COMMENTS OF ATTORNEYS GENERAL OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, MAINE, ILLINOIS, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON

Via Federal Express and via www.regulations.gov

March 23, 2026

Keith J. Coyle, Chief Counsel
Pipeline and Hazardous Materials
Safety Administration
U.S. Department of Transportation
West Building Ground Floor, Room W12–140
1200 New Jersey Avenue SE
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Re: *Hazardous Materials: Common Law Tort Claims Concerning Transportation, Loading, and Unloading of Gasoline. Applicant: Exxon Mobil Corporation*, 91 Fed. Reg. 1032 (Jan. 9, 2026)
PHMSA–2025–0777; PDA–42(R)

Dear Mr. Coyle:

The Offices of the Attorneys General of New York, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Virginia, and Washington (the States) submit these comments to the Pipeline and Hazardous Materials Safety Administration (the Administration or PHMSA) on Exxon Mobil Corporation (Exxon)'s application for an administrative determination by the Administration's Chief Counsel as to whether the federal hazardous material transportation laws preempt certain common law tort claims "regarding the marking, employee training, loading and unloading, and hazardous material classification for gasoline transported by cargo tank motor vehicle" (the Application).

The Administration published notice of the Application and the public comment opportunity in the Federal Register on January 9, 2026, initially setting a deadline of February 9, 2026 for opening public comments and a deadline of March 10, 2026 for rebuttal comments.[1] On January 30, 2026, the Offices of the Attorneys

[1] *Hazardous Materials: Common Law Tort Claims Concerning Transportation, Loading, and Unloading of Gasoline. Applicant: Exxon Mobil Corporation*, 91 Fed. Reg. 1032 (Jan. 9, 2026).

General of Rhode Island, New Jersey, Connecticut, Delaware, Maine, New York and Nevada submitted a letter to the Administration's Chief Counsel, noting that the Application itself (with its supporting exhibits)[2] had not been made publicly available until January 27, 2026 and on that basis requesting an extension of time for submission of opening public comments and rebuttal comments.[3] On February 10, 2026, the Administration published notice in the Federal Register of an extension for initial comments on the Application through March 23, 2026, and an extension for rebuttal comments through April 21, 2026.[4]

For the reasons stated below, the Administration should, based on separation of powers principles, decline the Application's request for the PHMSA Chief Counsel to review a New Jersey state court's determination that the federal Hazardous Materials Transportation Act (HMTA) does not preempt certain state common law claims. If the Administration should reach the merits of Exxon's Application, the Chief Counsel should determine that under the regulations governing the agency's preemption determinations, the HMTA does not preempt the state common law claims at issue.

I. THE STATES HAVE SOVEREIGN AND PECUNIARY INTERESTS IN PRESERVING THE REACH OF OUR HISTORIC POLICE POWERS AND THE ABILITY OF PARTIES WITH STANDING TO ENFORCE STATE COMMON LAW DUTIES IN COURT

A. The States Have Sovereign Interests in Our Historic Police Powers to Regulate Matters of Health and Safety and Sources of Pollution

As the U.S. Supreme Court has repeatedly recognized, "in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," the analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Supreme Court has explained that the presumption applies notwithstanding federal regulation of a field for decades "because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not

[2] https://www.regulations.gov/comment/PHMSA-2025-0777-0002

[3] https://www.regulations.gov/comment/PHMSA-2025-0777-0004

[4] *Hazardous Materials: Preemption Application from Exxon Mobil Corporation; Extension of Comment Period*, 91 Fed. Reg. 5988 (Feb. 10, 2026).

cavalierly pre-empt state-law causes of action.'" *Wyeth*, 555 U.S. at 565 n.3 (quoting *Lohr*, 518 U.S. at 485).

