup> Furthermore, the Court opined that even if the CWA imposes a more comprehensive

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116. See, e.g., Debra G. Archer, *Controlling Acid Rain: The Clean Air Act and Federal Common Law Nuisance*, 84 W. VA. L. REV. 1135 (1982); James M. Fischer, *The Availability of Private Remedies for Acid Rain Damage*, 9 ECOLOGY L.Q. 429 (1981).

117. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

118. While the Supreme Court once proclaimed, "There is no federal general common law," (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)), it later reversed course and held that there is federal common law when it is necessary "to effectuate congressional policy" (*United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979)), or "to protect . . . federal interests." *Id.* at 718. See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, *there is a federal common law . . .*" (emphasis added)).

119. *Am. Elec. Power Co.*, 564 U.S. at 430 (Alito, J., concurring) (citations omitted).

120. *Massachusetts v. EPA*, 549 U.S. 497, 533–35 (2007).

121. 42 U.S.C. § 7521(a)(1) (2017) (emphasis added).

122. *Am. Elec. Power Co.*, 564 U.S. at 426.

123. *Id.* ("As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981))).

system of regulations than the CAA, it is irrelevant in determining if the CAA preempts state common law claims.<sup>124</sup>

The CAA operates on a “cooperative federalism framework,”<sup>125</sup> whereas the CWA does not.<sup>126</sup> The primary purpose of the CAA is to set air quality standards “so as to promote the public health and welfare.”<sup>127</sup> To fulfill this purpose, the EPA Administrator is required to establish NAAQS for any pollutants that pose a threat to the public’s health or welfare.<sup>128</sup> Additionally, each state has to submit a SIP, which regulates stationary sources.<sup>129</sup> However, the SIP is subject to the approval of the EPA Administrator.<sup>130</sup> Upon approval, the SIP is enforceable as both state and federal law.<sup>131</sup> While the interplay between state and federal law can get complex,<sup>132</sup> there is a bright line with regard to the CWA. The CWA does not require states to submit plans for implementation. Since the EPA Administrator has to approve the plans of the states, the federal government is essentially dictating the state standards. As such, it logically follows that if the federal government is dictating standards at the state level, it would preempt state common law claims.

The CAA is not as ubiquitous as the CWA. The CAA regulates stationary sources that are dangerous to public health and welfare, but it does not

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124. *Am. Elec. Power Co.*, 564 U.S. at 426 (“Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing. The Clean Air Act is no less an exercise of the legislature’s ‘considered judgment’ concerning the regulation of air pollution because it permits emissions *until* [the] EPA acts.”).

125. See generally Holly Doermus & W. Michael Doremus, *Of Babies and Bathwater: Why the Clean Air Act’s Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799 (2008).

126. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). The Court explains that the Clean Water Act “effectively incorporate[s]” state law into the federal regulatory scheme. In certain instances, this turns state law into federal law.

127. 42 U.S.C. § 7401(b)(1) (2019).

128. *Id.* § 7409.

129. *Id.* § 7410(a)(1).

130. *Id.* § 7410(a)(2).

131. See *id.* § 7413(a).

132. See *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 289 (4th Cir. 2001) (The Surface Mining Control Act employed a cooperative federalism strategy under which “after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations [that set forth the basic policy goals], while continuing to provide the ‘blueprint’ against which to evaluate the State’s program, ‘drop out’ as operative provisions.”).

regulate all stationary sources of pollution.<sup>133</sup> More specifically, the National Emission Standards for Hazardous Air Pollutants (NESHAP) or NAAQS under the CAA regulates the pollutants that are deemed “hazardous.”<sup>134</sup> Thus, stationary sources that emit pollutants but have not been deemed hazardous by either NESHAP or NAAQS are unregulated. There is a solid legal argument that pollutants not regulated by the CAA are not subject to preemption. An example is acid rain. Acid rain is created from sulfur dioxide and nitrogen oxide reacting in the atmosphere with water and oxygen.<sup>135</sup> Acid deposition is not covered by the interstate pollution provision of the CAA and is thus unregulated by the CAA.<sup>136</sup> Therefore, since there is no federal law on acid rain, it may be argued that state law on acid rain is not preempted. Nevertheless, since there is federal law on certain pollutants, this syllogism may lead one to determine that the CAA does preempt state common law claims over pollutants that the CAA regulates.

V. COURTS WHICH ACCEPT THE ARGUMENT THAT  
THE CLEAN AIR ACT PREEMPTS STATE COMMON LAW CLAIMS

A. *Federal Circuit Court of Appeals*

1. United States Court of Appeals for the Fourth Circuit

In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the United States Court of Appeals for the Fourth Circuit found it difficult to balance the powers and authority of a federal regulatory scheme and the ability of states to protect their citizens through common law.<sup>137</sup> When exploring the CAA, the Fourth Circuit reasoned that there is congressional intent to have emissions standards set by expert regulatory agencies, not courts.<sup>138</sup> The

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133. 42 U.S.C. § 7411(b)(1)(A) (2019).

134. *See id.* § 7412.

135. NAT’L SCI. AND TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, NATIONAL ACID PRECIPITATION ASSESSMENT PROGRAM REPORT TO CONGRESS 2011: AN INTEGRATED ASSESSMENT (2011), [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2011\\_napap\\_508.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2011_napap_508.pdf).

136. Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 170 (1985).

137. N.C. *ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010) (“Indeed, the district court properly recognized that ‘[t]he ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance.’” (alteration in original) (quoting *North Carolina v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 815 (W.D.N.C. 2009))).

138. *Id.* at 299–300, 310.

court found the CAA directs the EPA to develop scientific expertise;<sup>139</sup> then allows for notice and comment rulemaking;<sup>140</sup> then facilitates uniform application of the standards.<sup>141</sup> Thus, these factors culminate in preventing conflicting emissions standards.<sup>142</sup>

The *Tennessee Valley Authority* court acknowledged that all nuisance claims are not preempted.<sup>143</sup> The court did elucidate claims should not be allowed to be brought under emission standards which are different from federal law and state law.<sup>144</sup> The court held that North Carolina was not allowed to apply its common law to facilities in Alabama and Tennessee, and thus, “the law of the states where emissions sources are located . . . applies in an interstate nuisance dispute.”<sup>145</sup> This holding is consistent with *Bell v. Cheswick Generating Station (Bell II)* and leaves open the possibility for a

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139. *Id.* at 304 (“Indeed, the Act directs the EPA to ensure that its air quality standards ‘accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air.’” (quoting 42 U.S.C. § 7408(a)(2) (2017))).

140. *Id.* at 305 (“The required notice and comment periods detailed above are further designed to allow EPA and state regulators to receive broad inputs into the regulatory scheme. Agency rulemaking is a ‘quasi-legislative power, . . . intended to add substance to the Acts of Congress, to complete absent but necessary details, and to resolve unexpected problems.’” (alteration in original) (citations omitted)).

141. *Id.* at 305 (“Shapiro also observed that the general nature of rulemaking enables uniform application across industries, lessens the likelihood of distortions caused by the influence of individualized facts in cases, and also makes the resulting rules readily accessible in a single location.” (citing David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 935–41 (1965))).

142. *Id.* at 302 (“The contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark. We are hardly at liberty to ignore the Supreme Court’s concerns and the practical effects of having multiple and conflicting standards to guide emissions. These difficulties are heightened if we allow multiple courts in different states to determine whether a single source constitutes a nuisance.”).

143. N.C. *ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) (“We need not hold flatly that Congress has entirely preempted the field of emissions regulation.” (citations omitted)).

144. *Id.* (“The *Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law. 479 U.S. at 497–99. At the same time, however, the *Ouellette* Court was emphatic that a state law is preempted ‘if it interferes with the methods by which the federal statute was designed to reach [its] goal,’ *id.* at 494, admonished against the ‘tolerat[ion]’ of ‘common-law suits that have the potential to undermine [the] regulatory structure,’ *id.* at 497, and singled out nuisance standards in particular as ‘vague’ and ‘indeterminate,’ *id.* at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981))”).

145. *Cooper*, 615 F.3d at 306.

state to bring forth state common law claims which are not preempted by the CAA.<sup>146</sup>

## 2. United States Court of Appeals for the Fifth Circuit

The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Southern District of Mississippi and held that the CAA preempts state common law claims of negligence and public and private nuisance.<sup>147</sup> In *Comer*, the plaintiffs brought tort claims alleging that major greenhouse gas (GHG) emitters caused global warming, which then created Hurricane Katrina, which damaged their property.<sup>148</sup>

The *Comer* court noted that the CAA preempts judicial determinations of what reasonable GHG emissions levels are since “those determinations had been entrusted by Congress to the EPA [through the CAA].”<sup>149</sup> The Supreme Court reversed the Second Circuit and held that federal judges were not allowed to determine what “amount of carbon-dioxide emissions is ‘unreasonable,’” and then decide “what level of reduction is ‘practical, feasible and economically viable.’”<sup>150</sup> Moreover, if courts were to set emission standards, they would be infringing on the powers of the Legislative Branch as they would essentially be making law.<sup>151</sup>

## B. Federal District Courts

### 1. United States District Court for the Western District of Pennsylvania

In *United States v. EME Homer City Generation L.P. (EME Homer City Generation)*, the court held that the CAA preempts state common law public

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146. See *Bell v. Cheswick Generating Station (Bell II)*, 734 F.3d 188, 197–98 (3d Cir. 2013).

147. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

148. *Id.* at 852.

149. *Id.* at 865.

150. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (citations omitted).

151. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (“To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.”). By this same logic, vesting powers to the Executive Branch, in this instance the DOJ, would reserve the right to the DOJ to make laws since they are determining what is constitutional and what is not constitutional. See also Max Birmingham, *Lie to Me: Examining Specific Intent Under 18 U.S.C. §§ 1001, 1035*, 15 FLA. A&M U. L. REV. (forthcoming 2019) (discussing the separation of powers between the branches of government, and the slippery slope of one branch trying to exert influence over another branch.).

nuisance claims.<sup>152</sup> The plaintiffs argued that the defendants operated a plant without a permit, which violated the Pennsylvania Air Pollution and Control Act (APCA), the Pennsylvania State Implementation Plan (SIP), and common law public nuisance.<sup>153</sup> The court held that these claims “essentially track the federal claims” and that “[i]n effect, the state and federal enforcement efforts [pursuant to the APCA and the CAA] are parallel.”<sup>154</sup>

