Turning Up the Heat: Climate Change Litigation and Clean Air Act Preemption of Consumer Protection Claims

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I. INTRODUCTION

Climate change stands as one of, if not the preeminent issue of the modern day. The science is clear—anthropogenic climate change is and will continue to be a highly impactful consequence of human activity.[1] Long gone are the days where the most visible effect of climate change was the proliferation of satirical depictions of Al Gore on television;[2] with each passing month, cities and countries across the world suffer the consequences of climate change with increasing frequency and severity, including storm intensification,[3] flooding,[4] and land degradation.[5] While

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1. *See generally WMO Statement on the State of the Global Climate in 2019*, WORLD METEOROLOGICAL ORG. (Mar. 10, 2020), https://library.wmo.int/doc_num.php?explnum_id=10211 [https://perma.cc/QCG3-LU5U].

2. *E.g.*, *South Park: ManBearPig* (Comedy Central television broadcast Apr. 26, 2006).

3. Jeff Masters, *Climate change is causing more rapid intensification of Atlantic hurricanes*, YALE CLIMATE CONNECTIONS (Aug. 27, 2020), https://yaleclimateconnections.org/2020/08/climate-change-is-causing-more-rapid-intensification-of-atlantic-hurricanes/ [https://perma.cc/K8DG-Y446].

4. Rebecca Hersher, *High-Tide Flooding on the Rise, Especially Along the East Coast, Forecasters Warn*, NPR (July 10, 2019, 1:26 PM), https://www.npr.org/2019/07/10/739466268/high-tide-flooding-on-the-rise-especially-along-the-east-coast-forecasters-warn [https://perma.cc/8687-Y8MA].

5. *UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates*

the lack of decisive action on the issue over the past several years has not brought humanity to a point of no return, the path to making a difference lies in "transformative change . . . a fundamental, system-wide reorganization."[6]

By design, however, system-wide reorganization falls beyond the province of the judicial branch.[7] Moreover, recent years evidence that, regrettably, the executive and legislative branches' will and ability to combat climate change on an effective scale is insufficient.[8] As one federal judge noted, however, the fact that "the other branches may have abdicated their responsibility to remediate [climate change] does not confer on Article III courts . . . the ability to step into their shoes."[9]

Climate change victims are thus stuck between the veritable rock and hard place. On one hand, courts are resistant to making the impactful decisions that are necessary to meaningfully stymie anthropogenic climate change, but on the other hand, politics and value clashes have prevented the executive and legislative branches from effectuating lasting change.[10] Despite this predicament, however, victims continue to bring lawsuits arising from the harms of climate change.[11] Though plaintiffs have brought a diverse assortment of suits, the results, inordinately, have been the same—a judgment in favor of the defendants.[12]

Each defeat, however, provides plaintiffs with an ever-expanding guide for overcoming the near-Sisyphean task of attaining a favorable final judgment in a climate change suit.[13] Today, there are well over a dozen suits currently pending in state courts across the country, but of particular interest are a group of suits that, in addition to or instead of property-based

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'Accelerating', UNITED NATIONS (2019), https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/ [https://perma.cc/VN9B-ELDM].

6. *Id.*

7. *See* Juliana v. United States, 947 F.3d 1159, 1171, 1174–75 (9th Cir. 2020).

8. *See id.* at 1175 ("The dissent correctly notes that the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals."); *see generally* Cinnamon P. Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U.L. REV. 387, 421–40 (2019).

9. *Juliana*, 947 F.3d at 1175.

10. *See* Carlarne, *supra* note 8, at 421–40.

11. Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 316–17 (2020).

12. *E.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011); North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 311–12 (4th Cir. 2010).

13. *See* Benjamin, *supra* note 11, at 338–41 (noting the parallels between the incremental change brought upon by tobacco litigation and the developing insights that come with each successive climate change lawsuit).

common law claims, have brought state consumer protection claims ranging from deceptive trade practices to negligent failure to warn.[14] Moreover, these plaintiffs have brought their claims against large fossil fuel product corporations, rather than against emitters or American governmental entities.[15] Though the plaintiffs face several hurdles before having their days in court, perhaps none are as daunting as the threat of preemption by the Clean Air Act (CAA).

To provide the exposition necessary to understand why climate change plaintiffs find themselves in the position they do today, as well why preemption by the CAA represents such a tall hurdle for plaintiffs, Section II of this Comment will dive into the history of American climate change litigation and its intersection with the CAA. Additionally, Section III of this Comment employs a preemption analysis of the consumer protection claims to argue that courts ought not dismiss them on preemption grounds.

II. BACKGROUND

Plaintiffs have turned to consumer protection claims as a means of acquiring recourse for losses that they have and will continue to sustain due to climate change. To understand the motivation for bringing these claims, as well as why CAA preemption poses such a danger to climate change claims, it is essential to review the decisions in two largely disconnected chains of cases. Consequently, Subsection A will focus on the roots of federal authority over greenhouse gas (GHG) emissions and the ensuing restriction of federal common law climate change claims. Subsection B will detail this authority's intersection with the CAA. Subsection C will elaborate on the consumer protection claims currently pending in state court, as well as their interplay with the cases detailed in Subsections A and B.

A. The Rise and Effect of Federal Authority

Though it may be taken as a given now, there was a time in which the federal government's, and more specifically, the Environmental Protection Agency's (EPA) power to regulate GHG emissions was unclear. Though the Supreme Court has resolved that issue, its decision created a ripple effect that dramatically altered the course of climate change litigation in the United States.

14. Complaint ¶ 270–81, 291–98, Mayor of Baltimore v. BP P.L.C., No. 24-C-18-004219 (Md. filed July 20, 2018) [hereinafter *Baltimore Complaint*].

15. *E.g.*, Baltimore Complaint, *supra* note 14, at ¶ 1–32.

1. The Genesis of Federal Authority

The root from which federal authority to regulate GHGs sprang is the 2007 Supreme Court case, *Massachusetts v. EPA*.[16] *Massachusetts* served as the culmination of a nearly decade-long battle over the EPA's regulatory authority over GHG emissions.[17] The battle began in 1999 when several organizations lodged a formal rulemaking petition for the EPA to use its authority under the CAA to regulate GHG emissions from motor vehicles.[18] After several years of factfinding, the EPA denied the request for two related reasons: first, "the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change," and second, "even if the Agency had the authority to set [GHG] emission standards, it would be unwise to do so at this time."[19] The organizations responded by joining with several states and local governments to seek review of the EPA's denial in the Court of Appeals, where albeit for different reasons, a two-judge majority agreed that the EPA's decision fell within its discretion under § 202(a)(1) of the CAA.[20] Citing the "unusual importance of the underlying issue" in the EPA's order, the Supreme Court granted certiorari.[21]

The Court noted that there were two operative questions surrounding the EPA's order: does the EPA have authority to regulate GHG emissions under § 202(a)(1),[22] and if so, does the EPA have the discretion to refuse to exercise said authority?[23] On the first question, the Court held that § 202(a)(1), which states that the EPA shall regulate "the emission of any air pollutant from any . . . new motor vehicles" that "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare" imbues the EPA with the authority to regulate GHGs as pollutants.[24] On the second question, the Court stated that the EPA could only refuse to regulate GHGs if it could ground its refusal within the CAA's language.[25] Thus, taken together, the Court's

16. 549 U.S. 497, 504–35 (2007).

17. *Id.* at 505–06.

18. Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After* AEP v. Connecticut, 99 VA. L. REV. 131, 135 (2013).

19. *Massachusetts*, 549 U.S. at 511.

20. *Id.* at 514.

21. *Id.* at 506.

22. *Id.* at 528.

23. *Id.* at 532–33.

24. *Id.* at 528–33 (quoting 42 U.S.C. § 7521(a)(1)).