And as the U.S. Supreme Court (and the appellate courts of many states) have also repeatedly recognized, "the historic police powers of the State include the regulation of matters of health and safety." *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 814 (1997); *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985); *cf. Cammon v. City of New York*, 95 N.Y.2d 583 (2000) (recognizing that "protecting workers employed in the state is within the historic police powers of the State" (citing *Gravatt v. City of New York*, No. 97-cv-0354(RWS), 1998 WL 171491, *12, (S.D.N.Y. Apr. 10, 1998))).

The States' historic police powers include regulation of sources of water or air pollution. *State v. Exxon Mobil Corp.*, 168 N.H. 211, 230 (2015) (recognizing that "[t]he control and elimination of water pollution is a subject clearly within the scope of the police power of the State") (citation omitted); *Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) ("Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state.").

The U.S. Supreme Court has been reluctant to allow the doctrine of federal preemption to override the "States' traditional authority to provide tort remedies to their citizens." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 241, 248 (1984) (declining to hold that "a state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility is preempted"). Consistent with that view, courts have found that a jury verdict that imposes "state tort law liability for negligence, trespass, public nuisance, and failure-to-warn falls well within the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*, 725 F.3d 65, 96, 104 (2d Cir. 2013) (upholding district court determination that New York common law tort claims related to drinking water pollution by gasoline additive were not preempted by federal law), *cert. denied*, 572 U.S. 1080 (2014).

The States thus have formidable sovereign interests in preventing the contraction of their historic police powers to regulate matters concerning health and safety, as well as the regulation of sources of pollution. The States have a related sovereign interest in ensuring that the States, political subdivisions within the States, and their residents who have been injured and can demonstrate standing can avail themselves of common law tort remedies against private tortfeasors by enforcing state common law duties in court.

B. Private Tort Litigation Often Helps Amplify and Reinforce the States' Objectives in the Areas of Public Health and Safety

In addition to the States' direct sovereign interests in preserving common law tort remedies for the States and their residents, the States have an indirect interest in toxic tort litigation, grounded in the advancement of public health knowledge.

First, mass tort cases (against the tobacco, opioid, and asbestos industries, to name three prominent examples) can directly influence public health by highlighting the need for development of safer consumer products and more protective, stricter regulatory standards.[5] For example, private tort litigation against the tobacco industry in the 1990s, *e.g.*, *Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000) (referencing $145 billion jury verdict) contributed to helping reveal that the tobacco industry concealed, misrepresented, and omitted material information about the health effects and addictive nature of cigarettes.[6]

Second, toxic tort litigation, through both fact and expert discovery, can reveal internal scientific information held by corporations that was previously hidden not only from the general public and consumers, but from state regulators. The information uncovered in such discovery processes may have a synergistic quality with scientific research being carried out by public health professionals, including within State and local government health agencies. By ferreting out instances of negligence, failures to warn or actionable nuisances, private litigation can reinforce public health regulatory regimes by identifying specific points of failure that cause widespread illness.[7]

Third, the toxic tort litigation system incentivizes corporate actors to better understand and mitigate the risks of their products and workplaces to avoid or limit liability. By putting corporate actors on notice of emerging threats posed by their products and workplaces, the system supplements State regulatory efforts and allows such actors to limit their prospective liability through risk assessment and self-regulation.

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[5] Timothy D. Lytton, *A Systems Theory of Tort Law: Reevaluating the Case Against "Regulation by Litigation"*, 90 MO. L. REV. 385 (2025), *available at* https://scholarship.law.missouri.edu/mlr/vol90/iss2/6

[6] Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 301 n.78 (2021), *available at* https://law.stanford.edu/wp-content/uploads/2022/07/Engstrom-Rabin-73-Stan.-L.-Rev.-285-1.pdf.

[7] *See generally id.*

C. Some of the States Have Interest in the Offset of Workers' Compensation Claims Paid by State Insurance Funds

Finally, private tort litigation by workers who are injured or by their survivors or estates is a source of monetary offset for certain State-controlled insurance funds after workers' compensation claims are paid out. Some of the States have workers' compensation laws which allow the State insurance fund to assert a statutory lien when a claimant (or estate) who suffers from workplace-related injury or death recovers monies from a tort-feasor responsible for the injury or death. For example, New York State's Workers' Compensation Law contains the following statutory lien provision:

> [T]he state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier.

