

Conflict in the Air? Federalism, the Clean Air Act, and Arkansas's Act 1302

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INTRODUCTION

Air pollution is now the world's "most important environmental carcinogen."¹ So concluded a recent expert panel on cancer research at the World Health Organization (WHO). Governments have responded to such unsettling statistics in part through increased regulation. In March 2013, Washington D.C.-based environmental consulting firm Enhesa reported that global environmental, health, and safety (EHS) regulation has risen 35% over the past four years.² In particular, global regulation of air emissions increased 26% between 2009 and 2012—the fourth highest rate of change by regulatory area surveyed.³ While North America passed over 70 air-related regulations in 2009, it adopted nearly 90 in 2012.⁴ Similarly, while Europe passed almost 150 air-related regulations in 2009,

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1. Maria Cheng, *Agency Cites Air Pollution as a Cause of Cancer*, BOS. GLOBE, Oct. 18, 2013 (quoting Kurt Straif, head of the World Health Organization's (WHO) International Agency for Research on Cancer), <http://www.bostonglobe.com/news/science/2013/10/17/world-health-agency-cites-air-pollution-cause-cancer/JvNI3zITpLliqMj4y4JjBL/story.html> (noting that for the first time, WHO has designated air pollution itself, rather than its individual components, as a carcinogen). See also Fabio Caiazzo et al., *Air Pollution and Early Deaths in the United States. Part I: Quantifying the Impact of Major Sectors in 2005*, 79 ATMOSPHERIC ENV'T, 198, 204 (concluding that over 200,000 people in the United States die early each year because of air pollution).

2. Virginia Shaffer & Tjeerd Hendel-Blackford, *Then and Now: The Difference Four Years Can Make in Global Regulatory Subject Matter Focus*, ENHESA FLASH (Enhesa, Washington, D.C.), Mar. 2013, at 4, <http://www.joomag.com/magazine/mag/0063144001363842084?feature=archive> (analyzing the growth in global environmental, health, and safety regulation between 2009 and 2012, with the greatest percentage increase in the areas of facility/technical safety (38%), occupational health (34%), emergency preparedness (33%), air emissions (26%), and hazardous materials management (21%)).

3. *Id.* at 7.

4. *Id.* at 6.

it adopted nearly 180 in 2012.⁵ Clearly, air emissions regulation is on the rise in North America and throughout the world.

And increasing regulatory activity inevitably breeds conflict. In the United States, this conflict often occurs between the federal government and the states. Consider Arkansas's Act 1302, which became law on April 18, 2013,⁶ and prohibits the Arkansas Department of Environmental Quality (ADEQ) from measuring air quality impacts from criteria pollutants with computerized modeling during the preconstruction review of certain new and modified stationary sources.⁷ Specifically, Act 1302 prevents ADEQ from using air dispersion modeling unless: (1) applied to new or modified sources subject to the Clean Air Act's (CAA's) Prevention of Significant Deterioration (PSD or attainment) program; (2) in fulfillment of federal National Ambient Air Quality Standard (NAAQS) obligations under a current or future Nonattainment State Implementation Plan (SIP) or NAAQS SIP; or (3) the owner/operator of the source consents.⁸ Instead, ADEQ must gather information from the state's 15 air pollution monitoring stations.⁹

Supporters argue that Act 1302 reduces the regulatory burden on certain industrial actors (e.g., minor sources) whom the U.S. Environmental Protection Agency (EPA) does not otherwise require to submit computerized modeling.¹⁰ Opponents contend that Act 1302 is a product of persistent industrial and business lobbying that will reduce Arkansas's air quality.¹¹ Nonetheless, Arkansas's prohibition may bring the state into conflict with mandates established under the federal CAA. Thomas Diggs,

5. *Id.*

6. ARK. CODE ANN. §§ 8-4-301-318 (2013).

7. The U.S. Environmental Protection Agency (EPA) has established National Ambient Air Quality Standards (NAAQS) for six "criteria" pollutants deemed especially detrimental to public health and welfare: sulfur dioxide (SO₂), nitrogen dioxide (NO₂), particulate matter (PM), carbon monoxide (CO), ozone (O₃), and lead (Pb). ENVIRONMENTAL LAW HANDBOOK 242 (Thomas F.P. Sullivan ed., 21st ed. 2011). Act 1302 only prohibits air dispersion modeling in the context of these criteria pollutants. Ark. Dep't of Env'tl. Quality, *Frequently Asked Questions Regarding Act 1302 Implementation 2* (Oct. 15, 2013), available at http://www.adeq.state.ar.us/home/pdfs/hot_topics_2013_air_1302_faq_10-15-13_for_web.pdf.