The *EME Homer City Generation* court blazoned that a plain meaning interpretation of the CAA stated that state common law public nuisance claims are preempted.<sup>155</sup> Extending the reasoning under *American Electric Power* to preempt state common law claims, the court noted that “the Clean Air Act preempted federal common law nuisance claims . . . but did not rule on the availability of a state law nuisance claim. . . . [T]he issue would turn ‘on the preemptive effect of the federal Act.’”<sup>156</sup> The court exclaimed that a plain language interpretation of the CAA preempted public law nuisance claims because said claims are duplicative of the CAA.<sup>157</sup>

## VI. COURTS WHICH REJECT THE ARGUMENT THAT THE CLEAN AIR ACT PREEMPTS STATE COMMON LAW CLAIMS

### A. *Federal Circuit Court of Appeals*

#### 1. United States Court of Appeals for the Second Circuit

In *In re Methyl Tertiary Butyl Ether Products Liability Litigation (MTBE Prods. Liab.)*, the United States Court of Appeals for the Second Circuit addressed the issue of whether the CAA has conflict preemption over state tort claims.<sup>158</sup> Of significant note, however, is that the Second Circuit observed that the defendant, Exxon, did not argue that Congress intended to occupy the field with regard to the CAA.<sup>159</sup> The Second Circuit could have

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152. *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 297 (W.D. Pa. 2011), *aff'd on other grounds in part*, 727 F.3d 274 (3d Cir. 2013).

153. *EME Homer City*, 823 F. Supp. 2d at 294.

154. *Id.*

155. *See id.* at 278 (“The role of the courts in interpreting a statute is to give effect to Congress’s intent. . . . Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute. When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is [sic] to enforce it according to its terms.” (quoting *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 759 (3d Cir. 2009))).

156. *Id.* at 296 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011)).

157. *Id.* at 296–97.

158. *MTBE Prods. Liab.*, 725 F.3d 65, 96–98 (2d Cir. 2013).

159. *Id.* at 97.

considered this issue *sua sponte* but declined to do so.<sup>160</sup> As such, the Second Circuit did not address this issue.<sup>161</sup>

The Second Circuit contended that the CAA was not in conflict preemption with state laws, yet it provided reasoning that is not pragmatic. Conflict preemption only exists if there is an actual conflict.<sup>162</sup> Hypothetical, potential, or theoretical conflict is not sufficient to meet the threshold of conflict preemption.<sup>163</sup> In *MTBE Prods. Liab.*, Exxon used a gasoline additive in New York until there was a state ban.<sup>164</sup> Exxon argued that Methyl Tertiary Butyl Ether (MTBE) is required under state law, even though state law did not explicitly or implicitly require this.<sup>165</sup> John Cahill, the then-Commissioner of the New York State Department of Environmental Conservation (NYSDEC) explained, “We still don’t have a good alternative to MTBE, so while we take a hard look at what other alternatives may be out there, we believe it’s appropriate to move forward and tighten up the

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160. Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 *FORDHAM L. REV.* 477 (1958).

161. *MTBE Prods. Liab.*, 725 F.3d at 97 (“The parties agree that the Clean Air Act and its 1990 Amendments contain no explicit preemption directive expressing a congressional intent to override state tort law, and Exxon does not argue that Congress intended to occupy any field relevant here. Rather, Exxon relies on the third form of preemption analysis—conflict preemption—to sustain its preemption argument. Accordingly, we address the two branches of conflict preemption in turn.”). See generally *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 (1938) (Butler, J., dissenting) (“No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.” (citations omitted)); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 604–05 (1936) (“No application has been made for reconsideration of the constitutional question there decided. . . . [the State of New York] is not entitled and does not ask to be heard upon the question whether the Adkins case should be overruled.” (footnote omitted) (citations omitted)); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”); *Esselstyn v. Casteel*, 288 P.2d 214, 214 (Or. 1955) (“The court can only decide questions that are before it.”).

162. *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990).

163. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

164. *MTBE Prods. Liab.*, 725 F.3d 65, 78 (2d Cir. 2013). See Raymond Hernandez, *Pataki Signs Two Measures Aimed at Cutting Back Pollution*, N.Y. TIMES, May 25, 2000, <https://www.nytimes.com/2000/05/25/nyregion/pataki-signs-two-measures-aimed-at-cutting-back-pollution.html>.

165. *MTBE Prods. Liab.*, 725 F.3d at 98.



standards.<sup>166</sup> It is evident that ethanol is not necessarily an acceptable alternative to MTBE.

The Second Circuit acknowledged that enormous costs might meet the threshold of conflict preemption.<sup>167</sup> The court observed that using ethanol in lieu of MTBE would increase the cost of manufacturing from 1.9 cents per gallon to 6.2 cents per gallon.<sup>168</sup> Astonishingly, the court did not seem to understand the context of this cost.<sup>169</sup> Exxon's profit was approximately 7.0 or 8.0 cents per gallon.<sup>170</sup> If we take the low-end projection of the cost of manufacturing at approximately 2.0 cents and the high-end projection of profit margin at 8.0 cents, the enormous costs of threshold conflict would be met, as compliance would cost 25% of the profit margin. Using the most advantageous projections for Exxon, ethanol would cost 88.5% of the profit margin (the cost of manufacturing at 6.2 cents per gallon at a profit margin of 7.0 cents per gallon). Using either projection, the enormous cost makes compliance with the New York state law impossible.<sup>171</sup>

The Second Circuit conflated impossibility preemption with obstacle preemption. First, the court trivialized obstacle preemption by claiming that it was a subset of impossibility preemption.<sup>172</sup> Then, the court held that "federal law does not preempt state law under obstacle preemption analysis

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166. Dan Fagin, *Tougher Gas-Additive Rule, State to Lower Amount of Permissible MTBE*, NEWSDAY, Nov. 9, 1999, at A05.