New York State Workers' Compensation Law § 29(1). New York's courts have recognized that this statutory provision "clearly reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits." *Petterson v. Daystrom Corp.*, 17 N.Y.2d 32, 39 (1966); *see also Ronkese v. Tilcon New York, Inc.*, 129 A.D.3d 1273, 1274-75 (3d Dep't 2015).[8] Colorado law includes a similar provision that entitles "[t]he party responsible for paying workers' compensation benefits" to "reimbursement from all moneys collected from the third party for all economic damages and for all physical

[8] New York's Workers' Compensation Law also includes a distinct statutory subrogation provision that authorizes the State Insurance Fund of New York to pursue common law claims against tortfeasors responsible for workplace injuries or death if the worker or the worker's survivors received a workers' compensation payout but failed to pursue litigation against tortfeasors within a specified statutory period. New York State Workers' Compensation Law § 29(2) ("If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor . . . , such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom.").

impairment and disfigurement damages," with a similar carve-out of reasonable attorneys' fees. CO Rev. Stat. § 8-41-203.

If claims alleging breaches of common law duties like those at issue in *Singh v. Exxon Mobil Corp. et al.* in the Superior Court of New Jersey (Middlesex County) are held to be federally preempted, some States' workers compensation insurance funds may suffer pecuniary harm, in addition to the harm to the States' sovereign interests discussed above.

II. PHMSA LACKS ANY AUTHORITY TO REVIEW JUDICIAL DECISIONS, AND ITS ADMINISTRATIVE DETERMINATIONS ON FEDERAL PREEMPTION MATTERS ARE NOT ENTITLED TO JUDICIAL DEFERENCE, UNDER *LOPER BRIGHT*

A. Notwithstanding the Authority Conferred by 49 U.S.C. § 5125(d)(1), PHMSA's Chief Counsel Cannot Sit in Review of Judicial Decisions

The statutory authority Congress conferred upon the Secretary of Transportation (and by delegation, to PHMSA's Chief Counsel) to make administrative determinations on preemption applications is a narrow form of rulemaking, rather than adjudication, *see infra* p. 8, let alone appellate review. In this context, it would violate the principles of the separation of powers and federalism for PHMSA's Chief Counsel to sit in review of the June 24, 2025 Order of the Superior Court of New Jersey (Middlesex County) denying Exxon's motion for summary judgment. The PHMSA Chief Counsel does not possess the authority to reverse the June 24, 2025 Order nor, in effect, to render that Order merely an advisory decision.

The federal Hazardous Materials Transportation Act (HMTA) states that, with certain exceptions, "a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe . . . that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted" if it is "about any of the following subjects":

> (A) the designation, description, and classification of hazardous material.
> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident.
> (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

49 U.S.C. § 5125(b)(1). Additionally, the HMTA provides:

> a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—
>
> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

49 U.S.C. § 5125(a).

The HMTA further provides that "a person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary [of Transportation], as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of [49 U.S.C. § 5125] or section 5119(f). . . . After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first." 49 U.S.C. § 5125(d)(1). PHMSA has adopted regulations implementing this statutory provision at 49 C.F.R. §§ 107.201-213.

Section 5125(d)(1) provides the Secretary of Transportation (i.e., through delegation, the PHMSA Chief Counsel) with an opportunity to render an administrative determination on a preemption issue upon an appropriate application seeking such a determination. But the statute narrowly circumscribes

PHMSA's role vis-à-vis parallel judicial proceedings. The statute does not purport to preclude judicial litigation over the same issue that is the subject of a § 5125(d)(1) application either *before* the application is made to PHMSA or *after* the initial 180-day post-notice period for the PHMSA Chief Counsel to issue a ruling on an application (or to state that it requires more time to rule). The statute only bars the *applicant* from seeking "judicial relief" on the preemption issue presented by the application while PHMSA's Chief Counsel is receiving comments on the application and developing a ruling within the 180-day period.

