Federal Preemption of State Law

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The purpose of this white paper is to analyze the principles that have been applied in recent U.S. Supreme Court and other federal court cases to determine whether a federal law's preemption provision preempts state laws on the same subject matter and, from this analysis, to recommend legislative language that Congress should use in federal legislation to ensure the federal law achieves the preemptive effect intended by Congress. In this white paper:

- *Part A* provides an overview of the preemption doctrine, including the courts' constitutional posture in preemption analyses to find in favor of preserving state laws, even in the face of federal preemption clauses, if possible. This part also briefly describes the two different analyses courts use to evaluate preemption clauses in federal legislation—express preemption analysis and implied preemption analysis.

- *Part B* uses the key findings of courts in federal preemption cases—including cases that have upheld federal preemption clauses and cases that have found them ineffective in preempting state laws—to recommend specific statutory language that ought to be incorporated into any proposed federal legislation for which Congress seeks to reliably preempt state laws of the same subject matter.

- *Part C* provides a brief summary of our conclusions, including the three key legislative recommendations explained in greater detail in *Part B*.

A. Preemption Doctrine

The Supremacy Clause of the U.S. Constitution states that federal law "shall be the supreme law of the land."[2] Thus, reaching as far back as the Supreme Court's decision in *M'Culloch v. Maryland*, it has been settled constitutional doctrine that state law in conflict with federal law is "without effect."[3] This principle, by which federal law trumps state law, is known as preemption.[4] However, it is also written into the Constitution that the federal system is a dual system of government in which the States are sovereign.[5] Thus, preemption will not lie unless it

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[2] U.S. Const. art. VI, cl. 2 ("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.").
[3] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819); *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L.Ed. 576 (1981), *cited in Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992).
[4] Richard C. Ausness, Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence since *Cipollone*, 92 Ky. L.J. 913, 913 (2003-2004).
[5] *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

is "the clear and manifest purpose of Congress."[6] Accordingly, congressional purpose is "the ultimate touchstone of preemption doctrine."[7]

Preemption doctrine, as the phrase implies, is the methodology courts use to determine the circumstances in which federal law is supreme.[8] When statutes contain *express* preemption provisions, courts look to the plain meaning of the text to discern Congress's intended scope of preemption.[9] However, when Congress's intended scope is not clear, courts conduct a conflict analysis to determine whether an *actual conflict* with state law indicates *implied* preemption.[10]

1. Express Preemption Analysis

Defining the reach of federal legislation is, first, within Congress's power.[11] If Congress has included in a federal statute an express preemption provision, that provision must be applied, and its intended scope determined through traditional modes of statutory interpretation.[12] However, if Congress does not speak clearly, the sovereignty of the states in the federal system must be recognized.[13] Justices have addressed this federalist notion by applying a *presumption against* preemption.[14] This presumption underlies courts' reluctance to find preemption of state law where either Congress has not spoken directly to the issue, or where Congress has spoken, but done so *ambiguously*.[15]

2. Implied Preemption Analysis

When Congress's intended scope of preemption is ambiguous or not clearly ascertainable, courts conduct an implied preemption analysis. This analysis rests on an *ex post* assessment of whether, in a given case, an actual conflict exists between federal and state law. In conducting the analysis, both sovereigns are treated as equals, and federal law is applied over state law only in the event of actual conflict. An actual conflict occurs when federal statutory objectives are thwarted by the concurrent operation of state law.[16] In such cases, the Constitution's Supremacy Clause operates as a default rule. However, so long as the purposes of federal and state law are not inconsistent, both can apply concurrently. For example, in *Beyond Systems, Inc., v.*

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[6] *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947).
[7] *Malone v. White Motor Corp*., 435 U.S. 497, 504, 98 S.Ct. 1185, 1189, 55 L.Ed.2d 443 (1978) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963).
[8] Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. Pitt. L. Rev. 181, 183 (2004).
[9] *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016) ("Where a federal statute contains an express preemption clause, courts . . . focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.") (*quoting Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582 (2011)).
[10] *Id.* at 184 (stating that federal law applies upon identification of an actual conflict).
[11] *Id.* at 198.
[12] *Id.* at 198-99.
[13] *Id.* at 219.
[14] Ausness, *supra* note 4 at 932, (stating that "Justice Stevens and other members of the Court who joined the plurality opinion (in *Cipollone*) clearly thought that the presumption applied in express preemption cases.")
[15] *Id.* at 932-933, (citing Justice Blackmun's opinion in *Cipollone* in which he articulated a "clear statement rule" which requires Congress to clearly express its intent to preempt state law and which construed any ambiguity in the text of the statute in favor of the states, thereby narrowing preemptive scope).
[16] Davis, *supra* note 8, at 219.

