Cleaning up the Confusion: Climate Change Litigation and Preemption

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I. Introduction

Climate change has been described as a "global emergency that goes beyond national borders."[2] Ninety-seven percent of scientists endorse the view that the current state of global warming is a direct result of human activity; namely the impact of urbanization and the burning of fossil fuels.[3]

Global warming is the long-term heating of Earth's climate system.[4] Since the pre-industrial period, scientists have estimated that human activities have increased Earth's global average temperature by 1.8 degrees Fahrenheit.[5] A famous 1998 illustration shows how global temperatures remained relatively flat before taking a sharp uptick.[6] On the other hand, climate change is the long-term change in the average weather patterns that define Earth's climate.[7] Climate change is primarily caused by the burning of fossil-fuels, which emits greenhouse gases that are then trapped in the Earth's atmosphere, raising Earth's average surface temperature.[8] According to the National Aeronautics and Space Administration ("NASA"), climate change has

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[2] *The Paris Agreement*, UNITED NATIONS, https://www.un.org/en/climatechange/paris-agreement (last visited Dec. 17, 2021).

[3] John Cook et. al., C*onsensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming*, ENVIRONMENTAL RESEARCH LETTERS (2016).

[4] *Overview, Weather, Global Warming, and Climate Change*, NAT'L AERONAUTICS AND SPACE ADMIN., https://climate.nasa.gov/resources/global-warming-vs-climate-change/ (last updated Dec. 13, 2021) (hereinafter "NASA").

[5] *Id.*

[6] Michael E. Mann, Raymond S. Bradley & Malcolm K. Hughes, *Northern Hemisphere Temperatures During the Past Millennium' Inferences, Uncertainties, and Limitations*, 26 GEOPHYSICAL RESEARCH LETTERS 759, 1999, https://agupubs.onlinelibrary.wiley.com/doi/pdfdirect/10.1029/1999GL900070 (describing the significant increase in temperature trends).

[7] NASA, *supra* note 4.

[8] *Id.*

already impacted the environment through shrunken glaciers, melting ice, shifts in plant and animal ranges, loss of sea ice, accelerated rising sea levels, and intense heat waves.[9]

NASA predicts that there are already long-term impacts of global climate change that are happening in the United States and will continue to happen for years to come.[10] Some of these changes include rise in temperatures, the lengthening of frost-free seasons which impact agriculture and ecosystems, changes in precipitation patterns, more droughts and heat waves, stronger hurricanes that cause more disruption, a rise in sea levels, and an ice-free Artic Ocean.[11] These changes are already happening throughout numerous regions in the U.S. and will continue based on current trends.[12]

Because of this global crisis, litigation in the U.S. over climate change has spiked over the last few years.[13] The United Nations Environment Programme's Global Climate Litigation Report, published in early 2021, noted that over the last three years climate cases have nearly doubled, with 1,200 cases filed in the United States alone.[14] The report identified a growing number of plaintiffs that sought legal redress from private actors for the private actors alleged contribution to climate change.[15] These private actor defendants are frequently oil and gas companies.[16] While the United States Supreme Court has addressed certain climate change litigation on procedural

[9] NASA, *supra* note 4.
[10] *The Effects of Climate Change*, NATIONAL AERONAUTICS AND SPACE ADMIN., https://climate.nasa. gov/effects/ (last visited Mar. 19, 2022).
[11] *See Id.*
[12] *See Id.*
[13] *Global Climate Litigation Report: 2020 Status Review*, UNITED NATIONS https://wedocs.unep.org/ bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y (Jan. 26, 2021).
[14] *Id.*
[15] *Id.*
[16] *See e.g.*, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021); Bd. of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020); City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020); County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020); Rhode Island v. Shell Oil Products Co., L.L.C., 979 F.3d 50 (1st Cir. 2020); City of Hoboken v. Exxon Mobil Corp., 20-CV-14243, 2021 WL 4077541 (D.N.J. Sept. 8, 2021); City of Annapolis, Maryland v. BP P.L.C., CV ELH-21-772, 2021 WL 2000469 (D. Md. May 19, 2021); City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

grounds, it has not addressed whether state law tort claims against fossil fuel corporations are preempted by federal law,[17] namely, the Clean Air Act ("CAA").[18] However, the Second Circuit recently found that the City of New York's action against a large fossil fuel company was preempted by the CAA.[19]

This Article aims to outline why fossil fuel companies sued under state law likely have a valid preemption defense. Specifically, this Article proffers that based on the purpose of the CAA, and the Supreme Court's decisions in two seminal cases discussing the purpose of the CAA and the Environmental Protection Agency's ("EPA") role in CAA enforcement, [20] federal law preempts state law causes of actions against fossil fuel companies for the impacts their fossil fuel emissions have on global climate change.