8. Ark. Dep't of Env'tl. Quality, *supra* note 7, at 1 (states implement the federal NAAQS through their state implementation plans (SIPs), which must include emission limitations, ambient air quality monitoring and data systems, an enforcement program, and other information).

9. Rob Moritz, *ADEQ Moving Forward with New Air Testing Law Despite Concerns*, THE CABIN.NET: LOG CABIN DEMOCRAT, June 8, 2013, <http://thecabin.net/news/state/2013-06-08/adeq-moving-forward-new-air-testing-law-despite-concerns#.UiY6uTamjJW>.

10. *See, e.g.*, Charles Nestrud, *Arkansas Legislature Takes Pre-Emptive Strike at New NAAQS Implementation*, AM. COLL. OF ENVTL. LAWYERS, July 10, 2013, <http://www.acoel.org/post/2013/07/10/Arkansas-Legislature-Takes-Pre-Emptive-Strike-At-New-NAAQS-Implementation.aspx>.

11. *See, e.g.*, Moritz, *supra* note 9.

Associate Director for Air Programs at EPA Region 6, wrote a letter to ADEQ stating that Act 1302 “will affect ADEQ’s current air permit program and we would like to remind the ADEQ of its legal obligations under the Clean Air Act and the Arkansas State Implementation Plan to protect human health and the environment.” Diggs further suggested that Act 1302 could conflict with federal pollution control strategy or NAAQS attainment.¹²

In this Field Report, I will analyze recent trends in CAA and broader preemption jurisprudence to determine whether federal law may preempt Act 1302. First, I will explain the constitutional foundation for preemption and the significant role of implied conflict preemption and “cooperative federalism” in the CAA. Second, I will apply these concepts to Arkansas’s Act 1302 to present arguments both for and against preemption of this law. Finally, I will conclude with the implications of this conflict for industry operating in Arkansas and other jurisdictions passing similar laws.

I. PREEMPTION AND “COOPERATIVE FEDERALISM”

A. Constitutional Preemption

Preemption disputes arise when federal and state law conflict. The source of these disputes is Article VI, Clause 2 of the U.S. Constitution, the “Supremacy Clause,” which states that “[t]his Constitution, and the laws of the United States . . . shall be the supreme Law of the Land.”¹³ The Supremacy Clause anchors federal preemption doctrine, which generally states that a valid federal law will supplant any conflicting state law.¹⁴ Importantly, “the purpose of Congress is the ultimate touchstone in every preemption case.”¹⁵

The U.S. Supreme Court has identified two main forms of preemption: express and implied.¹⁶ Express preemption occurs when Congress explicitly states the extent to which federal law supplants state law.¹⁷ Where no explicit statement exists, courts must resort to implied preemption analysis. Implied preemption is further subdivided into field

12. Letter from Thomas H. Diggs, Assoc. Dir. for Air, U.S. Env’tl. Prot. Agency, Region 6, to Mike Bates, Chief, Air Div., Ark. Dep’t of Env’tl. Quality 1 (June 5, 2013), *available at* http://www.adeg.state.ar.us/home/pdfs/hot_topics_2013_air_1302_faq_10-15-13_for_web.pdf; *see also* Moritz, *supra* note 9.

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

14. *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (citing *Gibbons v. Ogden*, 9 Wheat. 1 (1824)).

15. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

16. *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

17. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

and conflict preemption.¹⁸ Generally, field preemption exists where there is a “scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”¹⁹ Courts may also find field preemption where the federal interest in a given field is so dominant that state law may not encroach upon it.²⁰ Under implied conflict preemption, on the other hand, state law is preempted to the extent that it actually conflicts with federal law.²¹ Generally, conflict preemption arises when “‘compliance with both federal and state regulations is an . . . impossibility,’ or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”²²

B. The Clean Air Act and Preemption

Applying these constitutional theories, federal courts are currently examining the extent to which the CAA preempts state law. The CAA does not contain any broad express preemption clause creating a comprehensive federal scheme in air emissions regulation.²³ Congress’s only broad statement as to the balance of federal and state power is the CAA’s “savings clause,” which states that: “[N]othing in this Act shall 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 requirements respecting control or abatement of air pollution”²⁴ This general rule, however, is limited by an exception providing that states “may not adopt or enforce any emission standard or limitation which is less stringent” than that required under CAA §§ 111 and 112 or the state’s SIP.²⁵

Given the lack of any broad express preemption clause, federal litigants have focused instead on the extent to which the CAA’s savings clause impliedly preempts state law. The CAA’s savings clause reflects Congress’s intent to leave the door open for states to regulate above and

18. *Gade*, 505 U.S. at 98.