167. *MTBE Prods. Liab.*, 725 F.3d at 101 ("One can imagine a case in which a state law imposes such enormous costs on a party that compliance with a related federal mandate is effectively impossible. But this is not such a case.")

168. *MTBE Prods. Liab.*, 725 F.3d 65, 100–101 (2d Cir. 2013).

169. *Id.* at 101 ("At most, the evidence adduced at trial showed that using ethanol instead of MTBE would have increased Exxon's production costs to an extent that was far from prohibitive. Exxon has not shown that economic and logistical hurdles rendered compliance with the federal mandate by using ethanol instead of MTBE impossible for the purposes of preemption analysis." (footnote omitted)).

170. Kevin D. Williamson, *The Facts About Gas Prices and Oil Profits*, NAT'L REV. (Feb. 8, 2013, 5:28 PM), <https://www.nationalreview.com/exchequer/facts-about-gas-prices-and-oil-profits-kevin-d-williamson/> ("Exxon's 'downstream' earnings—the money it makes selling gasoline and other refined petroleum products—run about 7 or 8 cents a gallon."); Robert L. Bradley, Jr., *Oil Company Earnings: Reality over Rhetoric*, FORBES (May 10, 2011, 5:00 PM), <https://www.forbes.com/2011/05/10/oil-company-earnings.html#72944e522dc8> ("At the gas tank integrated oil companies make about 7 cents per gallon.")

171. See *MTBE Prods. Liab.*, 725 F.3d at 101; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); Goldsmith, *supra* note 27, at 205–06.

172. *MTBE Prods. Liab.*, 725 F.3d at 101 ("*Obstacle analysis—which appears to us only an intermediate step down the road to impossibility preemption—precludes state law that poses an 'actual conflict' with the overriding federal purpose and objective.*" (emphasis added) (quoting *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 162 (2d Cir. 2013))).

unless ‘the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.’”<sup>173</sup> This is not obstacle preemption. Obstacle preemption, as the Supreme Court explained, “[F]rustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”<sup>174</sup> This means that courts are to look at the purpose of the federal law and the legislative intent.<sup>175</sup>

It is clear from the legislative history of the CAA that its purpose and objective is to preempt state law. Even if there is specific legislative history declaring preemption, purposivists may broaden their interpretation of the statute by examining the policy context, in order to expand the ambit of what is presumed that legislators would envisage.<sup>176</sup> With regard to the CAA, it is built on a model of “cooperative federalism.”<sup>177</sup> Through cooperative federalism, the CAA allows the EPA to set standards for air emissions, which states are charged with implementing and enforcing.<sup>178</sup> Furthermore, the Act allows the federal government to financially penalize states for failing to meet federal ambient air quality standards.<sup>179</sup> The CAA does not allow states to penalize the federal government. “The [CAA] is the nation’s most far-reaching federal environmental law.”<sup>180</sup> Even with its far-reach, the Supreme Court has held that the CAA is constitutional.<sup>181</sup> Additionally, the evolution

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173. *MTBE Prods. Liab.*, 725 F.3d 65, 102 (2d Cir. 2013) (quoting *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)).

174. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis omitted).

175. See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370–71 (1947); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677 & n.11 (1997); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 252–53 (1998).

176. *Riggs v. Palmer*, 22 N.E. 188, 189–90 (N.Y. 1889) (admitting that the legislature intended to give effect to the testator’s wishes but presumed that the legislature would not have desired for a murderer to profit from their crime).

177. Cooperative federalism is defined as the “[d]istribution of power between the federal government and the states whereby each recognizes the powers of the other while jointly engaging in certain governmental functions.” *Federalism*, BLACK’S LAW DICTIONARY (11th ed. 2019). See 42 U.S.C. § 7410(a)(2) (2017).

178. 42 U.S.C. §§ 7401–7515 (2017).

179. See *id.* § 7604 (permitting remedies of both injunction and punitive civil penalties, payable to the federal treasury).

180. Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 ECOLOGY L. Q. 671, 672 (2016).

181. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

of the legislative history of the CAA points to the federal government growing its authority to regulate air quality.<sup>182</sup> In the 1970 amendments, Congress required the federal government to set air quality standards, even if state standards were sufficient. The states retained the task of implementing the air quality standards,<sup>183</sup> but the federal government, specifically the EPA, was tasked with setting the air quality standards.<sup>184</sup>

The Second Circuit incorrectly performed preemption analysis in *MTBE*. First, the court looked at the nominal amount that compliance with the regulation would cost without considering the actual impact on the profit margin.<sup>185</sup> Second, with regard to obstacle preemption, the court did not look at the legislative intent of Congress. Rather, the court employed a textualist approach to obstacle preemption, which Justice Thomas cheered on.<sup>186</sup> Despite the Second Circuit's contention that obstacle preemption is when "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together,"<sup>187</sup> the Supreme Court has held that this is incorrect in *Hillsborough County v. Automated Medical Laboratories, Inc.*<sup>188</sup> In *Hillsborough County*, the Supreme Court announced that, while it may not literally be impossible to comply with both federal law and state law, federal law preempts state law when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>189</sup> The Second Circuit failed to perform any analysis

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182. See *infra* § III. History of the Clean Air Act. This section details the five acts between 1955 and 1970.