25. *Id.* at 532–33.

two holdings required the EPA to regulate GHGs unless, per the statutory language, the EPA determined that GHGs could not "reasonably be anticipated to endanger public health or welfare."[26]

Soon after *Massachusetts*, the EPA determined that certain GHGs presented a danger to public health and welfare, which per the Court's holding, obligated the EPA to regulate the emissions of said GHGs.[27] In turn, the EPA released several new regulations and standards for both mobile and stationary sources of GHG emissions.[28] Unfortunately, although these efforts took steps in the right direction, they alone could not halt the impacts of climate change, nor could they compensate entities for losses they had and would sustain due to climate change.[29]

2. CAA Displacement of Federal Common Law

In an effort to more directly effectuate change, plaintiffs brought forth two cases, *American Electric Power Co. v. Connecticut* and *Native Village of Kivalina v. ExxonMobil Corp.*, each of which illuminated the effect that *Massachusetts* would have on climate change litigation going forward. In *American Electric*, the plaintiffs brought a federal common law public nuisance claim against a collection of powerplant owners that comprised "the five largest emitters of carbon dioxide in the United States."[30] Alleging that the defendants' GHG emissions constituted a "substantial and unreasonable interference with public rights" that constituted public nuisance, the plaintiffs sought an injunction that would require each defendant to cap and reduce its GHG emissions.[31] Eventually, the suit made its way to the Supreme Court, where the Court unanimously held that the EPA's authority to regulate GHG emissions displaced any federal common law right to pursue an injunctive cap on GHG emissions from powerplants.[32]

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26. *Id.* at 528–33 (quoting 42 U.S.C. § 7521(a)(1)).

27. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66497–98 (Dec. 15, 2009).

28. Rachel Rothschild, Note, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412, 418–19, 449 (2019); *see generally* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25326 (May 7, 2010) ("These rules will implement a strong and coordinated Federal greenhouse gas (GHG) and fuel economy program for passenger cars, light-duty-trucks, and medium-duty passenger vehicles.").

29. Rothschild, *supra* note 28, at 417–19.

30. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418–19 (2011).

31. *Id.*

32. *Id.* at 424.

Displacement, the Court explained, is a legal doctrine which states that, upon the promulgation of federal legislation that addresses "a question previously governed by a decision rested on federal common law," the ground for said federal common law claims dissipates.[33] In the interest of preventing conflicts between federal courts and Congress, legislation need only speak "'directly to [the] question' at issue" in a federal common law claim for courts to find displacement.[34] The Court readily determined that the CAA, in light of the EPA's newly established authority to regulate GHG emissions, spoke to the question at issue in a federal common law nuisance claim that arises from interstate GHG emissions.[35] As a consequence, the Court held that the CAA displaces any federal common law right for equitable relief regarding GHG emissions.[36] Thus, in one fell swoop, the Court put an end to any and all attempts to use federal common law as an equitable means of stymying GHG emissions.

Just a year later, in 2012, the Ninth Circuit closely followed the decision in *American Electric* when it ruled on the case *Native Village of Kivalina v. ExxonMobil Corp*.[37] In *Native Village*, the Village and City of Kivalina brought a federal common law claim of public nuisance against several fossil fuel companies for their contributions to climate change which, the plaintiffs alleged, "severely eroded the land where the City of Kivalina sits and threaten[ed] it with imminent destruction."[38] Unlike the plaintiffs in *American Electric*, however, the plaintiffs in *Native Village* sought legal, rather than equitable relief.[39] Though the Ninth Circuit acknowledged that the two cases differed in the relief sought, it stated that "the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement."[40] As a consequence, the Ninth Circuit held that the Supreme Court's determination in *American Electric* applied just as forcefully when the relief sought in a federal common law claim arising from GHG emissions is legal, as opposed to equitable.[41]

Though the decisions in *American Electric* and *Native Village* made it

33. *Id.* at 423 (quoting Milwaukee v. Illinois, 451 U.S. 304, 314 (1981)).
34. *Id.* at 424 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).
35. *Id.*
36. *Id.*
37. 696 F.3d 849, 853–58 (9th Cir. 2012).
38. *Id.* at 853.
39. *Id.*
40. *Id.* at 857.
41. *Id.* at 857–58.

abundantly clear that the EPA's authority under the CAA following *Massachusetts* would render all future federal common law claims fruitless, there was yet another path; in both cases, the plaintiffs brought state common law claims in the alternative to their federal claims.[42] Because the very definition of the doctrine of displacement foreclosed its application in cases involving state common law claims, the decisions in *American Electric* and *Native Village* blocked one, but not every pathway to relief for plaintiffs.[43] As such, state law claims provided plaintiffs with an avenue to obtain relief following the development of federal authority over GHG emissions.

B. The Source State Requirement: Preemption of State Common Law Claims

While plaintiffs found refuge from the dispositive effect of displacement in state common law, the doctrine of preemption represented a new and equally daunting hurdle. To understand the challenge that preemption has and will continue to pose to climate change plaintiffs, however, it is essential to first examine the manner in which courts conduct preemption analyses.

1. The Origin and Elements of Preemption

The doctrine of preemption has its roots in the Supremacy Clause of the Constitution,[44] which states: "[The] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[45] As the Supreme Court has emphasized, however, preemption is merely "a rule of decision," which states that federal law must reign supreme when it and state law come into conflict.[46] In determining whether a conflict exists, Congress's intent is the key factor.[47] Moreover, in the interest of preserving "the historic police powers of the States," courts have traditionally presumed that there is no conflict between federal and state law unless "the clear and manifest purpose of Congress" was to preempt

42. Am. Elec. Power v. Connecticut, 564 U.S. 410, 418 (2011); *Native Vill. of Kivalina*, 696 F.3d at 858 (Pro, J., concurring).

43. *See Am. Elec. Power*, 564 U.S. at 424.

44. Murphy v. NCAA, 138 S. Ct. 1461, 1479 (2018).

45. U.S. CONST. art. VI, cl. 2.

46. *Murphy*, 138 S. Ct. at 1479 (quoting Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015)).

47. Retail Clerks Int'l Ass'n, Loc. 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963).

state law.[48] In recent years, however, amidst a growing sense of doubt amongst textualist scholars and judges pertaining to the validity of this presumption, the Supreme Court has only sparingly invoked the presumption and has even taken steps to limit its applicability.[49] As such, with not just the weight, but the very legitimacy of the presumption in doubt, the role of the presumption in preemption analyses is highly uncertain.[50]

Nonetheless, the Supreme Court has stated that a conflict between state and federal law can arise from a federal statute's explicit language, or an implication "contained in [the statute's] structure and purpose," provided that the language or implication demonstrates a sufficiently clear congressional preemptive intent.[51] Correspondingly, courts have identified three distinct forms of preemption: express preemption, field preemption, and conflict preemption.[52]

There is express preemption when Congress uses explicit language within the statutory text to preempt state law.[53] When there is no such language, however, there can still be field or conflict preemption.[54] A state law is preempted on field preemption grounds when it falls within a preempted field.[55] A field can be preempted in one of two ways. First, a field can be preempted when courts imply an intent from Congress to preempt "all state law in a particular area" on the basis that "the scheme of federal regulation is sufficiently comprehensive."[56] And second, a field can be preempted when courts imply an intent from Congress to preempt all state law in a field because "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on

48. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

49. JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 3–4 (2019).

50. *See id.* at 3–6; *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1604 (2007) ("[T]he Court has not reliably applied [the] presumption, and Justices frequently disagree about when the presumption applies and what result it requires in any given case. This inconsistency has led to accusations that the Court is simply imposing its substantive preferences in preemption cases.") (footnotes omitted).

51. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quoting Jones v. Roth Packing Co., 430 U.S. 519, 525 (1977)).

52. Murphy v. NCAA, 138 S. Ct. 1461, 1480 (2018) (citing English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990)).

53. Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1383 (1998).

54. *Id.*

55. *Id.*

56. *Id.* (quoting Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985)).

the same subject."[57] Conflict preemption, on the other hand, occurs when a state law creates one of two forms of conflict with a federal law.[58] The first form, known as impossibility preemption, occurs when it is literally impossible to simultaneously comply with both state and federal law.[59] The second form, known as obstacle preemption, occurs "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[60]

Of course, there is a risk of courts finding a preemptive intent when there truly is none, so Congress at times employs statutory provisions known as "savings clauses" that make clear the extent to which Congress intends the statute to preempt state law.[61] The effect of a savings clause on preemption analysis necessarily depends on the form of preemption at issue, as well as the language of the clause. On the one hand, "the Supreme Court has generally interpreted savings clauses to preclude any finding of express preemption."[62] On the other hand, however, the Court refuses to enforce savings clauses that do not respect an established federal-state regulatory balance.[63] Moreover, the existence of a savings clause "may even create a negative inference that everything else not preserved by [the savings clause] is preempted."[64]

2. The Roots of CAA Preemption

These principles of preemption have taken center stage over the last decade in climate change litigation, as defendants have pushed back against plaintiffs by arguing that the CAA preempts the plaintiffs' state common law claims.[65] In these defenses, one case, *International Paper Co. v. Ouellette*, has played a particularly vital role.