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

20. *Id.*

21. *English*, 496 U.S. at 79.

22. *Frank Bros. v. Wis. Dep’t of Transp.*, 409 F.3d 880, 893 (7th Cir. 2005) (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987)).

23. The CAA’s express preemption clauses are all narrowly applicable. For example, one clause prohibits states from regulating in the field of motor vehicle emissions: “No State or any political subdivision thereof shall adopt or attempt to enforce any standards relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.” 42 U.S.C. § 7543(a) (2012).

24. *Id.* § 7416 (2012).

25. *Id.*

beyond the federal baseline. In other words, although Congress had the power to preempt the entire field of air regulation, it intentionally chose not to do. Therefore, most recent litigation has involved conflict preemption theory, which applies “in those areas where Congress has not completely displaced state regulation,”²⁶ rather than field preemption theory, which assumes that federal law occupies the entire regulatory field.²⁷

C. The Clean Air Act and “Cooperative Federalism”

The CAA is also a hallmark of “cooperative federalism,” alongside other comprehensive environmental statutes that Congress passed in the 1970s. This doctrine reflects Congress’s intent to allow the federal government to establish minimum standards while giving states substantial autonomy to implement and enforce the program, subject to federal oversight.²⁸ More specifically, under the CAA, states establish SIPs, which must meet minimum federal requirements, as the primary means of implementing and enforcing the CAA.²⁹ The CAA’s savings clause, in granting states authority to regulate air emissions above minimum federal standards, complements and reinforces this doctrine.

Cooperative federalism serves many purposes, including giving states flexibility in meeting standards, discouraging a “race to the bottom” among states in environmental regulation, sharing enforcement responsibility between federal and state actors, and generally streamlining the administrative process.³⁰ Most importantly, “cooperative federalism” reflects Congress’s intent regarding the balance of federal and state power under the CAA and related environmental statutes.

II. THE CLEAN AIR ACT AND ARKANSAS’S ACT 1302

No U.S. Supreme Court or Eighth Circuit cases exist that would determine the outcome of an Act 1302 preemption challenge. However, recent CAA case law and broader preemption jurisprudence support arguments both for and against preemption.

26. *Guerra*, 479 U.S. at 281.

27. *See, e.g., North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) (“We need not hold flatly that Congress has entirely preempted the field of emissions regulation.”).

28. Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL’Y F. 1, 6–7 (2010).

29. *Id.* at 6.

30. *Id.* at 6–7.

A. The Case Against Preemption

First, Act 1302 is not an “obstacle” to the CAA’s purpose and goals. Under established preemption doctrine, as discussed in Part I.A, challengers of Act 1302 would be hard-pressed to argue that the CAA preempts Arkansas’s law based on express or field preemption. However, challengers’ strongest argument would spring from the “obstacle” branch of conflict preemption, which applies when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³¹ As discussed later in Part B.I, challengers would argue that Act 1302 is an obstacle to federal pollution control strategy and state compliance with the federal NAAQS.

Recent federal case law refining the scope of the CAA’s savings clause refutes challengers’ proposition. In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the Tennessee Valley Authority (TVA), a federal agency, appealed a district court injunction requiring TVA to install emissions control equipment on four power plants in Alabama and Tennessee. The district court had found that the power plants constituted a public nuisance under North Carolina law.³² On appeal, the Fourth Circuit analyzed the CAA’s savings clause and found that it allowed for at least some state law nuisance claims.³³ Ultimately, the Fourth Circuit reversed the district court, holding that the CAA preempted, under conflict preemption principles, state law nuisance claims as to interstate power plant emissions when challenged under the laws of the *affected* state, North Carolina.³⁴

However, the Third Circuit refined *Cooper* in *Bell v. Cheswick Generating Station*, ruling that the CAA, via its savings clause, did *not* preempt state tort law claims as to power plant emissions when brought under the laws of the *source* state.³⁵ The *Bell* court found that source state nuisance claims would not “disrupt the regulatory partnership established by the [CAA’s] permit system” because they would not “subject [sources] to an indeterminate number of potential regulations” of affected states, but only to those of the source state.³⁶ The court, analogizing to the seminal Clean Water Act (CWA) case *International Paper Co. v. Ouellette*, noted

31. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

32. *Cooper*, 615 F.3d at 296.