II. Overview of Federal Common Law and Displacement

Although there is no federal general common law,[21] there remains limited areas of law in which federal common law exists because of the uniquely federal interests.[22] When Congress is silent on an issue, and there exists a "significant conflict between some federal policy or interest and the use of state law, the Court has found it necessary, in a few and restricted instances, to develop federal common law."[23] The Court has held that when dealing with "air and water in their

[17] *See* BP P.L.C. v. Mayor and City Council of Baltimore, 141 U.S. 1532 (2021) (ruling on procedural issue of removal and remand); *See also*, Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 429 (2011) (noting that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand").
[18] Clean Air Act, 42 U.S.C. § 7401.
[19] City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).
[20] *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011); Massachusetts v. EPA, 549 U.S. 487 (2007).
[21] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[22] City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 313 (1981).
[23] *Id.* at 313.

ambient or interstate aspects" federal common law exists.[24] However, federal common law is subject to Congressional action.[25]

When Congress acts, addressing a question "previously governed by a decision rested on federal common law" the need for federal common law and lawmaking by the federal courts disappears.[26] When determining whether federal common law is displaced, the Court starts with the presumption that Congress articulated the appropriate standards to be applied as a matter of federal law.[27] In contrast to preemption, displacement does not require the same clear and manifest purpose of Congress.[28]

III. Overview of Preemption

State laws that interfere with, or are contrary to, federal laws, are invalidated under the Supremacy Clause of the U.S. Constitution.[29] When a federal law invalidates or supersedes a state law, it is referred to as preemption.[30] Preemption can be both express or implied and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[31] In the absence of explicit preemptive language, there are two types of implied preemption: (1) field preemption and (2) conflict preemption.[32]

Implied field preemption analysis begins by ascertaining Congress' purpose of enacting certain legislation.[33] Unless there is a "clear and manifest purpose of Congress" to supersede the power of

[24] Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972).
[25] *City of Milwaukee*, 451 U.S. at 313.
[26] *Id.* at 314.
[27] *Id.* at 317.
[28] *Id.*
[29] *See* U.S. CONST. art. VI, cl. 2, (providing that the "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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"); *see also* Gibbons v. Ogden, 22 U.S. 1, 211 (1824).
[30] Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985).
[31] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).
[32] *Id.* at 98.
[33] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

the states in a certain field, federal law will not preempt the state's power.[34] The Court has held Congress's purpose may be evidenced where "the scheme of federal regulation [is] … so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it."[35] Further, field preemption may be evidenced by the fact that the Act in question touched "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."[36]

Even where Congress has not completely preempted state law in a specific field, state law is preempted where compliance with federal and state regulations is impossible, or where state law is an obstacle to the accomplishment and execution of Congressional purposes and objectives.[37] To determine whether compliance between state and federal regulations is possible, the test is whether both regulations can be enforced without impinging on the federal "superintendence" of the field.[38] In ascertaining whether state law is an obstacle to Congressional objectives, the Court considers "the nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering … whether supreme federal enactments preclude enforcement of state laws on the same subject."[39] State laws can be preempted through federal regulations or federal statutes.[40]

IV. The Clean Air Act

Congress first passed the Clean Air Act in 1963, one of the first pieces of federal legislation regarding air pollution control.[41] Congress passed this legislation as a direct response to a

[34] *Id.* at 230.
[35] *Id.*
[36] *Rice*, 331 U.S. at 230.
[37] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).
[38] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).
[39] Hines v. Davidowitz, 312 U.S. 52, 70 (1941).
[40] Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985).
[41] Clean Air Act of 1963, Pub. L. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. § 7401 (2021)).

proliferation of the urbanized world which led to increased levels of air pollution and Ozone depletion.[42] In passing the legislation, Congress reiterated that air pollution prevention "at its source is the primary responsibility of States and local governments; and that Federal financial assistance and leadership is essential for development of cooperative … programs to prevent and control air pollution."[43] The CAA's purpose was outlined with two overarching congressional goals: first, to promote public health and welfare and develop tools to combat air pollution; second, to provide assistance to states and local governments to implement "regional air pollution prevention and control programs."[44]

In 1970, Congress authorized four major regulatory programs: the NAAQs, State Implementation Plans ("SIPs"), New Source Performance Standards, ("NSPS"), and National Emission Standards for Hazardous Air Pollutants ("NESHAPs").[45] In conjunction with the CAA, Congress passed the National Environmental Policy Act,[46] establishing the EPA, the policing unit tasked with implementing and regulating various requirements included in the various pieces of environmental regulatory legislation.[47] The CAA authorizes the EPA to, among other things, establish National Ambient Air Quality Standards ("NAAQS") that protect the public and to regulate emissions of hazardous air pollutants.[48]

In 1977, Congress made significant changes to the original CAA concerning NAAQS.[49] Finally, in 1990, the federal government's authority and responsibility under the Act significantly increased with another round of amendments.[50] In the EPA's Journal published after the 1990