Despite its role as a central case for disputes related to CAA preemption of climate change claims, *Ouellette* was actually about

57. *Id.* (quoting *Hillsborough Cnty.*, 471 U.S. at 713).

58. *Id.*

59. *Id.*

60. *Id.*

61. Gallisdorfer, *supra* note 18, at 141.

62. *Id.*

63. *Id.* at 141–42.

64. *Id.* at 142 (internal quotation marks omitted, brackets in original). These negative inferences can apply in reverse when a statute features an express preemption provision. *See infra* note 130 and accompanying text.

65. *E.g.*, North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 302–04 (4th Cir. 2010).

preemption by the Clean Water Act (CWA), rather than the CAA.[66] In *Ouellette*, the Supreme Court determined whether and to what extent the CWA preempted a state common law suit brought under Vermont law for a New York paper company's contamination of Vermont waters.[67] The key issue of this case arose from the fact that the plaintiffs sought to use the law of the state that had been harmed by the pollutant, (i.e., affected state law) rather than the law of the state from which the pollutant was produced (i.e., source state law). In making its determination, the Court looked to the CWA's savings clauses, which states in relevant part, "[n]othing in this section shall restrict any right which any person . . . may have . . . to seek enforcement of any effluent standard or limitation or to seek any other relief,"[68] and, "[e]xcept as expressly provided . . . , nothing in this chapter shall . . . be construed as impairing . . . any right or jurisdiction of the States with respect to the waters . . . of such States."[69] The Court held that the savings clauses clearly precluded a view that the CWA preempted all possible state law actions, but noted that it was unclear to what extent the clauses protected suits originating under affected state law, as compared to source state law.[70]

Because the savings clauses failed to provide sufficient guidance to determine what claims were and were not preempted, the Court performed a preemption analysis for the CWA.[71] While the Court found no preemption of source state claims, it held that the CWA preempted affected state claims on obstacle preemption grounds.[72] Consequently, the Court determined that, while the CWA's savings clause permits states to impose higher standards than those promulgated elsewhere within the CWA, the CWA preempts state claims unless they were brought under the law of the state that served as the source for the contaminant.[73] As such, while Vermont may create emissions standards more strict than the CWA's minimum standards, if a pollutant originating from New York

66. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 483 (1987).

67. *Id.* at 483–84.

68. *Id.* at 503 (Brennan, J., concurring in part and dissenting in part) (quoting 33 U.S.C. § 1365(e)).

69. *Id.* (Brennan, J., concurring in part and dissenting in part) (quoting 33 U.S.C. § 1370).

70. *Id.* at 493–94 (majority opinion). In this context, affected states are those states whose waters are polluted by waterborne pollutants, and source states are those states from which the waterborne pollutant originates. This dichotomy is consistent in cases involving airborne pollutants; there, source states are those that serve as the point of origination for a given airborne emissions, while affected states are those that the emissions harm.

71. *Id.* at 491–94.

72. *Id.* at 504 (Brennan, J., concurring in part and dissenting in part).

73. *Id.* at 497 (majority opinion).

contaminates Vermont's waters, it must bring its claims under the potentially less-restrictive laws of New York.[74] In sum, under the CWA, an affected state's law is relevant only when the source of the pollutant originates within said state, creating a situation where the states that suffer the consequences of exposure to a pollutant are left without a claim unless the source state's laws are sufficiently comprehensive or strict or both.[75]

While this decision may have appeared fairly narrow in scope at first, its precedential effect gradually expanded as various circuit courts determined that the *Ouellette* holding was binding for preemption disputes involving not just the CWA, but the CAA as well.[76] Judges and commentators alike have noted that the CAA and CWA have nearly identical savings clauses, they both established regulatory schemes wherein "source states . . . play the primary role in developing the regulations by which a particular source will be bound,"[77] and they both are "similarly comprehensive" within their respective regulatory fields.[78] Altogether, these commonalities left "little basis for distinguishing the [CAA] from the [CWA]," such that courts have uniformly adopted the *Ouellette* source state approach in deciding CAA preemption cases.[79]

Though this extension of *Ouellette*'s source state requirement by courts was consistent with the language of the two acts and preemption doctrine, it slammed yet another door in the faces of climate change plaintiffs. Simply, the source state requirement presents an insurmountable Sophie's choice for climate change plaintiffs. The plaintiffs can either bring a claim under source state law and make the scientifically impossible argument that harms from global climate change were caused by GHG emitters from the single state under which the claim arises,[80] or they can bring a claim under affected state law and lose on preemption grounds before any litigation on the merits.[81]

74. See id.

75. The decision did not limit the type of relief plaintiffs can receive under source-state law, however. *See* JJ England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENV'T. L. 701, 728 (2013).

76. *E.g.*, North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 301–02 (4th Cir. 2010).

77. Bell v. Cheswick Generating Station, 734 F.3d 188, 196 (3d Cir. 2013).

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

79. Gallisdorfer, *supra* note 18, at 150.

80. *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018) (echoing the sentiment that climate change harms arise "only because third-party users of fossil fuels-located in all 50 states and around the world-emit greenhouse gases.") (emphasis omitted).

81. *E.g.*, *Cooper*, 615 F.3d at 301–02.

C. The New Generation of State Climate Change Lawsuits

Upon the establishment of the source state requirement for state common law air pollution claims, then, there was just one option for climate change plaintiffs—innovate. While the new generation of these claims are comparable to previous iterations of climate change claims, their new features create a potential avenue to escape from the constricting effect of the source state requirement.

1. Differences Between Current Claims and Past Claims

Though current and past claims differ in several ways, these differences all derive from new generation plaintiffs' decisions to bring their suits against fossil fuel producers. Though the post-*Massachusetts* climate change lawsuits differed in the sense that some featured state common law claims while others featured federal common law claims, they were invariably brought against GHG emitters for damages purported to arise from the creation of emissions.[82] Seeking an avenue to avoid the source state and displacement issues that plagued these suits, climate change plaintiffs across the country have almost entirely shifted their focus from emissions and emitters to fossil fuel products and their producers.[83] In so doing, plaintiffs have pled cognizably different state claims than their predecessors, ushering in a new generation of climate change claims and creating a brand new question of preemption for courts to analyze.[84]

By shifting their focus to fossil fuel products and their producers, plaintiffs now have the ground to bring product liability, fraud, and various other claims that fall within the umbrella of consumer protection law.[85] Previously, climate change plaintiffs brought claims that focused squarely on air quality regulation, particularly nuisance.[86] One can attribute this to

82. *E.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853–54 (9th Cir. 2012).

83. *E.g.*, Complaint at ¶ 229–30, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. filed July 2, 2018) [hereinafter *Rhode Island Complaint*].

84. *See* Rothschild, *supra* note 28, at 434–35 (stating that the refocusing of climate change claims from emitters to fossil fuel products creates a new issue for courts to determine in nuisance suits).

85. *E.g.*, *Rhode Island Complaint*, *supra* note 83, at ¶ 225–315 (bringing causes of action for the following: public nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, impairment of public trust resources, and violation of the State Environmental Rights Act).

86. *See* Benjamin, *supra* note 11, at 327–31 (describing nuisance claims as the foundation for *Native Village of Kivalina* and *American Electric Power*, the two major cases of the first wave of climate change litigation).

the cases' defendants because, largely, the extent of a stationary source's commercial activity involving GHGs is their act of combusting fossil fuels and creating GHG byproducts[87], thereby leaving little basis for litigation beyond the mere act of degrading air quality. Now, however, with fossil fuel companies serving as defendants, a whole new world of litigable commercial activity, including the creation, marketing, and sale of fossil fuel products, is available for plaintiffs to tackle in climate change litigation.[88] Thus, consumer protection claims are a bridge between this new ground for litigation and the familiar harms of climate change.[89]

These new consumer protection claims are oftentimes featured alongside other categories of claims, such as nuisance and trespass, each of which have also been reoriented to focus on fossil fuel companies.[90] The shift in focus from GHG emitters to fossil fuel companies and their products may indeed result in determinations from state courts that the CAA does not preempt the new generation of nuisance, trespass, or other claims.[91] That said, the novelty and potential impact of these consumer protection claims warrant individualized analysis. As such, this Comment will not address the preemption prospects for non-consumer protection claims.