183. See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970).

184. See Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 109, 4(a), 84 Stat. 1676, 1679-80.

185. *MTBE Prods. Liab.*, 725 F.3d 65, 100-101 (2d Cir. 2013) (the Second Circuit's analysis is based on how much compliance costs per gallon on a nominal amount. The court does not mention how much profit the defendants made per gallon, nor what percentage of the profit margin compliance would cost.).

186. See Catherine M. Sharkey, *Against Freewheeling Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63, 68 (2010).

187. See *MTBE Prods. Liab.*, 725 F.3d at 102 (quoting *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)).

188. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

189. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) ("Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle

of the purposes and objectives of Congress with regard to the CAA. If the court would have performed such analysis, it would have found that the CAA preempts state common law claims. If the court did not find impossibility preemption in the case, it should have found obstacle preemption.

## 2. United States Court of Appeals for the Third Circuit

In *Bell v. Cheswick Generating Station (Bell II)*,<sup>190</sup> the Third Circuit reversed a decision by the U.S. District Court for the Western District of Pennsylvania (*Bell I*)<sup>191</sup> and erroneously held that the CAA does not preempt state common law claims based upon a comparison of the CWA. The Third Circuit focused its findings on congressional intent. The court reasoned that CAA allows states to impose stricter standards than the minimum federal requirements and the savings clause, which allows citizens to seek enforcement by bringing suit to enforce emission standards or limitations.<sup>192</sup> In *Bell I*, the district court articulated that the CAA “represents a comprehensive statutory and regulatory scheme,” and the relief sought “impermissibly encroach[es] on and interfere[s] with that regulatory scheme.”<sup>193</sup> The court then concluded that the CAA preempts state common law claims.<sup>194</sup>

In *Bell II*, the Third Circuit failed to perform an analysis of the CAA implicitly preempting state law. The Third Circuit’s opinion relied on the lack of explicit language in the CAA, stating that it preempts state law, and the court absurdly observed that the CAA is not comprehensive enough.<sup>195</sup> Further, the Third Circuit’s interpretation relied heavily on *Ouellete*, which is contrary to the federal district court’s holding.<sup>196</sup> The CAA is considered one of the most comprehensive environmental statutes.<sup>197</sup> Since the CAA is

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to the accomplishment and execution of the full purposes and objectives of Congress.” (emphasis added) (citations omitted)).

190. *Bell v. Cheswick Generating Station (Bell II)*, 734 F.3d 188 (3d Cir. 2013).

191. *Bell v. Cheswick Generation Station (Bell I)*, 903 F. Supp. 2d 314, 323 (W.D. Pa. 2012).

192. *Bell II*, 734 F.3d at 191–97. See also Jonathan D. Sater, Note, *Sackett v. EPA: The Murky Confluence of Due Process and Administrative Compliance Orders Under the Clean Water Act*, 7 LIBERTY U. L. REV. 329, 329–31 (2013) (noting that the reach of the Clean Water Act and other environmental regulations are growing to a point of arbitrariness).

193. *Bell I*, 903 F. Supp. 2d at 322.

194. *Id.* at 323.

195. *Bell II*, 734 F.3d at 191–97. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

196. *Bell II*, 734 F.3d at 194–95.

197. John Gibson, *The Crime of “Knowing Endangerment” Under the Clean Air Act Amendments of 1990; Is It More “Bark Than Bite” as a Watchdog to Help Safeguard a*

very comprehensive, there is a strong legal argument that it may be interpreted to preempt state law implicitly.<sup>198</sup>

When performing an implicit preemption analysis, it is *circulus in demonstrando*<sup>199</sup> (circular reasoning) to look for explicit language for preemption and then hold that a lack of explicit language is evidence that there is no intent for implicit preemption.<sup>200</sup> If there is explicit language in a statute for preemption, then there would be no need to perform an analysis of implicit preemption since the statute would clarify the issue of whether it intends to preempt. If Congress did not intend for the CAA to preempt state law, it would not have made the CAA as comprehensive as it is and empower the federal government to have oversight of state laws within the CAA under cooperative federalism.

## B. Federal District Courts

### 1. United States District Court for the Western District of Texas

In *Gutierrez v. Mobil Oil Corp.*, the court incorrectly opined that the CAA does not preempt state law causes of action.<sup>201</sup> The court misinterpreted preemption when it proclaimed that Congress does not intend for the CAA to preempt state common law claims because it would “preclude relief for any person who can prove the elements of the common law claims.”<sup>202</sup> The court claimed Congress did not want the CAA to preempt state common law claims because it would effectively preempt state common law claims.<sup>203</sup> If

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*Workplace Free from Life-Threatening Hazardous Air Pollutant Releases?* 6 FORDHAM ENVTL. L. REV. 197 (1995); Roger Strelow, *Reviewing the Clean Air Act*, 4 ECOLOGY L. Q. 583, 587 (1975); *Summary of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-air-act> (last visited Sept. 7, 2019).

198. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (“[T]he scope of [federal law] indicates that Congress intended federal law to occupy the field exclusively.”). See also Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1115 (2007).

199. DOUGLAS N. WALTON, PLAUSIBLE ARGUMENT IN EVERYDAY CONVERSATION 206 (1992). “Wellington is in New Zealand. Therefore, Wellington is in New Zealand.” *Id.*

200. See *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284 (W.D. Tex. 1992); Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 HAMLINE L. REV. 727, 743 (2009) (“The requirement of ‘a specific statement of pre-emptive intent’ to demonstrate ‘an implicit intent’ to preempt in and of itself bespeaks some doctrinal disarray.” (emphasis omitted) (footnote omitted)).

201. *Gutierrez*, 798 F. Supp. at 1285.

202. *Id.* at 1284.

203. *Id.* (“To hold that the Clean Air Act preempts purely private state law causes of actions for damages would preclude relief for any person who can prove the elements of the

Congress did intend for the CAA to preempt state common law claims, it would preclude relief for any person who can prove the elements of the common law claims. Statutory interpretation begins with the plain meaning rule, which says that all other relevant information about statutory interpretation is not considered when the statutory text is plain or unambiguous.<sup>204</sup> Second, the court does not point to the congressional record to support their notion that Congress does not intend for the CAA to preempt state common law claims. It is myopic as it completely overlooks the Supremacy Clause. When Congress underwent an expansion of its powers under the Commerce Clause, it brought a great number of state laws into conflict with federal laws.<sup>205</sup> This led to the Supreme Court broadly interpreting congressional intent and often finding federal legislation to “occupy the field” and thus preempt state laws.<sup>206</sup> Therefore, it is unfounded for the court to presume that Congress does not intend for the CAA to preempt state common law claims based on congressional intent.<sup>207</sup>

The *Gutierrez* court freely admitted that holding defendants liable under the CAA and state claims is worrisome.<sup>208</sup> Notwithstanding this statement, the court based its interpretation on what it calls a plain interpretation of the statute without citing the specific language in the CAA to justify its claim.<sup>209</sup>

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common law claims.” If the Clean Air Act preempts private state laws, it would obviously preclude persons from getting relief regardless of whether the elements of common law claims may be proved.)

204. *Moskal v. United States*, 498 U.S. 103, 108 (1990); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997).

205. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 972–75 (2002) (discussing the Supremacy Clause and the expansion of preemption doctrine following “the unprecedented legislative activity of the post-Depression era”).

206. *Id.* at 974.

207. *See supra* Part III.

208. *Gutierrez*, 798 F. Supp. at 1285 (“This Court holds that the Clean Air Act does not preempt the plaintiffs’ various common law claims. *Although this Court is concerned with the manageability and efficiency of this dual system that Congress has created, this Court must adhere to the language of the Act and the precedent established by the Supreme Court.* Any change in the express wording of the statute must come from Congress and any change in the interpretation of such wording must come from a higher court. Such a conclusion is entirely consistent with the goals an [sic] purposes of the Clean Air Act, as well as the common law.” (emphasis added)).

209. *Id.* at 1285 (“This Court holds that the Clean Air Act does not preempt the plaintiffs’ various common law claims. *Although this Court is concerned with the manageability and efficiency of this dual system that Congress has created, this Court must adhere to the language of the Act and the precedent established by the Supreme Court. Any change in the express wording of the statute must come from Congress and any change in the interpretation of such*

The court also alleged that it is the intent of Congress to not preempt state common law claims without citing any legislative history.<sup>210</sup>

2. United States District Court for the Western District of Texas

In *Cerny v. Marathon Oil Corp.*, the court did not perform a detailed analysis of preemption and based its ruling on *Gutierrez v. Mobil Oil Corp.*<sup>211</sup> Moreover, the court mistakenly relied on a complete preemption analysis instead of an express or implied preemption analysis. However, this may be due to the lack of such an argument raised by the Defendants.

Perhaps the Defendants did not zealously advocate their arguments and may have, in fact, actually admitted liability. “For example, *Defendants appear to concede* that Plaintiffs’ claims that hydrofracking or hydraulic fracturing is causing foundation damage to their home and sinkholes to develop on their property are not preempted.”<sup>212</sup> The Defendants conceded that their actions caused damage, hence they conceded to negligence claims. If negligence claims are allowed, then all state common law claims would be allowed because of the argument that the CAA preempts state common law claims. At this point, this court, or any court for that matter, is not likely to perform a detailed preemption analysis based upon the Defendants not making the argument themselves.<sup>213</sup>

## VII. REDUCTIO AD ABSURDUM

The argument that the CAA does not preempt state common law claims is subject to *reductio ad absurdum* (reduction to absurdity).<sup>214</sup> With regard to

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*wording must come from a higher court.* Such a conclusion is entirely consistent with the goals an [sic] purposes of the Clean Air Act, as well as the common law.”) (emphasis added).

210. *Id.* at 1284 (“Such a result is clearly not intended under, and would not further the goals of, the Clean Air Act.” The court does not cite any evidence to support this statement.).