33. *Id.* at 301–03 (citing *North Carolina v. Tenn. Valley Auth.*, 515 F.3d 344 (4th Cir. 2008); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 497–99 (1987)).

34. *Id.* at 303. In these cases, the pollution at issue originates from power plants in the “source state,” damaging those in the “affected state.”

35. *Bell v. Cheswick Generating Station*, No. 12-4216, 2013 WL 4418637, at *9 (3d Cir. Aug. 20, 2013).

36. *Id.* at *8 (quoting *Ouellette*, 479 U.S. at 498–99).

that the CAA also sets a “regulatory floor, not a ceiling,” and that “states are free to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so.”³⁷ Although focused on state nuisance law, these cases nonetheless reveal courts’ willingness to preserve space for state regulation while invoking conflict preemption principles under the CAA’s savings clause.

The U.S. Supreme Court also has declined to find “obstacle” preemption in analogous environmental cases. For example, in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, the Court considered a California law that blocked the construction of nuclear power plants until the state could locate proper disposal locations for high-level nuclear wastes.³⁸ In part, the utility argued that the California law constituted an obstacle to the federal Atomic Energy Act’s (AEA’s) underlying objective to encourage the development of nuclear power and should be preempted.³⁹ The Court disagreed, classifying the state law’s underlying purpose as “economic” and the AEA’s underlying purpose as promoting nuclear energy development *when economically feasible*.⁴⁰ Therefore, the court distinguished the purposes of the two statutes and held that the AEA did not preempt the California law.

Likewise, Act 1302 does not present a barrier to federal pollution control strategy or to Arkansas’s compliance with the federal NAAQS. Here, Arkansas did not alter its federal obligations under the SIP; rather, it relaxed its own air dispersion modeling regulations that it had previously made stricter over the first decade of the 2000s.⁴¹ Therefore, although Act 1302 is deregulatory in nature, it only deregulates that which was already more strict than federally required. One commentator called this an “ad hoc policy of implementing the NAAQS through stationary source permitting” rather than through SIP development.⁴² Therefore, in relaxing its regulations back down to the level of its SIP, Arkansas’s action is well within the protections of the CAA’s savings clause and is not conflict-preempted.

Furthermore, as *Pacific Gas* demonstrates, courts may construe Act 1302’s goals as distinct from the CAA’s. In addition to its modeling prohibitions, Act 1302 creates a new type of SIP—a “NAAQS SIP”—that

37. *Id.*

38. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983).

39. *Id.* at 220–21.

40. *Id.* at 222–23.

41. Nestrud, *supra* note 10; *see also* Letter from Thomas H. Diggs to Mike Bates, *supra* note 12, at 1.

42. Nestrud, *supra* note 10.

ADEQ must use to “establish measures for the attainment and maintenance of the NAAQS.”⁴³ In part, the NAAQS SIP would incorporate recently stricter federal NAAQS for particulate matter (PM), one-hour sulfur dioxide (SO₂), and one-hour nitrogen dioxide (NO₂), and any associated air dispersion modeling requirements. This reflects the legislature’s decision to move Arkansas away from an air regulation regime that implements air dispersion modeling on a more costly, “ad hoc” permit-by-permit basis to a more efficient, uniform, and predictable one based on conformity with the SIP. In this sense, courts could distinguish Act 1302’s underlying goal (“modernizing” Arkansas’s air regulation regime within the confines of federal law) from the CAA’s (a baseline for public health and welfare), thereby allowing Act 1302 and the CAA to coexist.

B. The Case for Preemption

There are equally strong arguments for the federal preemption of Act 1302. First, Act 1302 is an “obstacle” to the underlying purposes and goals of the CAA. Second, the Arkansas law oversteps “cooperative federalism” under the CAA. Tied in with these arguments is a recent trend among federal courts to allow CAA conflict preemption of state law and to circumvent “cooperative federalism” when necessary under the CAA.