Keynetics, Inc. (a case discussed below in Part B), a Maryland statute whose overall purpose was to prevent the transfer of fraudulent or misleading information through commercial e-mail was deemed *consistent* with the federal CAN-SPAM Act, and therefore was not preempted.[17]

Additionally, when only one sovereign's policy objectives are ascertainable in an underlying matter, no reason exists to defeat those legitimate objectives and so the one law with a clearly stated interest can remain in effect.[18] For example, in *Sprietsma v. Mercury Marine,* discussed in Part B below, the Court ruled that the federal government's decision not to require a certain safety regulation did not imply a federal objective or desire to preempt, and therefore *did not* displace state common law remedies to address harms where there was no federal regulation.[19]

B. Recommended Legislative Language for Preemption Clauses

As previously stated, the purpose of this white paper is to examine the well-established principles of preemption analysis used by the courts and identify specific statutory language that Congress can use in federal legislation to create the greatest likelihood that courts will find that related state laws fall within a federal law's preemptive scope and are preempted. Based on the judicial opinions in recent cases, we make *three key legislative language recommendations* in this Part B on how Congress can draft a federal preemption clause in a manner that would most likely be upheld by federal courts to reliably preempt state laws on the same subject matter:

- **<u>Recommendation #1</u>: *Use Court-Tested Terms Providing the Broadest Preemptive Coverage.*** First, the preemptive language should only use court-tested terms that have consistently been upheld as providing the broadest preemptive coverage. Simultaneously, preemption clauses should avoid use of terms that have led to the narrowing of preemptive scope, such as the use of the words "information" and "covers."

- **<u>Recommendation #2</u>: *Include a Statement of Purpose in the Preemption Clause Itself.*** Second, to provide greater clarity that Congress believes federal and state laws on the same subject create an actual conflict, and to provide evidence of Congressional intent to find in favor of maintaining a uniform federal standard, Congress should include within the preemptive clause itself a statement of purpose in the form suggested below.

- **<u>Recommendation #3</u>**: ***Avoid Carve-Outs for Common Law and State Laws in Preemption Clauses***. Finally, it is imperative for preemption clauses to avoid the inclusion of carve-outs that attempt to preserve state laws capable of being used for purposes consistent with the purposes of the federal act. The mere presence of carve-outs can take an otherwise clearly stated express preemption clause, which would be entitled to express preemption analysis, and thrust it into an implied preemption analysis where the court must preserve the state law if it cannot find the state law's purpose to be inconsistent with the purpose of the federal law. The end result in these cases is often the

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[17] *Beyond Systems, Inc., v. Keynetics, Inc.,* 422 F.Supp.2d 523 (D.Md. Feb 14, 2006).
[18] Davis, *supra* note 8 at 219.
[19] *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67-70, (2002).

finding that the state law survives the preemption analysis and is not preempted, thereby frustrating the Congressional intent to create a uniform, national standard.

Each of these key recommendations and the specific legislative language Congress is recommended to use or avoid using are discussed further in the respective subparts below.

1. Use Court-Tested Terms Providing the Broadest Preemptive Coverage

The recommendation to use court-tested terminology in preemption clauses cannot be overstated, as very often the preemptive scope (i.e., the extent to which state laws are preempted, or not, by the federal law) has been found by a court to turn on the meaning of a single word or phrase. From an extensive analysis of prior case law, and as further explained in the numbered subparts below, this memorandum makes four recommendations with respect to the use of court-tested terminology if the Congressional intent of the express preemption clause is to be predictability applied to preempt state laws on the same subject matter. These recommendations are as follows:

- Use the phrase *"relating to"* in order to be broadly preemptive;
- Do not use undefined terms with unclear meanings (e.g., *"information"*);
- Use *"imposed under state law"* to preclude common law damage awards; and
- Avoid use of the word *"covers,"* which narrows the preemptive scope.

Each of these recommendations is discussed in further detail below, and the analysis includes references to the federal acts and court cases in which the preemptive effect of these terms and phrases were examined.

a. Use the phrase *"relating to"* to be broadly and expressly preemptive

In crafting an express preemption clause, it is important for Congress to clearly indicate its intent through precise language so that courts will not resort to an implied preemption analysis but instead will use the more predictable express preemption analysis. The more explicit the preemptory language, the more inclined courts will be to accord broad preemptive scope to the provision.