211. *Cerny v. Marathon Oil Corp.*, No. SA-13-CV-562-XR, 2013 U.S. Dist. LEXIS 109993, at \*14–15 (W.D. Tex. Aug. 6, 2013), *vacated*, No. SA-13-CA-562-XR, 2013 U.S. Dist. LEXIS 144831 (W.D. Tex. Oct. 7, 2013).

212. *Id.* at \*10 (emphasis added).

213. *See MTBE Prods. Liab.*, 725 F.3d 65, 97 (2d Cir. 2013) (“The parties agree that the Clean Air Act and its 1990 Amendments contain no explicit preemption directive expressing a Congressional intent to override state tort law, and *Exxon does not argue that Congress intended to occupy any field relevant here. Rather, Exxon relies on the third form of preemption analysis—conflict preemption—to sustain its preemption argument. Accordingly, we address the two branches of conflict preemption in turn.*”) (emphasis added).

214. *Reductio Ad Absurdum*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“In logic, disproof of an argument by showing that it leads to a ridiculous conclusion.”). Also, for purposes of

emissions, an inordinate amount of people on Earth contribute to carbon emissions—by driving cars, using electricity, and consuming products manufactured in carbon-emitting facilities. There is no reason why fossil fuel producers should be held responsible for harms that are generated by these activities when consumers partake in said activities as well. With so many intervening factors, it is absurd to argue that fossil fuel producers should be responsible for the aforementioned harms, yet those who consume their products should not be subject to liability. In light of the *American Electric Power Company* decision, which bars claims from entities that directly emit carbon dioxide, no corporation should be held responsible for emitting carbon dioxide. Thus, if the CAA does not preempt state law, then claims may be brought against anyone that partakes in activities that emit carbon dioxide.

Moreover, the *Comer* court held that the CAA preempts state common law claims because emissions from a producer is too remote for a plaintiff to plausibly claim relief.<sup>215</sup> The court noted that the actions of the defendants needs to be central to the injury suffered by the plaintiffs. In *Comer*, the court held that emissions, commingled with other types of gases over a significant period of time, is sufficient to break the causal connection between the defendant's actions and the plaintiff's injury.<sup>216</sup> Expanding on the court's reasoning, fossil fuel producers should not be held liable for state common law claims if other intervening factors (i.e. consumers) use their products. For example, if *A* sells *B* a vehicle and *B* uses the vehicle which emits carbon, *A* is not liable as the cause in fact of *B*'s emissions; or if *A* sells *B* livestock, such as a cow, and the cow emits carbon, *A* is not liable as the cause in fact of *B*'s cow's emissions.

Even though there are multiple sources of a state law claim, often only a sole defendant or multiple defendants with deep pockets face lawsuits. Under *Gutierrez*, a claim may be brought against a source of pollution once it is identified as causing the pollution, even if there are multiple sources.<sup>217</sup> Due

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clarification, this Article is making the specific argument that holding the CAA does not preempt state common law tort claims will lead to absurd results.

215. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 867–68 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

216. *Id.* at 868 (“The assertion that the defendants’ emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability. Therefore, the Court finds that the plaintiffs have not asserted a plausible claim for relief under state law.”).

217. *See Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285–86 (W.D. Tex. 1992) (“The Clean Air Act does not preempt source-state common law claims against a stationary source.



to multiple sources, it is absurd to argue that a specific fossil fuel producer is liable when it is not clear whether or not the last wrongdoer's intervening tort cut off the original wrongdoer's liability. One scholar promulgates, "In those cases in which proximate cause becomes an issue, the plaintiff usually wants to sue the original wrongdoer because that person has more available assets or is not a friend or neighbor."<sup>218</sup> Thus, holding that the CAA does not preempt state common law claims may have deleterious effects. For example, a fossil fuel producer—a deep pocket—may be the original wrongdoer, and a friend or neighbor—not a deep pocket offender—may add to the wrongdoing and be responsible for the vast majority of the tort. The fossil fuel producer may face liability, and the friend or neighbor may not face any liability. The CAA is intended to establish air quality controls<sup>219</sup> and not to set up a framework to exploit persons with deep pockets.

#### VIII. CONCLUSION

The CAA is a comprehensive statute that has undergone significant amendments by Congress. While states do have the ability to create plans, they are subject to the approval of the federal government. States do not have autonomy under the CAA.<sup>220</sup> States operate under the supervision of the federal government according to the cooperative federalism framework.<sup>221</sup>

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Accordingly, IT IS ORDERED that these two causes of action are hereby UNCONSOLIDATED AND REMANDED, pursuant to 28 U.S.C. § 1447(c), to the state courts from which they came, because this Court lacks subject matter jurisdiction to address these purely state common law claims involving non-diverse parties.”)

218. Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 302 (2002).

219. David P. Currie, *Nondegradation and Visibility Under the Clean Air Act*, 68 CALIF. L. REV. 48, 48 (1980) (“Under section 109, the EPA sets standards of ambient air quality designed to make the air harmless to public health and welfare. Under section 110, subject to federal supervision, the states submit plans for the ‘implementation’ or attainment of the ambient standards. These plans contain enforceable limitations on emissions from various sources, at levels calculated to assure compliance with air quality standards.” (footnotes omitted)).