Here, Exxon's Application expressly "seeks a PHMSA determination that the New Jersey state court's decision was incorrect and inconsistent with federal law."[9] But that request exceeds the constitutional constraints that limit the Transportation Secretary's authority. Because it is clear that a determination by the PHMSA Chief Counsel on an application under § 5125(d)(1) is a form of federal rulemaking,[10] not a form of Article I judicial adjudication (let alone Article III adjudication), it would contravene separation of powers principles, as well as federalism, for PHMSA's Chief Counsel to scrutinize the June 24, 2025 ruling of the Superior Court of New Jersey (Middlesex County) that precipitated Exxon's Application as if the Chief Counsel were sitting as an appellate adjudicator.

The U.S. Court of Appeals for the Second Circuit had occasion to interpret a similar set of procedures, where the Federal Communications Commission (FCC) was presented with an application for a preemption ruling after a federal district court gave preclusive effect to a state court judgment declining to find a municipal ordinance preempted by an FCC regulation. In *Town of Deerfield, N.Y. v. F.C.C.*, 992 F.2d 420, 428 (2d Cir. 1993), the Second Circuit reasoned that "[s]ince neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power." *Id.* at 428. The Second Circuit further explained that the FCC "plainly has no power to request or require such a court [i.e. a court with jurisdiction over the parties and subject matter] to render an opinion that is merely advisory." *Id.* at 429.

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[9] Application, at page 9. *See* https://www.regulations.gov/comment/PHMSA-2025-0777-0002.

[10] Reviewing the same statutory provision in an Eleventh Amendment challenge brought by the State of Tennessee, the U.S. Court of Appeals for the Sixth Circuit concluded that "the administrative procedure addressed in [49 U.S.C. § 5125(d)(1)] falls within the rule-making process lying at the center of the responsibilities of federal executive agencies" as opposed to being an "adjudicative procedure." *Tennessee v. U.S. Dept. of Transp.*, 326 F.3d 729, 736 (6th Cir. 2003). As this case was decided prior to the formation of PHMSA, the preemption determination authorized by 49 U.S.C. § 5125(d) was, at the time, delegated by the Secretary of Transportation to the Associate Administrator for Hazardous Materials Safety. *See id.* at 735.

The PHMSA Chief Counsel therefore cannot issue a determination on Exxon's application because it lacks authority to review the opinion rendered by the June 24, 2025 Order of the Superior Court of New Jersey (Middlesex County), which remains subject to prospective judicial review by the appellate court(s) of New Jersey. Nor, for that matter, may the PHMSA Chief Counsel take such action as would render the New Jersey's Court opinion merely "advisory."

To the contrary, unless the Superior Court of New Jersey's June 24, 2025 Order is reversed or revised by the appellate courts of New Jersey or the U.S. Supreme Court, a judgment of the Superior Court of New Jersey predicated on the June 24, 2025 Order will be *res judicata* and have such preclusive effect as New Jersey state law provides.[11] *See* 28 U.S.C. § 1738 (codifying in statute the U.S. Constitution's Full Faith & Credit Clause); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."); *cf. Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J.*, 105 F.4th 67, 73 (3d Cir. 2024) ("Because we are considering the preclusive effect of a New Jersey state court order, New Jersey preclusion law applies.").

B. The U.S. Supreme Court Has Never Held That the U.S. Department of Transportation's Statutory Authority to Determine Whether Non-Federal Laws Are Preempted by the Hazardous Materials Transportation Act Empowers the Agency to Preempt State Common Law Duties

In addition to the constitutional constraints on the Transportation Secretary's administrative rulings under 49 U.S.C. § 5125(d)(1), the U.S. Supreme Court has never construed that statute as empowering the Secretary to determine that the HMTA preempts state common law duties. Rather, the U.S. Supreme Court's holdings and statements in prior cases indicate that it may not read § 5125(d)(1) to confer such expansive authority on the Secretary or his delegee, the PHMSA Chief Counsel.