In *Morales v. Trans World Airlines, Inc.*, the issue was the preemptive scope of the Airline Deregulation Act of 1978 (ADA).[20] The ADA contains a preemption provision that expressly preempts the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law ***relating to*** rates, routes or services of any air carrier."[21] For purposes of determining preemptive scope, the Supreme Court found the key phrase to be "relating to." In analyzing the language, the Court assumed that the ordinary meaning of the phrase accurately expresses legislative purpose.[22] Finding the ordinary meaning of "relating to" to be very broad—"to stand in some relation; to have some bearing or concern; to

[20] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).
[21] Airline Deregulation Act of 1978, 49 U.S.C.App. § 1301 et. seq. (ADA), at § 1305(a)(1) (emphasis added).
[22] *Morales* at 383 (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, at 57 (1990)).

pertain; refer; to bring into association with"—the Court determined that the phrase was expressive of a broad preemptive purpose.[23] The Court ultimately held in *Morales* that state enforcement actions having a "connection with or reference to airline 'rates, routes or services'" were preempted.[24]

More recently, in *Coventry Health Care of Missouri, Inc. v. Nevils*, the Supreme Court considered whether a preemption provision in the Federal Employees Health Benefits Act (FEHBA) applied to Missouri state antisubrogation and antireimbursement laws for insurance.[25] The provision stated that "terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits . . . shall supersede and preempt any State or local law . . . *which relates to* health insurance or plans."[26] Keeping with the conclusion of *Morales*, the Court noted that "Congress characteristically employs the phrase to reach any subject that has a connection with, or reference to, the topics the statute enumerates" and held that the state laws were preempted.[27] **In light of these decisions, a court is likely to interpret a preemption clause as having the broadest preemptive effect if it expressly preempts any "law, rule, regulation, standard, or other provision having the force and effect of law *relating to*" a certain subject matter.**

One of the strongest examples of a preemption clause consistently interpreted by courts as having a broad preemptive effect is that contained in the Employment Retirement Income Security Act (ERISA). ERISA states that state laws are preempted when they "relate to" regulated employee benefit plans.[28] Considering this "relate to" language, the Supreme Court determined that state laws are preempted by ERISA when they have a "connection with, or reference to" regulated employee benefit plans.[29]

Of course, the scope of the subject matter that comes after "*relate to*" or *"relating to"* in a preemption clause also has an impact on its reach. For example, in *Dan's City Used Cars, Inc. v. Pelkey*, the Supreme Court held that the Federal Aviation Administration Authorization Act (FAAAA) did not preempt a vehicle owner's state-law claims against a company that towed his vehicle and then disposed of it without notifying or compensating him.[30] The FAAAA's preemption clause prohibits enforcement of state laws "*related to* a price, route, or service of any motor carrier . . . *with respect to the transportation of property*."[31] There, the Court held that "state-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier's service *with respect to the transportation of*

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[23] *Id.* at 383 (quoting Black's Law Dictionary 1158 (5th ed. 1979)); *see also Northwest, Inc. v. Ginsburg*, 572 U.S. 273 (2014) (holding that the ADA preempted state common law claims and claim for breach of the implied covenant of good faith and fair dealing).
[24] *Id.* at 384 (quoting the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305(a)(1)).
[25] *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S.Ct. 1190 (2017).
[26] *Id.* at 1192 (emphasis added).
[27] *Id.* at 1197.
[28] Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) ("the provisions of this subchapter…shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan…").
[29] *Coventry* at 1197.
[30] *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013).
[31] *Id.* at 254 (emphasis added).

property to warrant preemption.[32] Further, the Court reasoned, the plaintiff's tort-related and consumer protection-related claims were "far removed from Congress' driving concern" underpinning the FAAAA, which was to keep states from impeding the free flow of interstate commerce via a patchwork of laws.[33] The *Dan's City* case highlights the importance of properly describing the subject matter intended to be covered by a preemption clause.

Other language having a broad preemptive effect includes the "touch upon" language discussed in *CSX Transportation, Inc. v. Easterwood*.[34] However, while a clause preempting "all laws that ***touch upon***" a subject matter could be broadly preemptive, the "relating to" language is more tested and more commonly used, and is therefore more likely to be interpreted consistently by courts in the ways discussed above. For example, in *American Bankers Association v. Gould,* the "relating to" language used in the Fair Credit Reporting Act (FCRA) was so broadly preemptive that the judicial opinion did not even discuss it. Instead, that opinion turned on the statutory interpretation of the imprecise term "information" as discussed next.[35]

b. Do not use terms with multiple meanings, like the word *"information"*

In *Gould*, the Ninth Circuit considered whether FCRA preempted the California Financial Information Privacy Act (known as "S.B. 1") insofar as it regulated the exchange of information among financial institutions and their affiliates.[36] FCRA regulates the issuance and use of "consumer reports" by "consumer reporting agencies."[37] Its preemption clause states that "[n]o requirement or prohibition may be imposed under the laws of any State…with respect to the exchange of ***information*** among persons affiliated by common ownership or common corporate control."[38]

Although courts typically look to the plain meaning of words when conducting statutory interpretation, in *Gould*, the Court used the linguistic canon *noscitur a sociis* to narrowly interpret the meaning of the word "***information***" in the preemption clause.[39] Instead of using its broader dictionary definition, the court interpreted "information" as used in the context of FCRA to be limited to the kind of credit information that appears in consumer reports. **As a result of using this contextual definition of "information" instead of its plain meaning, the court narrowly interpreted FCRA's preemptive scope under an express preemption analysis**, preempting S.B. 1 only to the extent it applied to information shared between affiliates concerning consumer credit information used or expected to be used to establish eligibility for credit, insurance, employment or another authorized purpose under FCRA.[40]