[42] 42 U.S.C. § 7401 (a)(1)-(2).
[43] 42 U.S.C. § 7401 (a)(3)-(4).
[44] 42 U.S.C. § 7401 (b)(1)-(4).
[45] Clean Air Act of 1970, Pub.L. 91-604, 84 Stat, 1676 (1970) (codified as amended 42 U.S.C. § 7401).
[46] National Environmental Policy Act, 42 U.S.C. § 4321.
[47] *Id*.
[48] 42 U.S.C. § 7409 (b)(1).
[49] Clean Air Act of 1977, Pub.L. 95-95, 91 Stat. 139 (1977) (codified as amended 42 U.S.C. § 7401).
[50] Clean Air Act of 1990, Pub.L. 101-549, 104 Stat. 2399 (1990) (codified as amended 42 U.S.C. § 7401).

amendments, it highlighted the most significant changes: urban pollution, permits, motor vehicles, air toxics, acid rain, and ozone depletion.[51] One of the most significant amendments in the 1990 CAA was the EPA's expansion of enforcement authority and the authorization of a program to control over 189 toxic pollutants.[52]

Currently, the CAA delegates responsibility to the EPA for developing acceptable levels of airborne emissions (NAAQS).[53] States are required to create and submit to the EPA a SIP which provides "for implementation, maintenance, and enforcement of [NAAQs] … within such State."[54] Further, states must enforce the limitations the EPA approves, and the state adopts, and regulate any area covered under the SIP.[55] From this statutory directive, the EPA has promulgated NAAQs for various emissions that directly impact air quality standards.[56] The standards produced by the EPA are not arbitrarily set – it gives "a reasonable time for interested persons to submit written comments" and is provided before there is any adoption or modification to its regulations.[57] In addition, extensive regulations pertaining to proper scientific processes, techniques and equipment are used to measure emissions levels and air quality.[58]

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[51] *Id*.; *see also Evolution of the Clean Air Act*, ENVIRONMENTAL PROTECTION AGENCY, https://www.epa .gov/clean-air-act-overview/evolution-clean-air-act#caa70 (last visited Dec. 17, 2021).
[52] *Evolution of the Clean Air Act*, ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act#caa70 (last visited Dec. 17, 2021).
[53] 42 U.S.C § 7409 (b)(1) (Which reads, in relevant part, "National primary ambient air quality standards, … shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.").
[54] 42 U.S.C. § 7410 (a)(1).
[55] 42 U.S.C. § 7410(a)(2)(A)-(C).
[56] *See e.g*., 40 C.F.R. § 50.4 (setting the national air quality standards for sulfur dioxide); 40 C.F.R. § 50.6 (setting the national primary air quality standards for particulate matter); 40 C.F.R. § 50.8 (setting the national primary ambient air quality standards for carbon monoxide); 40 C.F.R. § 50.11 (setting the national primary air quality for oxides of nitrogen).
[57] *See* 42 U.S.C. § 7409 (a)(1)(B).
[58] *See* 40 C.F.R. § 50.1 (f)-(h).

Furthermore, the CAA contains a "Citizens Suits" clause, or a "savings clause" on state common law claims.[59] The provision outlines the ability, jurisdiction, venue, and rights of citizens to bring suits for harm suffered from air emissions, specifying that:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief… Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution.[60]

In sum, the CAA is Congress's delegation of and attempt to: protect and enhance air quality; to prevent and control air pollution; to aid the states with prevention and control of air pollution; and to encourage, assist, and enforce air pollution prevention and control programs.[61]

V. Seminal Cases in Climate Change Litigation

A. Massachusetts v. EPA

Massachusetts v. EPA is the landmark climate litigation case holding that the EPA regulates carbon dioxide and other greenhouse gas emissions from motor vehicles under the CAA.[62] A group of states, local governments, and private organizations ("Petitioners") alleged that the EPA "abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide."[63] The Court considered two questions: (1) whether the EPA has

[59] 42 U.S.C. § 7604(e)(1)-(2).
[60] 42 U.S.C. § 7604(e)(1)-(2).
[61] 42 U.S.C.A. § 7401(b)(1)-(4).
[62] Massachusetts v. EPA, 549 U.S. 487, 532-34 (2007).
[63] *Id.* at 505.

"statutory authority to regulate greenhouse gas emissions from new motor vehicles" and, if it does, (2) whether it could refuse to do so based on the statutory language in the CAA.[64]

The case arose in 1999 when a group of private organizations first filed a rulemaking petition under section 202(a) of the CAA asking the EPA to regulate greenhouse gas emissions from new motor vehicles that emit gases.[65] Section 202(a)(1) of the CAA, at the time of litigation, provided:

> The EPA Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, 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…[66]

The rulemaking petition noted that the EPA itself had already admitted that it had the power to regulate carbon dioxide through a memorandum released by its general counsel.[67] After the petition's submission, the EPA requested public comment on the issue; it received over 50,000 comments over a span of five months.[68]

In September of 2003, the EPA denied the rulemaking petition, stipulating that "(1) contrary to the opinions of its former general counsels, the [CAA] does not authorize the EPA to issue mandatory regulations to address global climate change; and (2) that even if [it] had the authority to set greenhouse gas emission standards, it would be unwise to do so..."[69] The EPA argued that Congress, in enacting the CAA, would have specifically authorized the EPA to do so if that was its intent.[70] Additionally, the EPA stated that even if it had authority to regulate greenhouse gases, it would refuse to exercise that authority because there was "residual uncertainty" in the causal