For example, in construing whether the Atomic Energy Act of 1954 (as amended) preempted state common law tort remedies pursued by a laboratory worker exposed to plutonium at a federally-licensed nuclear facility, the U.S. Supreme Court evaluated the legislative history, finding that

[11] On February 27, 2026, the Superior Court of New Jersey (Middlesex County), after receiving briefing and hearing oral argument, denied Exxon's and its co-defendants' motion for a 180-day stay of proceedings in that court, subject to extension, which the defendants had sought so that PHMSA "may render a determination in response to" Exxon's Application on preemption. *Singh v. ExxonMobil Corp.*, No. MID-L-004215-22 (N.J. Super. Ct. Law Div. Feb. 27, 2026).

> there is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 and or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Silkwood, 464 U.S. at 251.

As in *Silkwood,* Exxon's Application fails to point to any legislative history in the HMTA (or any amendments to it) that suggests that Congress intended § 5125(d)(1) to empower the Secretary of Transportation to determine whether state common law duties may be preempted. Notwithstanding that federal and state *courts* have found that common law claims may in certain cases be preempted by the HMTA under the criteria of 49 U.S.C §§ 5125(a) and (b)(1),[12] this does not mean that Congress necessarily provided the *Secretary* with the authority to make such a determination.

If anything, as the U.S. Court of Appeals for the Second Circuit has suggested in a recent decision, the legislative history surrounding the 1990 amendments to the HMTA, which added the present definition of "knowingly" for civil violations of the HMTA at 49 U.S.C. § 5123(a), suggests that Congress "not only intended for the 'knowingly' definition to encompass negligence, but it also contemplated *states maintaining and enforcing their own negligence laws running parallel* to the HMRs [federal Hazardous Materials Regulations]." *DCC Propane, LLC v. KMT Enters.*, Inc., 147 F.4th 171, 181 (2d Cir. 2025) (emphasis added).[13]

Further, in the two instances when Supreme Court opinions referenced 49 U.S.C. § 5125(d), they noted that the statutory provision authorizes the Secretary of Transportation "to decide whether a *state or local statute* that conflicts with the

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[12] *See Buono v. Tyco Fire Products, LP*, 78 F.4th 490, 499 (2d Cir. 2023) (finding that New York common-law claims for strict liability and negligence brought by a worker injured by a steel cylinder were "nonfederal 'requirement[s] of a State' within the meaning of 49 U.S.C. § 5125(b)(1)); *Roth v. Norfalco LLC*, 651 F.3d 367, 379 (3d Cir. 2011) (holding that "the HMTA preempts state common law claims that, if successful, would impose design requirements upon a package or container qualified for use in transporting hazardous materials in commerce"); *Malerba v. New York City Tr. Auth.*, 232 A.D.3d 91, 103 (1st Dep't 2024) (holding that injured maintenance worker's New York common law claims for negligence and strict liability against manufacturer of valve and cylinder components of a compressed gas tank were preempted by the HMTA).

[13] The Application, submitted to the PHMSA Chief Counsel on or about August 26, 2025, does not discuss the Second Circuit's decision in *DCC Propane*, decided on August 5, 2025.

regulation of hazardous waste transportation is pre-empted." *Wyeth v. Levine*, 555 U.S. 555, 576 n.9 (2009) (emphasis added); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 38 n.21 (2007) (Stevens, J., dissenting, joined by Roberts, C.J. and Scalia, J.). Though the Supreme Court has not expressly ruled on the issue, these statements do not reflect an expansive view of § 5125(d) that would authorize the PHMSA Chief Counsel to decide whether the HMTA preempts judicial enforcement of state common law duties, as Exxon's Application requests.[14]

C. Under *Loper Bright*, the PHMSA Chief Counsel's Construction of Ambiguous Statutory Provisions Is Not Entitled to Deference