Consumer protection claims are also unique in that it is state and local entities that are bringing the consumer protection claims against fossil fuel companies.[92] As earlier discussed, individuals and entities across the world are feeling the harmful effects of climate change, effects that intensify with each passing day.[93] Given the reluctance of federal actors

87. *See* 42 U.S.C. § 7602(z).

88. Amended Complaint at ¶ 327–95, Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., No. 2018CV30349 (Colo. filed June 11, 2018) [hereinafter *Boulder Cnty. Complaint*] (explaining the link between the defendant corporation's fossil fuel activities and the harms the plaintiff has suffered and will continue to suffer).

89. Whether the use of consumer protection claims to remediate the harms of climate change constitutes sound policy falls beyond the scope of this Comment. At the very least, however, the use of these claims in the climate change context would fulfill the "basic goals of tort law." David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENV'T. L. 1, 5 (2003).

90. *E.g.*, *Boulder Cnty. Complaint*, *supra* note 88, at ¶ 444–530.

91. *See generally* Rothschild, *supra* note 28 (arguing that the shift from suits directed at emitters to fossil fuel producers will enable state nuisance claims to avoid preemption by the CAA). *But see* Damien Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENV'T. L. 853 (2019) (arguing that property-based state common lawsuits directed at fossil fuel producers are preempted by the CAA).

92. *E.g.*, Complaint, Minnesota v. Am. Petroleum Inst., No. 62CV203837 (Minn. filed June 24, 2020) [hereinafter *Minnesota Complaint*].

93. *See supra* notes 1–6 and accompanying text.

to institute the change necessary to halt climate change's effects or provide either the funds or resources to properly combat current and expected damages, states, counties, and municipalities have taken matters into their own hands.[94] Indeed, these suits are, in essence, an attempt at providing state and local entities with the funds necessary to remediate existing harm and prevent future damage. To that end, the entities seek, in addition to injunctive relief, monetary relief sufficient to compensate them for past and future harm, as well as climate change mitigation costs.[95] Though none of the complaints cite a specific dollar figure, the sheer range of efforts necessary to combat climate change's impacts guarantees that the financial implications of the claims are vast.[96]

2. Specific Features of the Claims

While there are several individual consumer protection claims currently pending in courts across the United States, each claim fits within one of four broad categories: design defect,[97] deceptive trade practice,[98] fraud and misrepresentation,[99] and failure to warn claims.[100] While the intricacies of the claims within each category differ from one another due to variant laws across different state jurisdictions, the categories reflect the central argument of each claim: defendant fossil fuel companies had duties to consumers that they failed to uphold in their creation, marketing, and sales of fossil fuel products.[101] Beyond some minor differences between the claims and the laws from which they derive, however, such as some claims deriving from a statute in one jurisdiction and common law in another, the claims, both within and across categories, are highly similar for purposes of a preemption analysis.[102] For instance, each claim serves as a basis for legal and equitable relief,[103] each claim is directed at fossil

94. *See supra* notes 7–15 and accompanying text.

95. *Boulder Cnty. Complaint*, *supra* note 88, at ¶ 531–543.

96. *See* Boulder Cnty. Complaint, supra note 88, at ¶ 531–543.

97. *E.g.*, *Rhode Island Complaint*, *supra* note 83, at ¶ 251–72.

98. *E.g.*, *Boulder Cnty. Complaint*, *supra* note 88, at ¶ 489–500.

99. *E.g.*, Complaint ¶ 600–39, Massachusetts v. ExxonMobil Corp., No. 19-3333, (Mass. filed Oct. 24, 2019) [hereinafter *Massachusetts Complaint*].

100. *E.g.*, *Minnesota Complaint*, *supra* note 92, at ¶ 199–211.

101. *Compare* Rhode Island Complaint, supra note 83, at ¶ 273–84, *with* Minnesota Complaint, supra note 92, at ¶ 199–211.

102. *Compare* Boulder Cnty. Complaint, supra note 88, at ¶ 489–500, *with* Minnesota Complaint, supra note 92, at ¶ 212–21.

103. *E.g.*, *Boulder Cnty. Complaint*, *supra* note 92, at ¶ 531–43. The monetary relief sought was described in one suit as the amount necessary to compensate plaintiffs for their past and future damages

fuel companies for breaches of their duties to consumers,[104] and each claim is rooted in the states' traditional police powers.[105]

Despite the fact that plaintiffs initially brought some of the new generation of climate change claims as far back as 2017, litigants have made precious little progress on the merits of the suits.[106] In large part, this is due to the fact that the parties to the lawsuits have already spent several years embroiled in a battle over whether there is any basis for removal of the state law claims to federal courts.[107] At first glance, a consensus appears to have emerged on this issue among circuit courts across the country, as several district and circuit courts have concluded that there is no basis for removal of the state climate change claims.[108] Now, however, the Supreme Court has granted certiorari to determine the propriety of the scope of review the circuit courts employed in their decisions.[109] While this jurisdictional battle is thus set to continue over the coming months, each passing day brings us closer to the inevitable preemption clash between the parties involved in the new generation of climate change litigation.

III. ANALYSIS

This Comment argues that it would be a mistake for courts to find that the CAA preempts state consumer protection claims that seek relief for fossil fuel corporations' contributions to global climate change through their production, marketing, and sale of fossil fuel products. The road to

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caused by the defendants' breaches, as well as the costs necessary to mitigate the impacts of climate change. *See id*. Of the equitable relief sought, none specifically requested the reduction of GHG emissions or the removal of products from the stream of commerce, though the monetary and equitable relief sought through design defect claims could indirectly require said reduction or removal. *See* analysis *infra* Section III.D.2.

104. *Rhode Island Complaint*, *supra* note 83, at ¶ 266–67.

105. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 35–36 (2007) (Stevens, J., dissenting) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (noting that consumer protection laws fall within the States' traditional regulatory powers).

106. *See* Benjamin, *supra* note 11, at 341.

107. *Id.*, at 341–42.

108. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 798 (10th Cir. 2020).

109. *Mayor & City Council of Baltimore v. BP p.l.c.*, CLIMATE CASE CHART (Oct. 2, 2020), http://climatecasechart.com/case/mayor-city-council-of-baltimore-v-bp-plc/ [https://perma.cc/S6Y8-KCLF] ("[T]he U.S. Supreme Court granted fossil fuel companies' petition for writ of certiorari seeking review of the Fourth Circuit's order remanding to state court Baltimore's climate change case against the companies . . . . The question the Supreme Court agreed to consider is whether the statutory provision prescribing the scope of appellate review of remand orders 'permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.'").

recourse for past, present, and future climate change harms is rife with difficulties, perhaps none of which plaintiffs will more consistently encounter than the looming threat of preemption by the CAA. To properly examine this all-important intersection between preemption doctrine and the consumer protection claims, this Comment will mirror the preemption analysis performed by courts nationwide. Thus, this analysis will begin with an examination of the CAA's two savings clauses and then proceed with an examination of the extent to which the consumer protection claims are susceptible to express, field, impossibility, and obstacle preemption.

A. Savings Clauses in the CAA

To what extent the CAA's savings clauses apply to consumer protection claims will be a new issue for the vast majority of courts across the country. In taking these first steps, courts should be mindful not to ascribe an unduly broad meaning to the CAA's two savings clauses. More specifically, while courts ought to interpret the savings clauses to expressly permit certain state claims arising from both state statutory and common law sources, they ought not interpret the savings clauses to cover the consumer protection claims at issue.