220. Once EPA sets the NAAQS, states draft State Implementation Plans (SIPs) (42 U.S.C. § 7410(a) (2006)). If the EPA approves a SIP, federal agencies may not approve or fund any activity that does not conform to the SIP. If the EPA does not approve a SIP because it does not meet the standards of NAAQS, and the state fails to correct the problem, it becomes subject to sanctions in the form of withdrawal of federal highway funding and the imposition of a two-for-one offset requirement as a condition of permitting any new stationary sources (*See, e.g.*, Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 ST. LOUIS U. PUB. L. REV. 67, 91–95 (2001)).

221. 42 U.S.C. § 7410(a) (2006) (NAAQS sets standards of criteria pollutants and review and revise standards, as may be appropriate (42 U.S.C. § 7409(d) (2006)). These standards are binding and enforceable against all states, rather than directly against facilities. *See* Nicholas Knoop, *Cooperative Federalism and Visibility Protection Under the Clean Air Act*, 43 B.C.

Courts that hold that the CAA does not preempt state laws rely solely on explicit preemption. The aforementioned courts do not explore other types of preemption, such as implicit preemption or obstacle preemption. Moreover, said courts confuse explicit preemption with implicit preemption by holding that explicit language will indicate the intent of Congress. These courts fail to look at the structure or purpose or objective of the CAA to ascertain the intent of Congress.

If courts hold that the CAA does not preempt state laws, the law is subject to an absurdity argument. In *Massachusetts v. EPA*,<sup>222</sup> the EPA admitted to the *reductio ad absurdum*<sup>223</sup> and relied on it to defend its “Tailoring Rule.”<sup>224</sup> The EPA made an “Endangerment Finding” under section 202(a) of the CAA, which was the catalyst for imposing greenhouse gas emission standards for new motor vehicles.<sup>225</sup> The EPA then issued its “Triggering Rule”<sup>226</sup> for greenhouse gas emission standards for stationary sources under the Prevention of Significant Deterioration (PSD) and Title V of the CAA.<sup>227</sup> This, in turn, would have extended its requirements to all sources, including those that are small. It would be absurd for small sources to bear the expense and administrative burden of these requirements.<sup>228</sup> As a result, the EPA

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ENVTL. AFF. L. REV. E. SUPP. 1, 2–3 (2016) (“In accordance with the cooperative federalism framework, the Environmental Protection Agency (EPA) establishes air quality standards, and the states implement those standards, subject to federal oversight.”).

222. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

223. *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 411 (D.C. Cir. 2013) (“Finally, for the first time in its brief, *EPA relies on the absurd results doctrine*, which embodies ‘the long-standing rule that a statute should not be construed to produce an absurd result.’” (quoting *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998))) (emphasis added).

224. *See* Prevention of Significant Deterioration and Title V Greenhouse Gases Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

225. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536, 537, 538).

226. *Util. Air Regulatory Grp. v. EPA, et al.*, 134 S. Ct. 2427, 2437 (2014).

227. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts 50, 51, 70, 71).

228. *Ctr. for Biological Diversity*, 722 F.3d at 412 (“But the Deferral Rule cannot rest on the Tailoring Rule’s invocation of the absurd results doctrine for a simple reason: the two rules are aimed at different absurd results. The Tailoring Rule was intended to alleviate the crushing administrative burden on permitting authorities and sources, *see* Tailoring Rule, 75 Fed. Reg. at 31,547. . .”).

issued a “Tailoring Rule,” which essentially rewrote the statutory emission standards. In addition to having different rules based on size, there are causation issues.<sup>229</sup> Thus, even though there may be a small emitter of greenhouse gases, it may contribute to a larger emission of greenhouse gases from numerous parties, and it would be impossible to determine who is liable. There are causation problems with determining the damage because it cannot reasonably be stated that only a few parties are directly emitting carbon dioxide.<sup>230</sup> To rule otherwise would lead to absurd results.<sup>231</sup>

If courts properly perform preemption analysis, they will arrive at the conclusion that the CAA preempts state common law claims.

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229. See *supra* Part VII. Reductio Ad Absurdum.

230. *Sources of Greenhouse Gas Emissions*, U.S. EPA,

<https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Oct. 2, 2019) (“This annual report estimates the total national greenhouse gas emissions and removals associated with human activities across the United States.”) (acknowledging that people and corporations partake in activities that contribute to carbon emissions, and it is impossible to track in a granular manner).

231. *Reductio Ad Absurdum*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“In logic, disproof of an argument by showing that it leads to a ridiculous conclusion.”). See also Max Birmingham, *Paid in Full: Interpreting and Defining “Market Value” Under the Lacey Act*, 25 ANIMAL L. REV. 125 (2019) (see § V, absurdity section, which discusses how the absurd results if courts accept the argument that laypersons did not understand the Lacey Act, as well as how this defense violates the legal maxim *ignorantia juris non excusat* (“ignorance of the law excuses not”)); Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 FLA. A&M U. L. REV. 1 (2017) (see § VII, absurdity section, which discusses how a broad interpretation of a whistleblower statute will lead to absurd results); Max Birmingham, *Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Treaty Act*, 13 J. ANIMAL & NAT. RESOURCE L. 1, 14–15 (2017) (discussing a court that departed from a plain meaning interpretation of the Migratory Bird Treaty Act (MBTA) based on *reductio ad absurdum* arguments).