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[32] *Id.* at 255 (emphasis added).
[33] *Id.* at 263.
[34] *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993).
[35] *American Bankers Association v. Gould*, 412 F.3d 1081, 1086 (9th Cir. 2005).
[36] *Id.* at 1083.
[37] *Id.*
[38] *Id*. at 1084 (quoting the Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(2) (emphasis added).
[39] *Noscitur a sociis* literally means that a word is known by the company it keeps. This linguistic canon, aimed at facilitating plain language interpretation, involves reasoning by analogy. It is used by courts to mean that each word forms the interpreter's understanding of the other. In other words, the courts infer the meaning from the context.
[40] *Gould* at 1087.

On remand to the lower court, the Eastern District of California conducted an implied preemption analysis and found an actual conflict between FCRA and S.B. 1, ruling that no portion of S.B. 1's affiliate-sharing provision ultimately survived preemption.[41] Because of the presumption *against* preemption, however, cases like *Gould* are common as courts are apt to apply canons of statutory interpretation to ignore the plain meaning of words and narrow the preemptive scope of federal laws whenever such canons are reasonably applicable.[42] **Therefore, achieving a broadly preemptive scope requires more than the mere use of words with broad dictionary meanings.[43] Rather, it requires precise description and substantive explanation, as has been seen in the cases regarding the preemptive scope of FCRA.**

c. Use the phrase *"imposed under State law"* (not *"different from, or in addition to"*) to more completely preclude common law claims

Other language that has been held to expressly preempt state law includes the "***different from, or in addition to***" language used in *Hearing Help Express*.[44] The court there examined the Food and Drug Administration's enforcement of the Medical Device Amendments of 1976 (MDA), which stated that states may not impose "any requirement… different from, or in addition to" any federal requirement related to safety or effectiveness.[45] The Missouri statute at issue in that case provided that "[n]o person shall sell through the mails, hearing instruments without prior fitting and testing by a hearing instrument specialist."[46] The court held that "[i]f acts which are *permitted* under the federal scheme are made *mandatory* by the state statute, that requirement is '***in addition to*** the federal requirement.'"[47] Thus, the court concluded that the requirements of the Missouri statute were "in addition to" the federal requirements, and were therefore preempted. **However, while the phrase *"in addition to"* prevents states from making acts mandatory that are not mandatory under federal law, thus creating a ceiling for state regulation, it does not entirely preclude states from regulating the same subject matter.[48] For example, state common law tort claims tend not to be considered as requirements "in addition to" federal law.**

Cipollone v. Liggett Group, Inc. was the first in a long series of cases in which the Supreme Court determined whether federal product safety laws preempted state common law tort claims for defective products. The Court's decision in this case focused exclusively on language from

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[41] *See American Bankers Association v. Lockyer,* 2005 WL 2452798 (E.D.Cal. Oct. 5, 2005).
[42] *See Parker v. Brown*, 317 U.S. 341, and *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218.
[43] *See CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.") (citations and quotations omitted).
[44] *Missouri Board of Examiners for Hearing Instrument Specialists v. Hearing Help Express, Inc*., No. 05-3313, (8th Cir. 2006) (emphasis added).
[45] *Id.* (quoting Section 360k(a) of the Medical Devices Amendment (MDA), 21 U.S.C. §360k.
[46] *Hearing Help Express* (quoting Mo. Stat. § 346.010(6)).
[47] *Id.* (quoting *McMullen v. Medtronic, Inc*., 421 F.3d 482, 487 (7th Cir. 2005); see also *National Meat Association v. Harris*, 565 U.S. 452 (2012) (holding that California slaughterhouse regulations that imposed distinct requirements above those set by the Federal Meat Inspection Act were preempted for being "in addition to, or different than" the federal regulations).
[48] *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (a state law requirement that was equivalent to and fully consistent with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) labeling standards was not pre-empted).

the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969, holding that the 1969 Act *expressly* preempted common law failure-to-warn claims.[49] The 1969 Act's preemption provision declared that "***no requirement or prohibition*** based on smoking and health shall be ***imposed under State law***..."[50] Justice Stevens argued that because the petitioner's tort claims were predicated on the existence of a legal duty *under State law*, judicial recognition of such common law claims would impose "requirements or prohibitions" upon cigarette manufacturers.[51] He concluded that the phrase "imposed under State law" was therefore precise enough to preclude certain common-law damage awards against cigarette manufacturers.[52] **If Congress wishes to preclude common law claims that may be used to impose requirements or prohibitions in addition to those contained in a federal act, it should structure the act's preemption clause as *"no requirement or prohibition related to…shall be imposed under State law,"* since the Supreme Court has held this language to be precise enough to include those common law claims under its preemptive umbrella**.[53]

d. "Requirements," "Laws," "Regulations" and/or "Standards"