The CAA's two savings clauses expressly provide for the preservation of two different forms of legal authority in non-federal actors. The first savings clause states that the CAA shall not "preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."[110] The second savings clause states, in relevant part, that the CAA shall not "restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief."[111] Given that the plaintiff in each lawsuit involving the consumer protection claims is a "State or political subdivision," the first savings clause is of particular relevance.[112]

Facially, the range of claims that the savings clause preserves is unclear. The key issues for determining whether the savings clause expressly preserves the state consumer protection claims are whether (1) both statutory law and common law qualify as "standard[s] or

110. 42 U.S.C. § 7416.

111. *Id.* § 7604(e).

112. *E.g.*, Rhode Island Complaint, *supra* note 83, at ¶ 1.

limitation[s]," or "requirement[s]," and (2) if so, whether the common law and statutes from which the plaintiffs derive their consumer protection claims are in respect of "emissions or air pollutants" or "control or abatement of air pollution."[113]

On the first issue, the Supreme Court has previously addressed the meaning of the term "requirement," in a different context: cigarette labeling. In the case *Cipollone v. Liggett Group*, the Supreme Court conducted a preemption analysis involving the Federal Cigarette Labeling and Advertising Act of 1965 and its successor statute, The Public Health Cigarette Smoking Act of 1969.[114] Before reaching its ultimate conclusion regarding preemption, the Court had to determine whether the terms "requirements or prohibitions" encompassed state common law claims within the context of the former statute's express preemption clause.[115] The Court held that treating state common law claims as separate from "requirements or prohibitions" would be "at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions."[116] Further, the Court explained that the statute's use of the terms "requirements or prohibitions" suggested "no distinction between positive enactments," such as state statutes, "and the common law."[117] Finally, the Court stated that it must apply the ordinary meaning of "plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning."[118]

Given that the CAA uses the terms "standard," "limitation," and "requirement" in a manner similar to the Cigarette Labeling and Advertising Act, courts ought to follow the interpretation advanced in *Cipollone* unless there is a clear showing of congressional intent to the contrary.[119] Tellingly, the CAA's second savings clause offers significant evidence that Congress intended the terms to encompass both common law and statutes. The clause, which states that the CAA does not restrict the right of any person under "any *statute or common law* to seek enforcement of any emission *standard or limitation*," provides further evidence that Congress lacked an intent to limit the scope of its savings clauses to only

113. 42 U.S.C. § 7416, 7604(e).
114. 505 U.S. 504, 508–29 (1992).
115. *Id.* at 520–21.
116. *Id.* at 521.
117. *Id.*
118. *Id.*
119. *Compare* 42 U.S.C. § 7416, *with* 15 U.S.C. § 1334(b).

state statutes.[120] Consequently, regardless of whether the claims arise from common law or statute, courts ought to find that they constitute standards, limitations, or requirements.

Still, for the claims to fall under the protective umbrella of the CAA's savings clause, the state statutes and common law from which they arise must be "respecting emissions of air pollutants or . . . control or abatement of air pollution."[121] On this basis, courts ought not to extend the protections of the savings clause to state consumer protection claims. As a general matter, there is support within the CAA for broadly construing the "respecting" language of the savings clause to extend its protections to a wide array of statutes and common law. For example, in Congress's declaration of purpose within the CAA, the statute states "that air pollution . . . reduction or elimination, *through any measures* . . . is the primary responsibility of *States and local governments*."[122] Even still, the claims likely lack a close enough connection to emissions to find protection under the savings clause. Indeed, although the claims stress that GHG emissions are the cause of the climate change harms for which the plaintiffs seek relief,[123] the claims are predicated on the defendants' failure to uphold various duties to consumers in their production, marketing, and sale of fossil fuel products.[124] Simply, the goal of the claims is not to stop or regulate GHG emissions; instead, the goal is to "remediate the harm caused by [the defendants'] intentional, reckless and negligent conduct" in their activities involving fossil fuels.[125] Thus, while the savings clause ought to insulate certain claims arising from state law from preemption, the consumer protection claims ought not fall under that protective umbrella.

B. Express Preemption

Without the protection of the CAA's savings clauses, plaintiffs face the burden of persuading judges across the country that none of the four individual grounds for preemption are applicable for their consumer protection claims. While express preemption is lethal to claims or laws

120. 42 U.S.C. § 7604(e) (emphasis added).

121. *Id.* § 7416.

122. *Id.* § 7401(a)(1) (emphasis added).

123. *E.g.*, *Boulder Cnty. Complaint*, *supra* note 88, at ¶ 123, 139, 142.

124. *E.g.*, *Boulder Cnty. Complaint*, *supra* note 88, at ¶ 489–500.

125. *See Boulder Cnty. Complaint*, *supra* note 88, at ¶ 6 (stating "plaintiffs are not asking this court . . . to stop or regulate emissions in Colorado.").

that fall within a federal statute's express preemption provision(s), its efficacy, by definition, is nonexistent when there is no preemption provision on point.[126]

Fortunately for the consumer protection plaintiffs, the CAA lacks any express preemption provision that speaks to their claims. Within the entirety of the CAA, there is just one express preemption provision, which simply states that any "[s]tate or any political subdivision" act is preempted by the CAA insomuch as it "attempt[s] to enforce any standard relating to the control of emissions" from motor vehicles.[127] Given that none of the common law or statutory law from which the consumer protection claims derive from or pertain to motor vehicle emission standards, the CAA certainly does not expressly preempt state consumer protection claims.[128]

Of course, express preemption provisions are not made in a vacuum; the inclusion or exclusion of express preemption provisions are a strong indication of congressional knowledge and intent.[129] As such, courts have interpreted the absence of an express preemption provision related to certain state lawsuits to serve as an inference against a finding of obstacle preemption between a given statute and those same state lawsuits.[130] Moreover, the Supreme Court has stated that this inference weighs particularly strongly when the statute contains at least one express preemption provision, but none that speaks to the claims at issue.[131] Finally, when there is no express preemption provision on point and "Congress has indicated its awareness of the operation of state law in a field of federal interest . . . and nonetheless decided to . . . tolerate whatever tension there [is] between them," "the case for federal preemption is particularly weak."[132] With regard to the CAA, Congress expressly preserved state regulatory and remedial authority over emissions in the CAA's first savings clause.[133] Additionally, within the plain text of the CAA, Congress advocated for shared authority between federal, state, and local entities in air pollution initiatives.[134] Thus, considering

126. *See* Raeker-Jordan, *supra* note 53, at 1383.

127. 42 U.S.C. § 7543(a).

128. *See, e.g.*, Massachusetts Complaint, *supra* note 99, at ¶ 781–830.

129. Wyeth v. Levine, 555 U.S. 555, 574–75 (2009).

130. *Id.*

131. *Id.*

132. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989) (internal quotation marks omitted) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984)).

133. 42 U.S.C. § 7416.

134. *See id.* § 7401 (stating that "air pollution prevention . . . is the primary responsibility of

Congress's tolerance of joint authority, as well as its decision not to author an express preemption provision regarding any state consumer protection claims, courts ought to balance their preemption analysis with a particularly weighty inference against preemption.

C. Field Preemption

Field preemption presents a strong, yet still likely insufficient basis for a court to find that the CAA preempts the consumer protection claims. Generally, field preemption analysis follows a two-step structure, where the first step is to determine whether there is a clear congressional intent to occupy a given regulatory field, and the second step is to determine whether a given state law falls within said field.[135] The analysis is more complex in this instance, however, as courts could vary in which field they believe is proper for purposes of analyzing field preemption. On the one hand, because the claims are directed at fossil fuel product companies for violating duties to consumers, courts could determine that the proper field is the field of fossil fuel product regulation. On the other hand, however, because plaintiffs are employing these claims as bases for recovery from climate change harms, courts could determine that the field of air pollution regulation is the proper field for this analysis.

This overlap in fields is a familiar issue within the context of CAA preemption disputes. For example, in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, a Fourth Circuit case where the court extended the *Ouellette* source state rule to litigation involving GHG emissions, the court held that the CAA preempted affected state nuisance claims on a field preemption basis.[136] Much like consumer protection claims, nuisance claims arise from laws that lack any intrinsic connection to climate change or GHG emissions.[137] Instead, their relevance to climate change litigation lies in generally applicable language.[138] Even still, their use in claims that incidentally implicate the CAA provides sufficient ground for courts to consider the laws "within the field" of air pollution for purposes of a preemption analysis.[139] As such, to provide a full range

States and local governments" and that "[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, *State*, and *local governmental* actions . . . for pollution prevention.") (emphasis added).