In *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), the U.S. Supreme court overruled *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), reasoning that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the [Administrative Procedure Act]." 603 U.S. at 396. Under *Loper Bright*, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at 412. On just one occasion known to the States, a federal court has upheld a preemption determination by the PHMSA Chief Counsel that the HMTA preempted certain common law claims, but the court did so solely in reliance on *Chevron* when it was still good law. Here, on Exxon's application, if the PHMSA Chief Counsel's preemption determination on the Application is reviewed in federal court, the court will not be constrained to defer to the Chief Counsel's interpretation of any provisions of 49 U.S.C. § 5125 found to be ambiguous.

Between 1996 and 2020, PHMSA and its predecessor (the U.S. Department of Transportation's Research and Special Programs Administration) made 33 preemption determinations under 49 U.S.C. § 5125(d)(1).[15] Of those, only a single one concerned common law claims. In April 2008, AMTROL, Inc. applied to PHMSA for a determination on whether the HMTA "preempts State common law tort claims that the manufacturer of a DOT specification 39 compressed gas cylinder should

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[14] Given the case law discussed above, and the pendency of the New Jersey state court action in *Singh v. Exxon et al.* where the precise preemption question at issue in Exxon's Application has been presented to the court, PHSMA should abstain from ruling on Exxon's Application in deference to the state court proceeding. *Cf. Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818-19 (1976) (holding that a federal court may abstain from exercising jurisdiction over a case when there is a pending parallel state court proceeding and certain factors weigh in favor of abstention).

[15] https://www.phmsa.dot.gov/standards-rulemaking/hazmat/preemption-determinations.

have designed the cylinder to resist rusting and/or marked or labeled the cylinder with warnings of the potential hazard of rusting over time."[16]

In July 2012, over four years later, the PHMSA Chief Counsel made a determination in that case that

> [f]ederal hazardous material transportation law preempts a private cause of action which seeks to create or establish a State common law requirement applicable to the design, manufacture, or marking of a packaging, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce when that State common law requirement would not be substantively the same as the requirements in the HMR.[17]

In the same determination, the Chief Counsel also found that

> [f]ederal hazardous material transportation law does not preempt tort claims that the packaging or packaging component failed to meet the design, manufacturing, or marking requirements in the HMR [Hazardous Materials Regulations] or that a person who offered a hazardous material for transportation in commerce or transported a hazardous material in commerce failed to comply with applicable requirements in the HMR.[18]

The U.S. Court of Appeals for the Third Circuit upheld PHMSA's July 2012 preemption determination that the HMTA preempted the Tennessee common law design defect and failure-to-warn claims, but only because the court "conclude[d] that [49 U.S.C.] Section 5125 is ambiguous" and that "DOT's preemption determination is a reasonable construction of that statue" and "is entitled to *Chevron* deference." *In re Amtrol Holdings, Inc.*, 532 F. App'x 316, 318 (3d Cir. 2013).[19]

In its Application, Exxon cites the July 2012 determination and the Third Circuit's decision in *Amtrol* adopting that determination.[20] But under the *Loper Bright* framework for Administrative Procedure Act review that now applies, for the

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[16] PHMSA, *Common Law Tort Claims Concerning Design and Marking of DOT Specification 39 Compressed Gas Cylinders*, 77 Fed. Reg. 39,567, 39,568 (July 3, 2012) (Notice of administrative determination of preemption).

[17] *Id.* at 39,570.

[18] *Id.*

[19] AMTROL, Inc. was the only party on that appeal, so the Third Circuit did not receive any arguments that the court should not apply *Chevron* deference. *See id.* at 318.

[20] *See* Application, at pp. 24-25.

reasons explained below in section III of this letter, PHMSA will be hard pressed to argue under the circumstances present here that a reviewing court should defer to any interpretation of § 5125(d)(1) by the PHMSA Chief Counsel that the HMTA preempts the judicial enforcement of common law duties.