Overall, federal preemption provisions tend to identify state "requirements," "laws," "regulations," and/or "standards" as preempted. Reference to these terms has usually been found to preempt state common law duties, as was the case in *Riegel v. Medtronic, Inc*.[54] There, the Supreme Court determined that the plaintiff's common law claims were preempted because they were based on ***"requirements"*** with respect to a medical device that were "different from, or in addition to" the federal requirements related to device safety and effectiveness under the federal Medical Device Amendments of 1976.[55] Citing the *Cipollone* case, the Court explained, "And while the common-law remedy is limited to damages, a liability award 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'"[56] However, in some narrow cases, a reference to a state's **"laws"** or **"regulations,"** may be found to preempt only positive enactments, not common law actions.[57]

e. Avoid use of the words *"covers" or "covering" a subject matter*

Certain language ought to be avoided entirely if preemption of ***related*** state laws is intended by Congress. In *Easterwood* and, subsequently, in *Norfolk Southern Railway Co. v. Shanklin,* the Supreme Court examined the preemptive effect of the Federal Railroad Safety Act (FRSA), including its use of the word "covering" in the preemption clause that stated, "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary

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[49] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).
[50] Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5(a), 84 Stat. 87 (1970) (codified in 15 U.S.C. § 1334 (2000)).
[51] Ausness, *supra* note 4, at 936 (*quoting Cipollone*, 505 U.S. at 520).
[52] *Id.*
[53] *Cipollone* at 520.
[54] *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).
[55] *Id.*, at 324 ("Absent other indication, reference to a State's 'requirements' includes its common-law duties") (emphasis added).
[56] *Id.* (quoting *Cipollone* at 521).
[57] *Sprietsma*, 537 U.S. at 63 (holding that the phrase "a law or regulation" in the Federal Boat Safety Act did not preempt common law claims partly because of the inclusion of the article "a," which implied a discrete application).

of Transportation prescribes a regulation or issues an order ***covering*** the subject matter of the State requirement."[58] In interpreting the language of the FRSA's preemption provision, the *Easterwood* Court held that, to preempt state law, the federal regulation must ***"cover"*** the same subject matter, and not merely "touch upon" or "relate to" that subject matter.[59] The Court in *Shanklin* subsequently held that a federal regulation identifying two warning devices "cover[ed] the subject matter" of the adequacy of warning devices installed at rail crossings, and thus expressly preempted common law remedies indicating that the identified devices were not adequate.[60] Critical to the Court's ruling was its finding that States were required to follow two specific FRSA subsections that "establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject."[61]

From the opinions in these two cases, the inference can be drawn that "covering" a subject matter requires a much broader federal law or regulation than one that would merely need to "touch upon" or "relate to" a subject matter in order to preempt a state law on the same subject.[62] Because of the presumption *against* preemption and the plain meaning of the word "covers," courts are more likely to hold that federal law will not survive the higher hurdle and "cover" a subject matter unless it has broad language that fully *displaces* the state law on the same subject.[63] **When preemption clauses use phrases such as *"relating to"* or *"touch upon"* a subject matter, instead of *"covering"* it, preemption clauses tend to be applied more consistently because the words *"covers"* or *"covering"* create a higher hurdle for the federal law to survive the preemption analysis and preempt state laws on the same subject.**

2. Include a Statement of Purpose in the Preemption Clause Itself

If a federal law has a purpose which conflicts with a state law (i.e., ensuring uniform laws across states), then the federal law preempts. Use of the recommended/precise preemptive language discussed above will more likely ensure that courts ascertain Congress's intended scope of preemption and predictability apply express preemption analysis. However, because statutory interpretation is by its nature unpredictable, for a preemption clause to be broadly preemptive it must be able stand up in an implied preemption analysis as well, which as stated above involves comparing the purposes of the federal and state laws to determine if a conflict exists.

Therefore, including within the preemption clause itself a statement of purpose that may require a court (in an implied preemption analysis) to find that an *actual conflict* exists between the federal and state laws' purposes would force application of the Constitution's Supremacy Clause to preempt the state law. A statement of purpose in a federal act could, for instance, include the intent to create a national, uniform statutory/regulatory regime in order to avoid inconsistencies and potential conflicts among varying state regulations in the same subject

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[58] Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153, § 20106 (1994 & Supp. V 1999) (emphasis added).
[59] *Easterwood* at 664.
[60] *Norfolk Southern Railway Co. v. Shanklin,* 529 U.S. 344, at 358 (2000).
[61] *Id.* at 357.
[62] *See Easterwood* and *Shanklin*.
[63] *Shanklin* at 357-58 ("It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to the standard…that pre-empts state tort actions.")

area that would unnecessarily and inappropriately inhibit interstate commerce. Any state laws in the subject area would then conflict with this federal purpose.