135. English v. Gen. Elec. Co., 496 U.S. 72, 80–83 (1990).

136. 615 F.3d 291, 302–04 (4th Cir. 2010).

137. *See generally* Restatement (Second) of Torts § 821B (Am. L. Inst. 1979).

138. *See id.* § 821B(1) ("A public nuisance is an unreasonable interference with a right common to the general public.").

139. *E.g.*, *Cooper*, 615 F.3d at 302–04.

of analysis, this subsection will provide two separate field preemption analyses: one for the field of fossil fuel product regulation and another for the field of air pollution regulation.

1. Field of Consumer Protection

Should courts determine that the laws from which the consumer protection claims derive fall purely within the field of fossil fuel product regulation, there is little ground for preempting the claims on a field preemption basis. Again, even if a state law falls within a given field, there is only field preemption if there is a clear congressional intent to occupy a field.[140] Additionally, there can be no clear intent unless the field is one in which federal law is so pervasive and comprehensive that it leaves "no room for the States," or where there is a dominant federal interest.[141]

It is highly doubtful that any court could conclude that there is sufficiently pervasive and comprehensive federal law within the field of fossil fuel product regulations for field preemption to be valid. For the sake of comparison, the field of employee benefits represents a paradigmatic example of a field that is federally occupied by virtue of sufficiently pervasive and comprehensive regulation.[142] Within the Employee Retirement Income Security Act, the statute which governs the field, there is explicit federal authority over virtually every facet of employee benefits, including the establishment of coverage and fiduciary standards, penalties for noncompliance, and enforcement mechanisms, as well as a statutory provision which expressly describes the congressional will to invalidate any state laws within the field.[143]

Such a highly regulated field stands in sharp contrast with the field of fossil fuel product regulation. Notably, no federal statutes or regulations govern the sale and marketing of fossil fuel products, the very same commercial activity for which plaintiffs are employing consumer protection claims.[144] More broadly, "downstream" activity, which encompasses the refining, marketing, and sale of fossil fuel products, is subject to federal regulation only insofar as the downstream activities

140. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

141. *Id.*

142. *See* Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 11 (2001).

143. *See generally* PATRICK PURCELL & JENNIFER STAMAN, CONG. RSCH. SERV., RL34443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) (2008).

144. Rothschild, *supra* note 28, at 437–38.

intersect with general rules that apply to virtually all industrial activity, regardless of the field said activity falls within.[145] This absence of regulatory authority is especially significant considering that the federal government today occupies regulatory fields pertaining to the marketing and sales of other products, demonstrating the federal government's ability to occupy analogous fields, should it have the desire.[146] On the other hand, status-quo state statutory and common law reflects the states' robust will and ability to regulate the production, marketing, and sale of products, albeit through generally applicable laws, rather than any directly tied to fossil fuel products.[147] Considering that these laws exist in a space almost entirely untouched by federal law, it is difficult to say that federal law within the field of fossil fuel product regulation is sufficiently pervasive or comprehensive for field preemption purposes.

By extension, there is almost certainly no dominant federal interest in the field of fossil fuel consumer protection. Though the "dominant federal interest" standard is quite opaque, it is typically only applicable to fields like nuclear energy and international immigration "that have significant national or international implications for the United States," such that even complementary state laws would disrupt the federal regulatory scheme.[148] The absence of a federal regulatory scheme specific to downstream activity creates a significant inference against the idea that there is a dominant federal interest in fossil fuel products.[149] This inference is strengthened further by the fact that Congress, contrastingly, has established comprehensive regulatory schemes for many of the "upstream" and "midstream" aspects of the fossil fuel industry, such as exploration ventures and resource transportation, respectively.[150]

145. *See id.* at 437 ("At present, there are no statutory provisions or regulations governing the marketing and sale of oil. These companies are subject to the same general rules as other industrial businesses."); *see also* JOSEPH H. FAGAN, BECKY M. BRUNER, MICHAEL S. HINDUS & ROBERT A. JAMES, ELECTRICITY, OIL AND GAS REGULATION IN THE UNITED STATES 150–55 (2010), https://www.ourenergypolicy.org/wp-content/uploads/2013/08/ElectricityOilandGasRegulationintheUnitedStates.pdf [https://perma.cc/TS4L-K5AC].

146. *See* 15 U.S.C. § 1331–40 (reflecting the breadth of federal regulation over cigarette sales and marketing).

147. *E.g.*, COLO. REV. STAT. ANN. § 6-1-105 (West, Westlaw through 1st Reg. Sess. of 73d Assemb. (2021)).

148. Nancy D. Adams, *Title VI of the 1990 Clean Air Act Amendments and State and Local Initiatives to Reverse the Stratospheric Ozone Crisis: An Analysis in Preemption*, 19 B.C. ENV'T AFFS. L. REV. 173, 210–11 (1991).

149. *See supra*, notes 140–42; Ga. Latino All. for Hum. Rts. v. Governor of Ga., 691 F.3d 1250, 1264 (11th Cir. 2012) (explaining that the breadth of laws within a given field can serve as an indication of a dominant federal interest).

150. *See* FAGAN ET AL., *supra* note 145, at 152–53.

Moreover, the multitude of state laws of general applicability across the country that both speak to the issue of fossil fuel product regulation and, to this date, have gone unchallenged by the federal government, rebuts any potential argument that there is no room for states within the regulatory field.[151] Altogether, then, if courts determine that fossil fuel product regulation is the proper field, there is no basis for a determination of field preemption of the consumer protection claims.

2. Field of Air Pollution Regulation

Though the field preemption analysis is more complicated if courts determine that air pollution regulation is the proper field to evaluate the claims, courts still ought not find that the consumer protection laws are preempted on a field preemption basis. Though there is significantly more federal regulation within the field of air pollution than in the field of fossil fuel products, the regulation still lacks a sufficient level of comprehensive or pervasiveness for field preemption to be valid. Moreover, there is little basis for the idea that air pollution is a field in which there is a dominant federal interest.

As evidenced by the CAA's provisions and history, courts ought not determine that federal air pollution regulation is sufficiently comprehensive or pervasive. First and foremost, Congress built the CAA around the notion of "cooperative federalism," wherein state and federal actors alike share regulatory responsibilities.[152] The practical effect of this framework is that state entities maintain a large degree of flexibility in their implementation of "key policy choice[s]," while the federal government maintains oversight authority over state decisions.[153] These policy choices encompass some of the most important aspects of air pollution regulation, including the promulgation of limitation measures, determining whether regulations are necessary to bring the state into compliance with the EPA's National Ambient Air Quality Standards, and the establishment of monitoring and enforcement programs.[154] In

151. *See e.g.*, COLO. REV. STAT. § 6-1-105 (West, Westlaw through 1st Reg. Sess. of 73d Assemb. (2021)) ("A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person . . . knowingly or recklessly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods . . . .").

152. Holly Doremus & W. Michael Hanemann, Of Babies and Bathwater: *Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 817–18 (2008).

153. *Id.*

154. *See id.*

addition, because the CAA is merely a floor-setting statute, except with regard to motor vehicle emissions,[155] states have the authority to set more stringent requirements regarding air pollution on their own accord.[156] This delegation of authority to the states is consistent with Congress's perspective that "air pollution prevention . . . is the primary responsibility of States and local governments."[157]

Moreover, even if there was no shared authority within the field, the CAA's savings clause negates "the inference that Congress 'left no room' for state causes of action."[158] Simply, by expressly preserving state claims arising from airborne pollution, the CAA preserves state remedial authority within the field, which, as the Supreme Court held in *Oullette*, is determinative in a field preemption dispute.[159] This perspective is further supported by the legislative history of the CAA. For example, "the legislative record of the 1970 Clean Air Act states, '[c]ompliance with standards under this Act would not be a defense to a common law action for pollution damages,'" meaning that Congress never possessed an intent to exclude states from exercising remedial authority within the regulatory field.[160] In sum, then, not only is the current federal regulatory scheme for air pollution built upon a foundation of state authority, but per the will of Congress, it was also designed with the preservation of state remedial authority in mind, the very authority that plaintiffs employ in their climate change actions. Thus, considering that it is both known and accepted that non-federal actors possess authority within the field of air pollution regulation, it would be inappropriate to conclude that federal law is so pervasive and comprehensive within the field that there is no room for states.