1. “Obstacle” to Federal Law

Under conflict preemption theory, Act 1302 is an “obstacle” to federal law. Although the CAA’s savings clause allows states to independently regulate air emissions, Congress limited this power by establishing that states “may not adopt or enforce any emission standard or limitation which is less stringent” than that required under the CAA or the state’s SIP. Courts may interpret Act 1302 as being “less stringent” in the sense that it may bring the state into noncompliance with the NAAQS or federal pollution control strategy.

In turn, federal courts have found conflict preemption notwithstanding a statute’s valid savings clause. In *Geier v. American Honda Motor Co.*, the U.S. Supreme Court considered an injured petitioner’s claim that a vehicle’s lack of air bags constituted a design defect under District of Columbia tort law. The defendant car manufacturer argued that the National Traffic and Motor Vehicle Safety Act’s (NTMVSA) regulations, which gave manufacturers the choice of air bags among other options for

43. ARK. CODE ANN. § 8-4-318 (2013); Ark. Dep’t of Env’tl. Quality, *supra* note 7, at 3–4.

passive restraints systems, preempted state tort law.⁴⁴ The NTMVSA also contained a savings clause stating that “compliance with a [federal] motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.”⁴⁵ However, the Court rejected petitioner’s argument that the savings clause prevented a finding of conflict preemption, holding that state tort law posed an “obstacle” to the NTMVSA’s goal to provide a range of restraint device options.⁴⁶ Other cases similarly have found conflict preemption when the state law interfered with a federal goal.⁴⁷ In these cases, a valid savings clause did not prevent the courts from finding conflict preemption.

Arguably, Act 1302 falls into a similar category by seeking to loosen preexisting air modeling requirements that have become the basis for evaluating new and modified minor sources under a federal regulatory scheme and ensuring compliance with the federal NAAQS. As *Geier* illustrates, savings clauses like those in the NTMVSA and CAA cannot be given “broad effect . . . where doing so would upset the careful regulatory scheme established by federal law.”⁴⁸ EPA has emphasized that, under both CAA § 110(a)(2)(C) and 40 CFR 51.160–164, “ADEQ must have a SIP-approved, enforceable program” to determine minor sources’ compliance with the NAAQS and “have the authority to prevent construction or modification of a minor source” that will violate the NAAQS or federal pollution control strategy.⁴⁹ This includes a requirement to address air dispersion modeling.⁵⁰ In removing any obligation under state regulations for minor sources to partake in air dispersion modeling, Act 1302 constitutes a direct “obstacle” to these federal mandates under the CAA.

2. Overstepping “Cooperative Federalism”

Finally, Act 1302 is a breach of a weakened “cooperative federalism” under the CAA. As noted, this doctrine reflects Congress’s intent to allow the federal government to establish minimum standards while giving states

44. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

45. 49 U.S.C. § 30103(e) (2012).

46. *Geier*, 529 U.S. at 869–70.

47. *See* *Perez v. Campbell*, 402 U.S. 637 (1971); *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235 (1967).

48. *Geier*, 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106–07 (2000)).

49. Letter from Thomas H. Diggs to Mike Bates, *supra* note 12.

50. 40 C.F.R. § 51.160(f) (2013); *see also* ENVIRONMENTAL LAW HANDBOOK, *supra* note 7, at 245 (“A[n] SIP must provide for air quality modeling and submission of related data as prescribed by the EPA administrator.”)

substantial autonomy to implement and enforce the program, subject to federal oversight. In two recent cases, *Texas v. EPA* and *GenOn REMA, LLC v. EPA*, circuit courts demonstrated the extent to which they were willing to limit “cooperative federalism” under the CAA’s plain meaning. Here, the courts did not let states or industry “hide” regulatory violations behind an otherwise valid SIP. This parallels Act 1302 in two ways. First, EPA certified that it approved Arkansas’s most recent SIP in 2000. Second, Act 1302 relaxed state regulations without regard to Arkansas’s SIP.⁵¹ Therefore, under this precedent, if Act 1302’s prohibitions on dispersion modeling are contrary to federal law, Arkansas may have trouble claiming a “valid SIP” defense.