For example, a federal data privacy bill could include a statement of purpose in the preemption clause that states that the act serves two purposes: (1) promoting uniform, national data privacy standards, and (2) expressly preempting state laws to ensure uniformity of those standards and consistency of their application across state jurisdictions, thereby reducing administrative costs and burdens on interstate commerce associated with varying state standards. **However, if the only purpose stated in the federal statute is simply the promotion of data privacy standards, an implied preemption analysis could be used by a court to rule that the federal law permits state laws of consistent purpose (e.g., promoting data privacy standards), allowing state laws to legislate beyond the federal statute.**

3. Avoid Carve-Outs for Common Law/State Law; These Thwart Congressional Intent

It is important to recognize how courts view carve-outs in preemption clauses in order to understand the significant risk of an adverse decision in litigation that frustrates Congressional intent. When drafting federal acts with preemption clauses, it should be understood that:

- Courts often view any included carve-out in a preemption clause as fatal to what may otherwise be strong, express preemption language because the **mere existence of the carve-out calls into question the Congressional intent** behind the entire preemption clause.
- The result is that courts have consistently used the presence of a common law or state law carve-out to justify using an **implied preemption analysis** in these cases, **permitting state laws with a "consistent purpose" to remain in effect**.

Because many data privacy, data security and other consumer protection bills introduced in Congress over the past two decades have attempted to include with their express preemption clauses certain carve-outs for common law and/or state laws, the following discussion examines three federal acts that included similar carve-outs and the seminal court rulings that came to the same conclusion—that an implied preemption analysis must be used when such a carve-out is present.

a. National Traffic and Motor Vehicle Safety Act (NTMVSA)

In *Geier v. American Honda Motor Company*, the Supreme Court stated clearly that express preemption analysis is not exclusive.[64] In *Geier*, the Court was asked to analyze the effect of the express preemption provision in the National Traffic and Motor Vehicle Safety Act (NTMVSA) on common law damages actions. NTMVSA's preemption provision states that whenever a federal motor vehicle standard is in effect, the States may not establish or continue in effect any "safety standard applicable to the same aspect of performance" which is not identical to the

[64] *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

federal standard.[65] The statute also contains a carve-out which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.[66] The Court concluded that the statute's preemption provision did not preempt common law damages actions, but it conducted no textual analysis of the statute's language as it had in previous cases.[67] Rather, the Court read the NTMVSA's express preemption clause and the carve-out clause together, concluding that the phrase "safety standard" in the express provision coupled with the carve-out provision made Congress's intended scope of preemption uncertain; this uncertainty led the Court to use an implied preemption analysis instead of an express one.[68]

The Court also defaulted to an implied preemption analysis in the 2011 case, *Williamson v. Mazda Motor of Am., Inc.*, where it again analyzed the NTMVSA's preemption provision. [69] It concluded that the carve-out clause in the NTMVSA placed a state tort claim outside the scope of the statute's express preemption clause "since tort law is ordinarily 'common law'".[70] It reasoned that an implied preemption analysis was appropriate because "the saving clause does not foreclose or limit the operation of 'ordinary pre-emption principles, grounded in longstanding precedent.'"[71] Tracking its analysis in *Geier*, the Court reviewed the federal agency's reasoning in promulgating the relevant regulation and deferred to the viewpoints articulated by that agency. However, the *Williamson* Court reached a much different conclusion than the *Geier* Court upon applying an implied preemption analysis. It concluded that the agency did not intend for the regulation to preempt state tort lawsuits like the one at issue and that the state tort suit did not stand as an obstacle to the accomplishment of the full purpose and objectives of the federal law.[72] The different conclusions reached in *Geier* and *Williamson* highlight the great impact that the inclusion of a carve-out clause can have on a preemption provision. **Carve-out language greatly decreases the likelihood that courts will consistently and predictably interpret a federal act's preemption provision as Congress intended. Instead, the inclusion of carve-outs with express preemption clauses ultimately leaves to the court's discretion the preemptive effect of federal law.**

b. Federal Boat Safety Act of 1971 (FBSA)

Two years after the *Geier* decision, the Supreme Court again examined the possible preemption of common law damages actions in *Sprietsma v. Mercury Marine*, ruling on the preemptive scope of the Federal Boat Safety Act of 1971 (FBSA).[73] The FBSA's preemption clause sets forth that a State "may not establish, continue in effect, or enforce a law or

[65] Davis, *supra* note 8, at 209-210 (quoting the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381, § 1392(d) (1988) (current version at 49 U.S.C. §§ 30101-30170 (2000)).
[66] *Id*. at 210.
[67] *Id*.
[68] *Id*.
[69] 562 U.S. 323, 323 (U.S. 2011).
[70] *Id.* at 329.
[71] *Id.* (quoting *Geier*, 529 U.S., at 874).
[72] *Id.* at 335.
[73] *Sprietsma,* 537 U.S. 51.

regulation… that is not identical to a regulation prescribed [by the Coast Guard]."[74] In the FBSA, Congress included a carve-out that stated "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." At issue in *Sprietsma* was whether a Coast Guard decision not to require a propeller guard preempted a common law damages claim.