The broad status-quo authority of states within the field also provides ample evidence that there is no dominant federal interest within the field. If there is indeed a dominant federal interest in the field, then the very existence of shared federal and state authority over air pollution would

155. 42 U.S.C. § 7543(a).

156. Bell v. Cheswick Generating Station, 734 F.3d 188, 197–98 (3d Cir. 2013); *see also* Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. UNIV. L. REV. 579, 626 (2008).

157. 42 U.S.C § 7401(a)(3).

158. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987).

159. *Id.*; 42 U.S.C. § 7416.

160. Rothschild, *supra* note 28, at 439 (quoting S. REP. NO. 91-1196, at 38, *reprinted in* 1 S. COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 438 (1974)).

prove disruptive to the federal government's regulatory scheme.[161] This is not the case within the field of air pollution regulation, however, as the success of the federal regulatory efforts is reliant on the cooperative federalism scheme envisioned by the CAA. Without the remedial and regulatory efforts put forth by the state, there would be massive gaps in the regulatory scheme concerning the creation and monitoring of emission standards, enforcement measures, and penalties for conduct that, though compliant with the floor set by the CAA, harms states and their residents.[162] Thus, because the field's regulatory scheme is reliant on state actors, it stands to reason that there cannot be a dominant federal interest in the field. Moreover, because there is neither a dominant federal interest nor sufficiently comprehensive or pervasive federal law within the field, regardless of whether the consumer protection claims actually fall within the field, there is no basis for field preemption.

D. Conflict Preemption

With field and express preemption off the table, only conflict preemption remains as a potentially viable preemption category. Conflict preemption, however, encompasses two distinct forms of preemption: impossibility preemption and obstacle preemption.[163] Though there is likely no basis for a finding of either subcategory of preemption, there is a far more compelling argument in favor of obstacle preemption than impossibility preemption.

1. Impossibility Preemption

There is virtually no basis for preempting the consumer protection claims on impossibility preemption grounds. Impossibility preemption exists only in a single circumstance: when it is literally impossible to comply with both federal and state law.[164] To illustrate this standard, the Supreme Court has described a hypothetical situation where a federal law proscribes the sale of avocados with an oil content more than 7%, but a state law proscribes the sale of avocados with an oil content below 8%.[165] The circumstance described in this hypothetical, where compliance with federal law necessarily means a violation of state law, or vice versa, makes

161. *See* Adams, *supra* note 148, at 211.
162. *See supra* notes 138–46.
163. *See* Raeker-Jordan, *supra* note 53, at 1383.
164. *Id.*
165. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963).

up the only time in which a court may validly strike down laws or claims on the basis of impossibility preemption. For the CAA to preempt the consumer protection claims, then, it must be impossible for entities to comply with the CAA without violating the laws from which the consumer protection claims derive, or vice versa.

Considering both the conduct required and prohibited by the CAA and the four main categories of consumer protection claims, there is no basis for a court to render the claims invalid on impossibility preemption grounds. While the intricacies of the consumer protection laws may vary from state to state, compliance with the each of the four categories of claims generally requires the same actions and inactions. More specifically, each failure to warn law requires entities to issue adequate warnings regarding the risks associated with the entities' products,[166] each deceptive trade practice law prohibits the use of statements in advertising that falsely represents a product to consumers,[167] each design defect law requires entities to not introduce defective products into the stream of commerce,[168] and each fraud/misrepresentation law prohibits the use of fraudulent acts or misrepresentations in the production, marketing, and sale of products.[169]

Correspondingly, for impossibility preemption to be valid, there must be some indication, of which there is none, that compliance with the CAA would necessarily result in a violation of one or more of the consumer protection laws. Ultimately, the only duties created by the CAA are those that relate to keeping emissions of airborne pollutants below a certain numerical threshold,[170] maintaining sufficient records of emission activities,[171] and other necessary emission management and prevention conduct.[172] In fact, in the rare circumstances where there is overlap between the CAA and consumer protection laws, the two serve as natural complements of one another in their efforts to control emissions and

166. *Compare Baltimore Complaint*, *supra* note 14, at ¶ 271, *with* Complaint ¶ 186, City & Cnty. of Honolulu v. Sunoco LP, No. 1CCV-20-0000380 (Haw. filed Mar. 9, 2020).

167. *Compare* Massachusetts Complaint, *supra* note 99, at ¶ 773, *with* Minnesota Complaint, *supra* note 92, at ¶ 223.

168. *Compare* Baltimore Complaint, *supra* note 14, at ¶ 263, *with* Rhode Island Complaint, *supra* note 83, at ¶ 266.

169. *Compare* Massachusetts Complaint, *supra* note 99, at ¶ 814, 817, *with* Minnesota Complaint, *supra* note 92, at ¶ 185.

170. *E.g.*, 42 U.S.C. § 7521(a)(3)(B)(ii).

171. *E.g.*, *id.* § 7414(a)(1).

172. *See generally* CONG. RSCH SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS (2020).

protect consumers from harm and fraudulent conduct.[173] As such, there is virtually no basis for impossibility preemption regarding the relationship between the CAA and consumer protection laws.

2. Obstacle Preemption

Obstacle preemption is both the basis upon which *Ouellette* and its progeny preempted state common law claims in years past, as well as the best argument in favor of the preemption of state consumer protection claims.[174] Even still, however, courts ought not preempt the consumer protection claims on obstacle preemption grounds. A court may render a law invalid on obstacle preemption grounds when the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[175] Thus, an obstacle preemption analysis must begin and end with the purpose underlying a given act or regulatory scheme.

Congress's purposes in its promulgation of the CAA in its current form are explicitly stated within the Act's text. Specifically, Congress declared four purposes for the CAA: (1) protecting and enhancing America's air resources, (2) initiating and accelerating a research and development program to prevent and control air pollution, (3) providing technical and financial aid to state and local governments for their air pollution programs, and (4) encouraging and aiding in the development of regional air pollution programs.[176] The consumer protection claims could not serve as an obstacle to achieving the latter three purposes, as each pertain to a financial or logistical relationship between federal, state, or local actors, whereas the state consumer protection claims pertain to a state-imposed duty on private actors in their dealings with citizens.[177] Thus, entities seeking to preempt consumer protection claims on obstacle preemption grounds would likely need to base their arguments around the

173. *See* 42 U.S.C. § 7522(a)(3)(A) (prohibiting acts that remove or render inoperable any devices on motor vehicles designed to bring the vehicles in compliance with the CAA's requirements); *see also In re* Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1064 (E.D. Mich. 2018) (rejecting an argument that state fraud claims predicated on the defendant's use of a "defeat device" to circumvent CAA requirements are implicitly preempted by the CAA).

174. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); *see also id.* at 504 (Brennan, J., concurring in part and dissenting in part).

175. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

176. 42 U.S.C. § 7401(b)(1)–(4).

177. *Id.*

idea that consumer protection claims stand as an obstacle to the Act's first purpose: the protection of American air resources.

One could attempt to create such an argument on the basis that the consumer protection laws, in one way or another, present an obstacle to the achievement of the aforementioned purpose by impairing the efficacy of one or more specific provisions within the CAA, though this would almost certainly fail. The key issue in making such an argument is that the CAA lacks a single provision that speaks specifically to fossil fuel products, much less consumer protection duties in relation to commercial activity involving said products.[178] Moreover, even within the context of motor vehicles, products that the CAA does play a role in regulating, courts have stated that consumer protection claims do not per se fall within the ambit of the CAA for obstacle preemption purposes.[179] Simply, "[t]he EPA is tasked with *environmental* protection, not *consumer* protection," a fact that echoes throughout the CAA's text and is fatal to any obstacle preemption argument tied to a potential conflict with any one CAA provision.[180]

Still, there is room for a relatively persuasive argument that, while state consumer protection claims do not pose an obstacle to any one specific CAA provision, enabling states to impose penalties on fossil fuel companies for their breaches of duty to consumers in relation to GHG emissions would pose an obstacle to the general regulatory scheme created by the CAA. This argument has its roots in *Ouellette*, where the Court determined that allowing any affected states to enforce their own nuisance laws against a given polluter would create such a "chaotic regulatory structure" that it would present an obstacle to the achievement of the Clean Water Act's purpose.[181] This argument has succeeded in airborne pollution cases under the CAA as well, as courts have noted that affording affected states the right to bring state nuisance claims under the given state's law against a source of GHG emissions in a different state would result in a "patchwork" of standards that would serve as an obstacle to protecting air resources.[182] Indeed, as the court noted in *North Carolina*

178. *See generally* 42 U.S.C. §§ 7401–7671.