[64] *Id.* at 505.
[65] *Id.* at 510.
[66] *Id.* at 506.
[67] *Id.* at 510.
[68] *Massachusetts*, 549 U.S. at 511.
[69] *Id.*
[70] *Id.* at 512.

connection of human activities and an increase in global surface temperatures.[71] It also reasoned that EPA regulation could hinder the President's approach to the climate-change problem, and potentially hinder the President's ability to "persuade key developing countries to reduce greenhouse gas emissions."[72]

Following the EPA's lengthy response, the complainants, joined by intervenor States and local governments, sought review in Court of Appeals for the District of Columbia.[73] The court of appeals held that the EPA properly exercised its discretion in denying the petition for rulemaking, which Petitioners appealed.[74]

In answering the first issue, the Court interpreted section 202(a)(1) of the CAA and addressed whether substances that contribute to climate change were included in the definition of the statute.[75] The statute defined air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive … substance or matter which is emitted into or otherwise enters the ambient air."[76] The legislature chose to define "welfare" broadly, including "effects on … weather … and climate."[77] The Court found Congress's use of the word "any" in its definition of air pollutant, significant.[78] It reasoned that "[o]n its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any.""[79]

[71] *Id.* at 513.
[72] *Id.* at 513-4.
[73] *Id.* at 514.
[74] *Massachusetts,* 549 U.S. at 514.
[75] *Id.* at 528.
[76] *Id.*; 42 U.S.C. § 7602(g).
[77] *Massachusetts,* 549 U.S. at 506; 42 U.S.C. § 7602(h).
[78] *Massachusetts,* 549 U.S. at 529.
[79] *Id.*

Finding that the statutory language unambiguous, the Court rejected the EPA's second contention that it could refuse to regulate based on a narrow reading of the statute's text.[80] It noted that, contrary to the EPA's assertion that it cannot regulate emissions because it would require the EPA to overlap with other authorities (such as the Department of Transportation), both federal agencies could "administer their obligations and yet avoid inconsistency."[81] It reasoned that

> While the Congresses … might not have appreciated … that burning fossil fuels could lead to global warming, [it] did understand that without regulatory flexibility, changing circumstances and scientific development would soon render the Clean Air Act obsolete. The broad language of § 202 (a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.[82]

The Court accordingly held that the EPA has the statutory authority to regulate – and must regulate if it found that emissions were a danger to public health or welfare – the emission of greenhouse gases from new motor vehicles.[83] The Court further reasoned that the fact that a statute can be applied in situations not expressly "anticipated" by Congress does not mean there is a statutory ambiguity.[84] Since greenhouse gases "fit well within the Clean Air Act's capacious definition of "air pollutant"" the Court held the EPA could regulate the emission of such gases.[85]

B. Am. Elec. Power Co., Inc. v. Connecticut

Four years after *Massachusetts*,[86] several states, the city of New York, and three private land trusts ("Plaintiffs") sued four private power companies and the federal Tennessee Valley Authority ("Defendants") seeking a remedy of abatement of carbon emissions in the form of a "decree setting carbon-dioxide emission for each defendant at an initial cap, to be further reduced annually."[87] In

[80] *Id*. at 529.
[81] *Id.* at 532.
[82] *Id.*
[83] *Id.* at 532-33.
[84] *Massachusetts*, 549 U.S. at 532-33.
[85] *Id.*
[86] *Id.* at 487.
[87] Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 415 (2011).

Am. Elec. Power Co., Inc. ("AEP"), the Court considered whether the Plaintiffs could maintain a federal common-law public nuisance claim against the carbon-dioxide emitting Defendants.[88]

Plaintiffs asserted that "the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law."[89] Plaintiffs sought injunctive relief to require the Defendants to cap their carbon dioxide emissions and then reduce them by percentage per year for a decade.[90] The district court dismissed the suits, but the Second Circuit held that the Plaintiffs stated a claim under federal common law and that the CAA did not displace these claims.[91] The Court granted certiorari to determine whether federal common law applied, and if so, whether the CAA displaced federal common law.[92]

The Court first noted that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.""[93] The Court then held, however, that the Plaintiffs' federal common law claims were displaced by the CAA that authorized the EPA to regulate emissions.[94] It noted that if Congress expressly addresses a question governed by federal common law, the Court looks to the legislation, not the common law.[95]

The Court reiterated that legislative displacement of federal common law "does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law."[96] It then stated that the "test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at

[88] *Id.* at 415.
[89] *Id.* at 418.
[90] *Id.*
[91] *Id.* at 419.
[92] *Id.* at 420.
[93] *Am. Elec. Power Co., Inc.*, 564 U.S. at 421.
[94] *Id.* at 423.
[95] *Id.* at 423.
[96] *Id.*

issue."[97] The Court reiterated its holding in *Massachusetts* where it made clear air pollution was subject to regulation under the CAA, and accordingly held "we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants."[98]