III. Under PHMSA's Regulations Governing Preemption Determinations, the Common Law Duties at Issue in *Singh v. Exxon Mobil Corp. et al.* Are Not Federally Preempted

PHMSA's regulations include "[s]tandards for determining preemption," which govern the Chief Counsel's determination, on a proper application, as to whether "a requirement of a State, political subdivision, or Indian tribe" is "preempted under 49 U.S.C. 5125." 49 C.F.R. §§ 107.201, 202. Under the PHMSA regulatory criteria for administrative preemption determinations, the States agree with the findings in the June 24, 2025 Order of the Superior Court of New Jersey that the HMTA does not preempt Mr. Singh's state common law claims against Exxon and others similarly situated.

A. No Direct Conflict: It is Possible for Exxon and Others Similarly Situated to Simultaneously Comply with Common Law Duties as Formulated by the Superior Court of New Jersey (Middlesex County) in *Singh* and with the Federal Hazardous Materials Transportation Act and the Hazardous Materials Regulations (49 C.F.R. § 107.202(b)(1))

Under PHMSA's regulations implementing 49 U.S.C § 5125, the HMTA preempts a nonfederal requirement if "[i]t is not possible to comply with" both the nonfederal requirement and "a requirement under the Federal hazardous material transportation law, a regulation issued under the Federal hazardous material transportation law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security." 49 C.F.R. § 107.202(b)(1). This provision does not provide a basis for the PHMSA Chief Counsel to find that the enforcement of Exxon's common law duties under New Jersey state law is preempted.

Here, it is possible for Exxon (and others similarly situated) to comply with any federal requirements placed upon it under the HMR as a producer of petroleum products, as well as to satisfy a New Jersey common law duty, to the extent recognized by the Superior Court of New Jersey in the June 24, 2025 Order, to warn hazmat workers who visit Exxon's premises in the course of their duties that gasoline contains benzene, and that benzene is understood to be carcinogenic.

It is also possible for Exxon to provide hazmat employees who visit Exxon's premises in the course of their duties with additional training and protective

equipment for loading gasoline onto a tanker truck. This presents no direct conflict with Exxon's existing federal obligations as a producer of petroleum products or with the obligations under the HMR imposed on the hazmat workers' direct employers (like ITC in the *Singh* case). Exxon stresses in its application that "the comprehensive regulations DOT has issued regarding the training of hazardous materials (hazmat) employees, see 49 C.F.R. §§ 172.700-172.704, are requirements imposed on hazmat employers."[21] But there is no conflict in requiring that hazmat workers receive training from their employers in compliance with 49 C.F.R. §§ 172.700-172.704, *and* also that hazmat producers like Exxon comply with a common law duty to provide additional training and appropriate protective equipment at their storage terminals, in light of benzene-related risks to those workers.

As Exxon concedes in the Application, a "state may require drivers domiciled in that state to complete additional training that does not conflict with the federal training."[22] Those PHMSA regulations only "prescribe minimum training requirements for the transportation of hazardous materials"—a floor, not a ceiling. *See* 49 C.F.R. § 172.701.

Therefore, the criteria under 49 C.F.R. § 107.202(b)(1), which assesses whether there is conflict between compliance with the HMTA and compliance with Exxon's state common law duties, does not support a determination of preemption.

B. No Obstacle: Judicial Enforcement of the Common Law Duties of Exxon and Others Similarly Situated, as Formulated by the Superior Court of New Jersey (Middlesex County) in *Singh*, Are Not an Obstacle to the Accomplishment and Carrying Out of the Federal Hazardous Materials Transportation Act and the Hazardous Materials Regulations (49 C.F.R. § 107.202(b)(2))

Under PHMSA's implementing regulations, the HMTA also preempts a nonfederal requirement if that nonfederal requirement is "an obstacle to accomplishing and carrying out" the HMTA or the PHMSA regulations thereunder. 49 C.F.R. § 107.202(b)(2). This provision also does not provide a basis for the PHMSA Chief Counsel to find that the HMTA or PHMSA regulations preempt enforcement of Exxon's duties under state common law.