179. *In re* Caterpillar, Inc., No. MDL No. 2540, 2015 U.S. Dist. LEXIS 98784, at *51–55 (D.N.J. July 29, 2015); *In re* Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1064–65 (E.D. Mich. 2018).

180. *In re Duramax Diesel Litig.*, 298 F. Supp. 3d at 1064.

181. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496–97 (1987).

182. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 302 (4th Cir. 2010). The "patchwork" argument endorsed by the court in *Cooper*, is not without its own challenges, however, with one commenter noting that "patchwork" regulation is both a fixture of status-quo regulatory efforts and a necessary protection for traditional state powers. *See* William W. Buzbee,

ex rel. Cooper v. Tennessee Valley Authority, variant standards enforced by different states could cause rushed changes to emitting facilities that lack the efficacy of a "system-wide analysis of where changes will do the most good," incentivize power companies to emit pollutants to a greater degree in areas where there are less demanding standards, and result in countless other unpredictable consequences for regulatory efforts under the CAA.[183]

Though this argument aligns with CAA preemption precedent, there is a significant difference between consumer protection claims and the nuisance claims described above, a difference that ought to be dispositive to an obstacle preemption argument based around the CAA's regulatory scheme. Namely, the consumer protection claims, with one exception, only incidentally relate to the CAA and its regulatory scheme; neither compliance with nor enforcement of consumer protection laws encroach upon or affect the scheme envisioned by Congress to effectuate the Act's purposes. In *Cooper* and other CAA preemption cases, the nuisance claims, if successful, would have enabled extraterritorial regulation of out-of-state GHG emitters by state entities either directly, with injunctions, or indirectly, by requiring payment of damages.[184] In so doing, the nuisance claims would have circumvented the regulatory scheme envisioned by the CAA, where states are afforded significant authority to prescribe emissions standards, but only within their own borders.[185]

By contrast, three of the four categories of consumer protection claims—failure to warn, fraud and misrepresentation, and deceptive trade practice—do not permit any form of extraterritorial regulation of fossil fuel companies' GHG emissions by state entities; instead, they merely endeavor to regulate and punish the companies' failures to uphold their duties to consumers related to proper warnings, false advertising, and fraudulent behavior in their downstream activity involving fossil fuel products.[186] In fact, the claims do not even regulate GHG emissions *within* the state's jurisdiction, as the companies could continue or even increase their status-quo GHG emitting activities so long as they complied with the duties to consumers involving proper warnings, trade practices, and fraudulent conduct. Because the claims affect neither individuals nor

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Federalism Hedging, Entrenchment, and the Climate Challenge, 2017 WIS. L. REV. 1037, 1099–1110 (2017).

183. 615 F.3d at 302.

184. *E.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018).

185. *See Cooper*, 615 F.3d at 306.

186. *See generally* Baltimore Complaint, *supra* note 14.

entities in any way relevant to the CAA, there is little room to argue that they present any obstacle to the accomplishment of the CAA's purposes.

Design defect claims, the fourth category of consumer protection claims, however, are different. The central thrust of design defect claims is that entities ought to be liable for harm foreseeably caused by a defective product, and, at least from the plaintiffs' perspectives, products that create GHG emissions in their ordinary use are defective.[187] To remedy the harm, plaintiffs can pursue both equitable and legal relief.[188] Moreover, the entirety of the companies' downstream fossil fuel activities serve as the basis for the claims, rather than just activity within a given source state.[189] Consequently, if successful, the claims enable both direct and indirect extraterritorial regulation of fossil fuel companies, wherein companies must reduce the extent to which both intrastate and out-of-state downstream activities contribute to climate change under the threat of liability and/or injunctions.[190] As such, the claims ostensibly go beyond a mere incidental relation to the CAA; instead, by threatening financial and legal repercussions for the continued production, marketing, and sale of fossil fuel products, the claims appear to directly intersect with the CAA's purposes and the regulatory scheme created to effectuate said purposes.

Appearances can be deceiving, however. Though the claims certainly implicate matters involving GHG emissions to a greater extent than the other consumer protection claims, they still do not create an obstacle to the accomplishment of the CAA's purposes. While federal precedent suggests that extraterritorial regulation of GHG emissions by state and local entities presents the potential for interference with the CAA's regulatory scheme, the cases only speak to one form of regulation.[191] In *Ouellette* and associated CAA preemption cases, the claims at issue all endeavored to regulate stationary sources of pollutants, rather than the companies responsible for the products that created the pollutants.[192] Design defect suits, by contrast, do not involve any stationary sources, instead focusing their attention on fossil fuel products and the companies responsible for them.[193] This distinction is key because the CAA is silent on regulation of fossil fuel products; instead, the CAA institutes a regulatory scheme to

187. *See Baltimore Complaint*, *supra* note 14, at ¶ 261–69.
188. *E.g.*, *Baltimore Complaint*, *supra* note 14, at § VII.
189. *See Baltimore Complaint*, *supra* note 14, at ¶ 261–69.
190. *See* Baltimore Complaint, supra note 14, at § VII.
191. *E.g.*, North Carolina *ex rel*. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296 (4th Cir. 2010).
192. *Id.*
193. *See Baltimore Complaint*, *supra* note 14, at ¶ 261–69.

manage emissions from the stationary and mobile constructs that use said products.[194] Because neither the companies nor their products constitute a "source," regulatory efforts involving said companies and products have no bearing on the CAA nor its regulatory scheme,[195] a view echoed in several CAA preemption cases involving other product types.[196] Overall, then, while the design defect claims bear a connection with the CAA, they do not pose an obstacle to the achievement of the CAA's purposes, as they only seek to regulate entities and products beyond the reach of the CAA.

Altogether, then, there is no singular provision within the CAA that the consumer protection claims even somewhat interfere with. Moreover, while there is an argument in line with existing CAA preemption precedent that permitting state consumer protection claims against companies that produce, market, and sell fossil fuel products could detrimentally affect the CAA's regulatory scheme, this argument has a substantial flaw. While the state law claims featured in those cases would have had a direct effect on the CAA's regulatory scheme, and by extension, the accomplishment of its purposes, three of the four categories of consumer protection claims have no bearing on any CAA regulatory efforts or matters relevant to CAA regulatory efforts. While the fourth category, design defect claims, may appear to have a substantial effect on matters relevant to CAA regulation, because the CAA does not regulate fossil fuel products, it cannot be said that the claims pose an obstacle to the achievement of the CAA's purposes. As such, there is likely no basis for preempting any of the consumer protection claims on an obstacle preemption basis.

IV. CONCLUSION

The past several years of climate change litigation have resulted in dead end after dead end for plaintiffs, often due to CAA preemption. Though the pending consumer protection claims directed at fossil fuel companies for their allegedly fraudulent, negligent, and deceptive practices in relation to fossil fuel products are inextricably linked to climate change, they ought not befall the same fate as their predecessor claims. By bringing claims against fossil fuel corporations for their failures to uphold state-imposed duties to consumers in downstream activities, the plaintiffs bringing these claims can deftly clear the hurdles

194. Rothschild, *supra* note 28, at 449.

195. *Id.*

196. *Id.* (citing *In re* Caterpillar, Inc., No. MDL No. 2540, 2015 U.S. Dist. LEXIS 98784, at *47 (D.N.J. July 29, 2015); *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs. & Prods. Liab. Litig., 295 F. Supp. 3d 927, 990–1003 (N.D. Cal. 2018)).

posed by preemption doctrine. While avoiding preemption may amount to little more than another day of survival for the claims, considering the gravity of the issue underlying the suits, the value of another day of survival cannot be understated.