Further, the Court rejected the Plaintiff's argument that federal common law is not displaced unless the EPA expressly exercises its regulatory authority.[99] In rejecting this argument, the Court stated that the relevant inquiry for field preemption is "whether the field has been occupied, not whether it has been occupied in a particular manner."[100] It reasoned,

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulatory of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.[101]

The Court made clear that the Plaintiff's proposal that the judiciary first determine what amount of carbon-dioxide emissions is unreasonable, and then determine what level is "practical, feasible, and economically viable," is irreconcilable with the scheme Congress provided under the CAA.[102] In the Court's conclusion that federal common law was displaced by the CAA, it expressly refused to address whether state law nuisance law was preempted by the CAA: "We therefore *leave the matter open* for consideration on remand."[103]

C. BP P.L.C. v. Mayor and City Council of Baltimore

In the 2021 case of *BP P.L.C. v. Mayor and City Council of Baltimore*, the Court again narrowly ruled on a procedural issue in a string of consolidated cases that arose when alleged

[97] *Id.* at 424.
[98] *Id.*
[99] *Am. Elec. Power Co., Inc.*, 564 U.S. at 425.
[100] *Id.* at 426.
[101] *Id.* at 428.
[102] *Id.* at 428.
[103] *Id.* at 429 (emphasis added).

carbon-emitting defendants were sued under state law for various claims.[104] Baltimore's mayor and city council sued various energy companies for fossil fuel promotion while "concealing their environmental impacts."[105] The Court did not address the merits of the claim; it addressed the procedural issue of removal and remand.[106] The Court's opinion on whether the CAA will preempt state law causes of action, therefore, is still open for consideration.

VI. Circuit Court Cases Following *AEP*

One year after the Court's *AEP* decision, the United States Court of Appeals for the Ninth Circuit considered whether a city's federal common law claims against a fossil fuel company seeking *damages* for the harm its greenhouse gas emissions caused were displaced by the CAA and the EPA action the Act authorizes.[107]

The City of Kivalina ("*Kivalina*"), an Alaskan village, asserted that its native village land was severely threatened due to the impact of global warming.[108] It alleged the changes to its land were "in part from emissions of large quantities of greenhouse gases by the Energy Producers."[109] Kivalina sued multiple oil, energy, and utility companies, arguing that "as substantial contributors to global warming, [the Energy Producers] are responsible for its injuries."[110] This question differed from the Court's recent *AEP* decision that addressed whether a city could seek abatement of emissions; not damages.[111]

[104] BP P.L.C. v. Mayor and City Council of Baltimore, 141 U.S. 1532 (2021).
[105] *Id.* at 1535.
[106] *Id.* at 1536.
[107] Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012) (emphasis added).
[108] *Id.* at 853-4.
[109] *Id.* at 854.
[110] *Id.*
[111] Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 415 (2011).

Kivalina argued that its claims arose under federal common law.[112] The Ninth Circuit ultimately concluded that this was a distinction without a difference and that the CAA governed.[113] The court began its analysis by assessing first whether Kivalina's claims did arise under federal common law, and, if so, whether federal law displaced its federal common law claims.[114] Holding that there was guidance through the Court's recent *AEP* decision, the Ninth Circuit concluded that an action seeking damages for harm caused by past emissions is displaced by the CAA and the EPA action the Act authorizes.[115]

The court held that "displacement is extended to all remedies," meaning that the *AEP* decision focusing on abatement included causes of actions for damages.[116] It further noted that when a federal common law cause of action is displaced by federal law, it means the field has been made the subject of "comprehensive legislation" by Congress.[117] The court thus concluded that Kivalina's claims were displaced, noting that "the solution to Kivalina's dire circumstances must rest in the hands of the legislative and executive branches of our government, not the federal common law."[118]

Other circuits have not yet directly addressed whether state law claims against multinational carbon-dioxide emitters is preempted by the CAA.[119]

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[112] *Native Vill. of Kivalina*, 696 F.3d at 855.
[113] *Id.* at 857.
[114] *Id.* at 855.
[115] *Id.* 856-7.
[116] *Id.* at 857.
[117] *Native Vill. of Kivalina*, 696 F.3d at 857.
[118] *Id.* at 858.
[119] *See e.g.*, Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 686, 695 (6th Cir. 2015) (holding that Congress did not intend that all emissions regulation occur through the CAA's framework and that state law tort claims seeking abatement of certain emissions that occurred within its own state were not preempted by the CAA); Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013) (holding that private property owners state law tort claims were not preempted by the CAA when their claims were against a source of pollution *located* within the state).