Here, the New Jersey court's imposition of common law duties on Exxon (and others similarly situated) based on the operation of Exxon's "vapor recovery system" on the loading arm of its fixed petroleum storage containers does not constitute an obstacle to the accomplishing and carrying out of federal HMTA. The New Jersey

[21] Application, at p. 32.

[22] *Id.* at p. 31 n.11.

court reasoned that because the vapor recovery system that operates on the loading arm—which is itself "permanently attached to the fixed [petroleum] storage containers located on [Exxon's] premises"—is "not a portable object and is not used during the actual movement of hazardous materials," it "cannot reasonably be said to fall within the same scope of federal preemption contemplated in *Malerba* [*v. New York City Tr. Auth.*, 232 A.D.3d 91 (1st Dep't 2024)] and similar cases involving injuries from portable objects.[23] The New Jersey court also found it significant that the "regulation of vapor recovery systems falls within the purview of the New Jersey Department of Environmental Protection."[24]

As Exxon acknowledges in the Application, PHMSA's Hazardous Materials Regulations primarily regulate the practices of "hazmat employers" (i.e. ITC in the *Singh* case) that provide transportation services. But judicial enforcement of state common law duties against Exxon and other producers of gasoline and other petroleum products that contain benzene does not operate as an "obstacle" to the enforcement of the HMTA and its implementing regulations. 49 C.F.R. § 107.202(b)(2). Moreover, even if, as Exxon posits, the courts of various states may not impose *identical* state common law duties related to the disclosure of benzene-related risks by gasoline producers, this hypothetical variation across states' common law does not alter the federal Hazardous Materials Regulations technical requirements imposed on entities in the business of transporting petroleum products.

C. The "Similarity" Requirement of 49 C.F.R. § 107.202(a) Is Inapplicable to the Common Law Duties of Exxon and Others Similarly Situated, as Formulated by the Superior Court of New Jersey (Middlesex County) in *Singh*

Finally, because the common law duties of Exxon (and similarly situated parties) recognized by the June 24, 2025 Order of the Superior Court of New Jersey New Jersey concern the hazards of benzene exposure at the point of the "vapor recovery system," which is incident to gasoline storage rather than gasoline transport,[25] the nonfederal requirements at issue do not "concern" any of the five

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[23] *See* June 24, 2025 Order of the Superior Court of New Jersey (Middlesex County) (Exhibit 1 to the Application), at p.24.

[24] *Id.* at pp. 24-25 (citing N.J.A.C. 7:27-16.3(d)).

[25] State environmental protection agencies regulate vapor recovery systems in relation to storage of petroleum products, not transportation of petroleum products. *See, e.g.*, N.J.A.C. 7:27-16.3(d) (relevant State of New Jersey Department of Environmental Protection regulations); 6 N.Y.C.R.R. Part 613 *et seq* (relevant New York State Department of Environmental Conservation regulations); 5 C.C.R. 1001 – 9(VI)(C)(4)(b)(ii) (relevant Colorado Division of Oil and Public Safety regulations); 310 C.M.R. § 7.24(3) (relevant Massachusetts Department of Environmental Protection Phase I Enhanced Vapor Recovery System regulations).

subjects of preemption listed at 49 C.F.R. § 107.202(a), including the "packing, repacking, handling, labeling, marking, and placarding of hazardous material" under § 107.202(a)(2). Thus, properly understood, there is no threshold legal basis to evaluate whether the common law requirements recognized by the New Jersey court satisfy the "similarity" requirement of § 107.202(a).

CONCLUSION

For the reasons discussed above, the States urge the PHMSA Chief Counsel to decline Exxon's invitation to make an administrative determination that the HMTA and PHMSA's implementing regulations preempt the New Jersey common law duties as recognized by the June 24, 2025 Order of the Superior Court of New Jersey (Middlesex County).[26]

Respectfully submitted,

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