Because the law contained an express preemption clause, the Court initially conducted an express preemption analysis focusing on linguistic canons and the plain wording of the clause. The Court found that the article "a" before "law or regulation" implied a discreteness which is embodied in statutes and not present in common law. Further, because "a word is known by the company it keeps[75]," the Court interpreted the terms "law" and "regulation" being used together in the preemption clause to indicate that Congress intended only to preempt positive enactments. **However, as was the case in *Geier*, the Court found the carve-out provision problematic and ultimately ruled that there was no express preemption due to the uncertainty created by the carve-out. It therefore turned instead to an implied preemption analysis.** Under an implied preemption analysis, the Court found no actual conflict existed between the purposes of the federal and state laws, holding that a more substantial indication of Congressional intent would have to be shown to preempt a state common law remedy that served the Act's more prominent objective…boat safety.[76]

c. CAN-SPAM Act of 2003

Four years after the Supreme Court's decision in *Sprietsma*, in *Beyond Systems, Inc. v. Keynetics, Inc*., the Federal District Court of Maryland analyzed the preemptive scope of the CAN-SPAM Act of 2003 to determine whether an anti-spam law enacted by the State of Maryland would be preempted in light of the Supreme Court's recent opinions regarding carve-outs coupled with express preemption clauses.[77] The CAN-SPAM Act's preemption clause, much like the federal laws at issue in *Sprietsma* and *Geier*, contains carve-out provisions. **Because of the included carve-out provisions, the court found that the Congressional intent of the preemption clause in the CAN-SPAM Act was not clear, and it therefore conducted an *implied* preemption analysis.** The court explained its reasoning for an implied preemption analysis by simply observing that the CAN-SPAM Act "provides a carve-out for any state statutes, regulations or rules that 'prohibit[] falsity or deception in any portion of a commercial electronic mail message or information attached thereto.' Accordingly…insofar as a state statute is not inconsistent with CAN-SPAM, it will not be deemed pre-empted."[78]

In conducting its implied preemption analysis, the court found that the Maryland anti-spam law served the same purpose as the CAN-SPAM Act, which was preventing the transmission of

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[74] *Id*. at 58 (quoting 46 U.S.C. §4311) (the Secretary of Transportation had authority to promulgate rules which was delegated to the Coast Guard).
[75] *See supra* note 39 regarding the linguistic canon *noscitur a sociis*.
[76] Davis, *supra* note 8, at 217.
[77] *Beyond Systems, Inc.*, 422 F.Supp.2d 523.
[78] *Id.* at 537 (quoting CAN-SPAM Act, 15 U.S.C. § 7707(b)(1), and citing *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 722-24, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963) (upholding state statute barring discriminatory hiring by airlines despite essentially identical federal statute)).

fraudulent or misleading information by commercial e-mail, and concluded that the state law's purpose was "in no way inconsistent with CAN-SPAM."[79] The court went on to say that, "At most it supplements the federal law. It does not frustrate the goals of the federal legislation; in fact it furthers them. Given that sort of compatibility between state and federal law, the preemption doctrine simply does not apply."[80] **Because the two laws' purposes were to restrict the same behavior and their restrictions were not inconsistent, there was *no actual conflict* between them. Therefore, the court, resting on the well-established presumption *against* finding federal preemption of a state law that is not in conflict with a federal law, ruled that the Maryland spam law was *not preempted* by the CAN-SPAM Act.**

Two circuit court decisions that came after *Beyond Systems, Inc.* might be read to suggest that the carve-out provisions in CAN-SPAM will not trigger application of the implied preemption analysis. In *Omega World Travel, Inc.*, the Fourth Circuit considered for the first time whether the CAN-SPAM Act preempted Oklahoma state law claims based on e-mail messages that contained a variety of inaccuracies.[81] In *Gordon v. Virtumundo, Inc.*, the Ninth Circuit considered the scope of the CAN-SPAM Act's preemption clause where a plaintiff sought to hold a defendant liable under a Washington state anti-spam law for sending messages that did not clearly display the identity of the sender.[82]

Both courts analyzed the CAN-SPAM Act's express preemption provision and did not explicitly state that they were using an implied preemption analysis. In analyzing the carve-out language of the Act, however, the courts focused on determining whether the state laws at issue *conflicted* with the Congressional intent underlying the CAN-SPAM Act – which is the approach taken in an implied preemption analysis.