VII. The Second Circuit Finds Climate Change Claims Concerned with Greenhouse Gas Emissions are Preempted by the Clean Air Act: City of New York v. Chevron

In April of 2021, the United States Court of Appeals for the Second Circuit Court weighed in on the issue of whether municipalities could utilize state tort law to hold multinational oil companies liable for damages caused by global greenhouse emissions.[120] It held that the answer is no.[121]

In its complaint, New York City (the "City") alleged that it "is exceptionally vulnerable to the effects of global warming" and that its taxpayers "should not have to shoulder the burden of financing the City's preparations to mitigate the effects of global warming."[122] The City alleged that a group of large fossil fuel producers "are primarily responsible for global warming and should bear the brunt of these costs."[123] It sued Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, BP p.l.c., and Royal Dutch Shell plc (the "Defendants") to shift the costs of "protecting the City from climate change impacts back onto the companies."[124] It requested compensatory damages for past and future costs of "climate-proofing its infrastructure and property" and damages and an injunction to abate the public nuisance and trespass."[125]

The district court dismissed the City's complaint because it determined its claims were displaced by federal common law, reasoning that "transboundary greenhouse gas emissions are, by nature a national (indeed, international) problem, and therefore must be governed by a unified federal standard."[126] The district court then determined that the CAA displaced the City's common

[120] City of New York v. Chevron Corporation, 993 F.3d 81, 85 (2d Cir. 2021).
[121] *Id.* at 85.
[122] *Id.* at 86.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 88.
[126] *City of New York*, 993 F.3d at 88-9.

law claims that related to domestic emissions.[127] The City appealed the district court's ruling to the Second Circuit.[128]

A. Federal Common Law

The Second Circuit first addressed whether the City's state law claims were displaced by federal common law.[129] It noted that federal common law exists in "few and restricted enclaves where a federal court is compelled to consider federal questions that cannot be answered from federal statutes alone."[130] The few and restricted issues where federal common law are "those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law."[131] Further, there must be a conflict between the federal interest and state law.[132]

In deciding whether federal common law applied at the case at issue, the court first turned to clarify the nature of the City's lawsuit.[133] It asked: "Is this a clash over regulating worldwide greenhouse gas emissions and slowing global climate change, or is it a more modest litigation akin to a product liability suit …?"[134] The court held that it was the former, stating

> Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions… Put differently, the City's complaint whipsaws between disavowing any intent to address emissions and identifying such emissions as the singular source of the City's harm. But the City cannot have it both ways. Stripped to its essence, then, the question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no.[135]

[127] *City of New York*, 993 F.3d at 89.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 90.
[132] *Id.*
[133] *City of New York*, 993 F.3d at 91.
[134] *Id.* at 91.
[135] *Id.*

The court held that the City's lawsuit reached past the limits of state law and that federal common law applied.[136]

B. Federal Common Law is Preempted by the CAA

After determining federal common law applied, the Second Circuit held that federal common law claims concerned with domestic greenhouse gas emissions were preempted by the CAA.[137] The court noted that federal common law is preempted where Congress passes a statute that speaks directly to the questions the judge-made federal rules were designed to answer.[138] Further, it requires a showing of sufficient legislative solutions to a particular issue that the statute has displaced a field historically reserved for federal common law.[139]

The court looked to *AEP* and the subsequent Ninth Circuit decision in *Kivalina* to support its conclusion that domestic transboundary emissions claims are directly addressed by the CAA.[140] It pointed to the Supreme Court's holding that the CAA provided a remedy for states seeking limits on emissions of carbon dioxide.[141] To support its finding that suits for damages are also displaced by the CAA, it relied on the holding and reasoning in *Kivalina*, where the Ninth Circuit determined that the CAA displaced Kivalina's federal common law damages claim.[142] In sum, the Second Circuit concluded that the CAA displaces the City's common law damages claims.[143] It reiterated that the claims would operate as "*de facto* regulation on greenhouse gas emissions."[144] Since

[136] *Id*.
[137] *Id.* at 94.
[138] *Id.* at 95.
[139] *City of New York*, 993 F.3d at 95.
[140] *Id.*
[141] *Id.*
[142] *City of New York*, 993 F.3d at 96; *see also* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).
[143] *City of New York*, 993 F.3d at 96.
[144] *Id.* at 96.

Congress has already addressed the manner and means of regulating carbon emissions, the court held the City's claims concerning these emissions are displaced by the CAA.[145]

The court then rejected the City's final argument; that the City's state law claims could "snap back into action unless specifically preempted by statute."[146] In rejecting this argument, the court noted

> Under the City's view, if Congress were to pass legislation adopting verbatim a judge-made common law rule, that could potentially give birth to new state-law claims – claims that could not have existed in the absence of Congress's intervention – even though the substance of the applicable federal rule has not changed. Such an outcome is too strange to seriously contemplate.[147]

While conceding that the CAA employs a cooperative approach between the federal government and the states, the court noted that this cooperation did not give the City power to impose standards on emissions "emanating from all 50 states and the nations of the world."[148] It therefore held that the City's state-law claims are barred.[149]

VIII. Analysis: The Clean Air Act Preempts Climate Change Suits

Fossil fuel companies sued under state tort law for the impact of their global emissions, regardless of the remedy sought, likely have a valid preemption defense. Congress has spoken directly to states power to regulate greenhouse gas emissions by its enactment of the CAA and its grant of regulatory power to the EPA. While the CAA does not expressly preempt state law, based on Congress's intent to regulate global greenhouse gas emissions, it impliedly does. States' attempts to circumvent the prescribed regulations in the CAA by common law claims against global emitters are therefore preempted.