In *Texas v. EPA*, decided by the D.C. Circuit on July 26, 2013, petitioners Texas, Wyoming, and certain industry groups challenged five EPA rules regulating greenhouse gases.⁵² The petitioners argued that, in the interim period during which the CAA allows states to revise their SIPs to incorporate federal greenhouse gas standards, the states could still issue preconstruction review permits under the former, less stringent regulations. In effect, petitioners claimed that the outdated SIPs “shielded” them from complying with recent federal regulations in their permitting processes until the states fully incorporated the federal regulations into their SIPs.⁵³ The D.C. Circuit disagreed, holding that even during the SIP revision period, the states must issue permits complying with the new federal standards. The court found that CAA §§ 165 and 167 are unambiguously self-executing, requiring states to immediately include the new greenhouse gas standards into attainment program preconstruction review permits prior to SIP revisions.⁵⁴ In effect, the court found that Texas and Wyoming could not shield themselves from complying with current, more stringent law with an otherwise “valid” SIP.

Reinforcing the D.C. Circuit’s rejection of the SIP “shield,” the Third Circuit decided *GenOn REMA, LLC v. EPA* on July 12, 2013. In *GenOn REMA*, New Jersey (the downwind state) petitioned EPA under CAA § 126 to prevent a coal-fired electricity generating plant in Pennsylvania (the upwind state) from emitting sulfur dioxide (SO₂), which put certain New Jersey counties into SO₂ nonattainment.⁵⁵ After a rulemaking process,

51. Letter from Thomas H. Diggs to Mike Bates, *supra* note 12; *see also* Nestrud, *supra* note 10.

52. *Texas v. EPA*, 726 F.3d 180, 182 (D.C. Cir. 2013).

53. *Id.* at 186.

54. *Id.* at 199.

55. *GenOn REMA, LLC v. EPA*, 722 F.3d 513 (3d Cir. 2013). CAA § 126 reads: “Any State . . . may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)[i].” That section generally requires states to minimize interference with other states’ NAAQS attainment.

EPA granted New Jersey's petition in a final rule that required the Pennsylvania plant to reduce its SO₂ emissions.⁵⁶ The plant challenged the rule, arguing that it had no obligation to reduce emissions until Pennsylvania incorporated the revised one-hour SO₂ NAAQS into its SIP.⁵⁷ The court disagreed, finding Section 126's language unambiguous and independent of any SIP revision requirements, and upheld EPA's rule requiring SO₂ emissions reductions.⁵⁸ As in the D.C. Circuit, the Third Circuit rejected states' attempts to use their SIPs to "shield" their reliance on outdated regulations that violated the NAAQS.

These cases suggest that Arkansas may not "hide" behind a federally sanctioned SIP if the state is otherwise violating the NAAQS or other CAA requirements by prohibiting air dispersion modeling under Act 1302. More generally, these cases are important reflections of a recent trend: the willingness of courts to limit state control under "cooperative federalism" per the CAA's plain meaning. Because the specific CAA sections at issue (126, 165, and 167) apply to major sources (unless "group of stationary sources" under CAA § 126 could be interpreted to apply to a group of minor sources), these cases will likely have a more direct impact on prospective state laws than Act 1302, which exempts major sources. Nonetheless, these cases present further evidence that the compass of U.S. air emissions regulation will continue to point more in the direction of "preemption" than "cooperative federalism."

III. CONCLUSION

In the end, does one argument prevail as to whether or not the CAA preempts Act 1302? Recent CAA jurisprudence, including *Geier*, *Cooper* (as reaffirmed through *Bell*), *Texas*, and *GenOn REMA*, reflects a trend of federal courts favoring federal conflict ("obstacle") preemption while limiting "cooperative federalism" where possible under the statute's plain meaning. However, the greater body of jurisprudence on conflict preemption and "cooperative federalism" suggests a more complex picture. Indeed, although congressional intent may be the cornerstone of any preemption analysis, judicial outcomes may rely more on how the court characterizes the purposes and goals of both federal and state laws.⁵⁹ And despite these recent trends favoring federal preemption, one should not forget the axiom, often overlooked, that preemption analysis should

56. *Id.* at 518–19.

57. *Id.* at 519.

58. *Id.* at 522, 526–27.

59. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 414 (4th ed. 2011).

begin “with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁶⁰

Finally, what are the practical implications of this conflict for the regulated community? Companies in Arkansas or other states enacting similar laws in the near future may face increased uncertainty in regulatory compliance. Industry should keep a close eye on these developing federal-state conflicts and take note of administrative and judicial precedent. In addition, companies should maintain maximum flexibility in their operations and regulatory compliance regimes, allowing them to adjust to either scenario—federal preemption or state supremacy—at the lowest possible cost. Given the recent increase in air emissions regulation and the rising aversion to regulation in more conservative states, companies should anticipate similar conflicts to arise in the foreseeable future.

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