In *Omega World Travel, Inc.*, the Fourth Circuit concluded that Oklahoma law was preempted by the CAN-SPAM Act because a contrary decision "would be inconsistent with the federal Act's preemption text and structure, and, consequently, with a 'fair understanding of congressional purpose.'"[83]

The Ninth Circuit reached a similar conclusion in *Gordon.* In that case, the Ninth Circuit determined that the carve-out provisions in the preemption provision led to facial ambiguity.[84] That led the court to look at whether there was a conflict between the state law and congressional intent. The court wrote that it was "compelled to adopt a reading of the preemption clause that conforms with the statute's structure as a whole and the stated legislative purpose."[85] With that, the Ninth Circuit used the principles of an implied preemption analysis. It simply did so without specifying in its opinion that what it was conducting was an implied preemption analysis.

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[79] *Id.* at 538.
[80] *Id.*
[81] *Omega World Travel, Inc. v. Mummagraphics, Inc.,* 469 F.3d 348 (4th Cir. 2006).
[82] *Gordon v. Virtumundo, Inc*., 575 F.3d 1040 (9th Cir. 2009).
[83] *Omega World Travel*, 469 F.3d at 359.
[84] *Gordon,* 575 F.3d at 1062.
[85] *Id.* at 1063.

Although the *Omega World Travel, Inc.* and *Gordon* opinions failed to explicitly state that they were relying upon an implied preemption analysis, both the Ninth Circuit and the Fourth Circuit made congressional intent and the question of whether the state law at issue conflicted with that congressional intent the determinative factor in their analyses. That approach largely mirrored the stated application of an implied preemption analysis in *Beyond Systems, Inc.* **All three of these cases then demonstrate one principle – that the inclusion of a carve-out provision in a preemption clause leads courts to move away from an express preemption analysis to an implied one where they question whether there is a conflict between the purposes of the state and federal laws in question, whether or not the court describes that process of analysis as one of "implied preemption."**

d. Carve-Outs Frustrate Congressional Intent to Create Uniform Standards

The courts in *Sprietsma* (FBSA)*, Geier* (NTMVSA), and *Beyond Systems, Inc.* (CAN-SPAM) used *implied* preemption analyses because carve-out provisions were included in the preemption clauses of the federal statutes. The FBSA and NTMVSA created exceptions for common law remedies, while the CAN-SPAM Act provided a carve-out for state laws prohibiting falsity or deception in commercial emails. In those cases, the carve-out provisions in the federal acts allowed the courts to conclude that Congressional intent was not clear, and then resort to using implied preemption analyses to examine whether the state and federal laws' purposes were consistent. Following the well-established presumption *against* preemption, a court using an implied preemption analysis may determine that federal and state laws with consistent purposes are not in actual conflict and that both laws may operate concurrently, even where the state law's requirements exceed that of the federal law. **With data privacy legislation under congressional consideration now, courts could ultimately find the purposes of existing state data privacy laws are consistent with the purpose of a federal privacy law once it is enacted. For this reason, it is especially important for federal legislation to exclude carve-outs in the preemption clauses of any act for which Congress intends to create nationwide uniform data privacy standards by preempting related state laws on the subject.**

C. Conclusion

Ultimately, the tension between the Constitution's Supremacy Clause and the presumption *against* preemption results from courts' repeated determinations in many cases that Congress has failed to explicitly indicate its intent as to whether or not a federal statute preempts state laws and to what extent it does so. Absent a clear expression of Congressional intent, courts are free to exercise their own judgment in resolving questions of preemption and must, under the principles of *Parker v. Brown*, apply a presumptive stance against preemption when exercising their judgment.[86] Unfortunately, it is difficult to predict with great certainty how courts will interpret federal preemption clauses when they are challenged, as differences in one court's interpretation over another court's can often be the result of nothing more than a preference justified by the use of arcane statutory canons to support the interpretation of the court. To mitigate against that uncertainty, this white paper examined the key findings of courts in federal preemption cases in order to determine which statutory language would provide the greatest certainty to Congress

[86] *See supra* notes 5 and 42.

that the laws it passes with the intent to preempt state laws on the same subject matter will survive courts' preemption analyses.

In conclusion, for Congress to avoid uncertain results in the application of its laws as a result of persistent litigation challenging the preemptive scope of federal acts that were intended to preempt state laws on similar subject matters, drafters of federal laws should follow the three legislative recommendations of this white paper set forth in Part B, as briefly summarized here:

1) Use court-tested terms that have been consistently found by federal courts to provide the clearest expression of Congressional intent with respect to the preemptive effect of the federal law;

2) Include a statement of purpose in the preemption clause itself indicating that a purpose of the federal law is to preempt state laws in order to create a uniform national standard; and

3) Avoid including any carve-outs for common law and state laws in preemption clauses, the inclusion of which can be used by courts to thwart Congressional intent to establish uniform national standards.