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[145] *Id.* at 97.
[146] *Id.* at 98.
[147] *Id.* at 98-9.
[148] *City of New York*, 993 F.3d at 100.
[149] *Id.* at 100.

A. Express Preemption

Nothing in the text of the CAA expressly preempts common law claims against tortious greenhouse gas emitters. The CAA has, however, expressly preempted states' powers to regulate certain emitters, such as new motor vehicles.[150] Based on its express preemption of standards relating to mobile sources, any claim against a mobile source in compliance with federal standard is expressly preempted by the CAA. Since there is no express preemption as to stationary sources, such as fossil fuel producers or oil and gas companies that operate within, or outside of, states' borders, it must be determined whether implied preemption exists.

B. Implied Preemption

a. The Second Circuit correctly held that state nuisance and trespass claims for global emissions are displaced by federal common law

The United States Court of Appeals for the Second Circuit was correct in holding that the CAA displaced state law tort claims when the claims were based on the impact of the companies' contribution to climate change. In its *City of New York* decision, it correctly relied on the Supreme Court's reasoning in *AEP* which interpreted whether federal common law governed injunctions against global greenhouse gas emitters.[151] The Plaintiff's suit in *City of New York* was based on transboundary pollution from the Defendants and the damage it caused to the city[152], meaning the suit directly implicated the same type of greenhouse gas emitters at issue in *AEP*. Further, in that case the City did not refute that it sought a local remedy for a global problem.[153] Based on the

[150] 42 U.S.C § 7543(a) (stating that "No State … shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part").
[151] City of New York v. Chevron Corporation, 993 F.3d 81, 95 (2d Cir. 2021).
[152] *Id*. at 88-9.
[153] *Id*. at 91.

claim it raised, the Court's reasoning in *AEP* governed because the Court forcefully stated that the regulation of global air pollution was directly addressed and governed by the CAA.[154]

Further, the Second Circuit's reliance on *Kivalina*, in which damages instead of abatement was at issue for global emitters, was likely correct. Significant damage remedies act as *de facto* regulation for the emitters to avoid astronomical payouts in the future. Therefore, the court correctly held that the remedy of damages was a distinction without a difference. The City's complaint made it clear that it sought to act as a regulatory body towards global greenhouse gas emitters to protect the citizens of its state from the impact of global pollution.[155] Such a suit was correctly barred as there is already a significant structure in place and federal regulatory body tasked with regulating these emitters.

While the Second Circuit was ultimately correct in its holding, it seemed to accept the Defendants' contentions that the City had no interest in protecting its citizens from the impacts of climate change in the form of tort suits. This is contrary to the text of the CAA. The savings clause specifically allows private intervention against emitters that are not compliant with the CAA or with the state itself.[156] However, as the Second Circuit correctly noted, the City overextended its reach by focusing on damages from global climate change and global greenhouse gas emissions. While the City does have an interest in protecting its local citizens from the impact of local emissions, its only tort remedy applies when intrastate emitters cause damage to its citizens.

The Court's precedent makes clear that when dealing with "air and water in their ambient or interstate aspects" federal common law exists and governs over state law.[157] Accordingly, the

[154] Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 423 (2011).
[155] City of New York v. Chevron Corporation, 993 F.3d 81, 86 (2d Cir. 2021).
[156] 42 U.S.C. § 7604(e).
[157] *See Am. Elec. Power Co., Inc.*, 564 U.S at 421*;* Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972).

Second Circuit correctly applied that suits over global greenhouse gas emissions are governed by federal common law.

b. The Second Circuit correctly found that global greenhouse gas emission regulation is a field occupied by federal legislation

i. Field Preemption

The Second Circuit was correct in holding that global greenhouse emission regulation, in the form of tort suits, is likely a field occupied by the federal government through its enactment of the CAA. Accordingly, the Court is likely to find preemption exists in a climate change litigation suit, particularly where a state has sued a corporation for the impact of its global greenhouse gas emissions.

The Second Circuit's reliance on the Court's *AEP* decision that the CAA provided a remedy for states seeking limits or regulation on emissions from carbon dioxide was correct. It supports the proposition that it is the clear and manifest purpose of Congress to supersede the power of the states in the field of global greenhouse gas emission regulations. The congressional findings and purpose, along with the Court's interpretation of the CAA to control global greenhouse gas emissions in *AEP*, shows Congress's clear intention to supersede the power of the states in greenhouse gas emission regulation. Further, as the court in *Kivalina* noted, a remedy for abatement versus damages is a distinction without a difference.[158] When a state seeks substantial monetary damages for past and future harm, it is skirting the federal government by attempting to regulate the company's behavior.[159] The Second Circuit correctly noted this by finding that the

[158] *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) (noting that "the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief").

[159] *See City of New York*, 993 F.3d at 96 (noting that "the City's claims, if successful, would operate as a *de facto* regulation on greenhouse gas emissions. And as both *AEP* and *Kivalina* conclude, Congress has already "spoken directly to th[at] issue" by "empower[ing] the EPA to regulate [those very] emissions.""

claims would operate as *de facto* regulation[160] of global greenhouse gas emissions, which the CAA and the Supreme Court's interpretation of the text prohibits.

Further, the scheme of regulation through the CAA, and the authority it delegates to the EPA, is "so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it."[161] Congress outlined specific procedures required when a state wishes to regulate emissions *within its own state*.[162] The CAA does not give states blanket immunity to regulate within their own borders – the borders of other states – and the international borders of which a company operates and contributes to greenhouse gas emissions. The federal interest in the regulation of global greenhouse gas emission dominates over state laws on the same subject. Greenhouse gases, as interpreted by the Court in *Massachusetts*[163], are within the EPAs regulatory power. Further, the Court has essentially endorsed this view in its admission that, prior to the CAA, federal common law governed claims of global greenhouse gas emissions.[164]

Accordingly, under the Supreme Court's jurisprudence as it relates to field preemption and the CAA, it would find that states are precluded from asserting common law claims for the impact of global greenhouse gas emissions because of the extensive federal regulation that operates the field of greenhouse gases.

ii. Conflict and Obstacle Preemption

Conflict preemption does not exist because compliance with federal and state regulations is not impossible. State regulation of greenhouse gas emissions is permitted through the CAA.[165] When a state opts to regulate greenhouse gas emissions, or to sue for harm that greenhouse gas

[160] *City of New York*, 993 F.3d at 96.
[161] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[162] 42 U.S.C. § 7410 (a)(1).
[163] Massachusetts v. EPA, 549 U.S. 487, 532 (2007).
[164] Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 421 (2011).
[165] *See* 42 U.S.C. § 7410 (a)(1).

emissions cause within its own states, it likely does not conflict with the CAA. In fact, in all practicality, if a state is operating within the bounds of the CAA and adopts a more demanding standard, in most cases, the less demanding standard is met as well. These two laws, therefore, would not conflict. Further, where a state adopts these regulations, or sues tortious emitters within the borders of its own state, its laws or regulations will not conflict with the CAA because the CAA specifically: (1) gives states the ability to regulate and enforce air quality programs within its own state; and (2) gives citizens power to sue emitters that do not comply with state or federal regulations within their own state.[166] Because of this regulatory flexibility under the current CAA provisions, both regulations can likely be enforced without impinging on the federal "superintendence" of the field.[167]

However, whether state tort law is an obstacle to congressional objectives requires a different analysis. First, the nature of the power exerted by Congress through its enactment of the CAA was interpreted by the Court in *Massachusetts* to include the EPA's regulation of greenhouse gas emissions.[168] This power of the EPA to regulate greenhouse gas emissions as interpreted by the Court is strong evidence of Congress's intent to leave climate change regulation to the federal government. Further, the object sought to be attained, as discussed in the language of the CAA itself, is to promote public health and welfare by developing tools to combat air pollution and to provide federal assistance to states and local governments to implement local air pollution programs.[169] This object, and the focus on providing a tool to help local and regional areas with pollution within their own state shows an intent to help with intrastate pollution matters. This

[166] *See* 42 U.S.C. § 7410 (a)(1)-(2)(A)-(C); 42 U.S.C. § 7604(e)(1)-(2).
[167] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).
[168] Massachusetts v. EPA, 549 U.S. 487, 532 (2007) (holding that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."
[169] 42 U.S.C. § 7401 (b)(1)-(4).

intrastate intention is significant. Such clear and unambiguous language as to its intrastate goals is convincing evidence that the CAA, and the EPA's regulatory authority, trumps state regulation of global greenhouse gas emissions while giving the states the ability to regulate only within its own boarders. Finally, the character of the obligations imposed by the law all stem around one overarching obligation: the control, regulation, and implementation of air pollution control programs. Part of these obligations is the obligation to regulate and enforce limits on global greenhouse gas emissions.[170]

In sum, the nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the CAA, lead to the conclusion that suing fossil fuel companies for global greenhouse gas emissions would be an obstacle to the accomplishment and goals of Congress in enacting the CAA.

IX. Conclusion

Suits against greenhouse gas emitters seeking damages for the emitters' contribution to global climate change are preempted by the Clean Air Act. The remedy for states suffering under climate change, global warming, and damage to its states and its citizens, lies with the federal legislature alone. While states rightfully are seeking to protect its citizens from the dire impact of environmental changes, the text of the CAA makes clear that states are given limited power over greenhouse gas emitters.

States are limited to protecting only those within their own borders. The solution to the international climate change crisis, precipitated by greenhouse gas emissions, rests in the hands of

[170] *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 424 (2011) (holding that air pollution was subject to regulation under the CAA and that regulation made it "equally plain that the Act "speaks directly" to emissions of carbon dioxide"); Massachusetts v. EPA, 549 U.S. 487, 532 (2007).

the federal government or in the executive branch – it cannot be remedied through various suits against fossil fuel emitters.