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# *MAZZOCCHIO V. COTTER CORP.*, BROODING FEDERAL INTERESTS, AND PROBLEMS OF PREEMPTION: WHY THE EIGHTH CIRCUIT'S REASONING MAY SIGNAL CLEARER SKIES AHEAD

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*Doctrines of preemption exist to determine the correct balance between state and federal power. But despite the delicate nature of this task, courts have sometimes overlooked the plain language of the preemption provisions at play in the field of nuclear safety. Instead, brooding federal interests have loomed large. The idiosyncrasies of the field of nuclear safety may merit a cautious approach to applying state tort law, but the Eighth Circuit's finding that state standards of care were not preempted rests on sound first principles. In particular, the Eighth Circuit's decision was correct given its clear analysis of the relevant preemption provision's plain language meaning.*

*The Eighth Circuit's reasoning should be adopted moving forward to afford these plaintiffs their day in state court and clarify a frequently litigated doctrine for both Congress, as it drafts future preemption provisions, and state governments, as they seek to further their own policy and regulatory interests.*

## INTRODUCTION

In 2022, Nikki Mazzocchio and Angela Kraus brought suit against Cotter Corporation, alleging that Cotter had improperly disposed of radioactive waste near Coldwater Creek, Missouri, in the years following the Second World War, exposing them to harmful radiation and causing them to eventually develop cancer.[1] The plaintiffs, two sisters, both spent time in the 1980s and 1990s living and working in Hazelwood, Missouri, a suburb of St. Louis and home to Coldwater Creek.[2] The Agency for Toxic Substances and Disease Registry (ATSDR) has stated that this area may be

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1. Petition at 2, Mazzocchio v. Cotter Corp., No. 4:22-CV-292-MTS (E.D. Mo. Sep. 8, 2023), 2023 WL 5831960.

2. Id. at 8.

linked with certain cancers.[3] While the ATSDR has not recommended additional general disease screening for individuals who live or have lived in the area, the Public Health Assessment, completed in 2019 at the request of community members, has given plaintiffs some hope that their claims might have merit.[4] But for Mazzocchio, Kraus, and other plaintiffs looking to prove exposure to this area, their success, at least initially, may turn on preemption, rather than on typical issues of tort liability.[5]

Cotter, following rulings from other circuits, argued for a federal standard of care and that any potential state standard was preempted.[6] But in October of 2024, the Eighth Circuit ruled that the sisters' claims, considered "public liability actions" under the Price–Anderson Act (PAA), could proceed using a state standard of care while remaining in a federal forum.[7] The decision in *Mazzocchio* created a split with the Third, Sixth, Seventh, Ninth, and Eleventh Circuits, which had all ruled that any state standards of care were preempted in public liability actions.[8]

This Comment explores how the *Mazzocchio* opinion can change not only the lives of the parties involved in this case but also the balance of federal and state regulatory power. First, Part I offers a brief overview of the field of nuclear safety in general, including the public liability action provided by Congress and the differing forms of implied preemption present. Part II begins by examining how other circuits have treated this issue. It then focuses on the Eighth Circuit's decision in *Mazzocchio*, noting its commonsense rationale while acknowledging some possible difficulties. Finally, Part III considers what the Eighth Circuit's decision could mean for preemption doctrine at large, in particular the development of a new default rule and promotion of new policymaking norms.

## I. PREEMPTION IN THE FIELD OF NUCLEAR SAFETY

This Part starts by giving background on the federal scheme for regulating nuclear energy, focusing on the Price–Anderson Act of 1957 and subsequent developments. Then, this Part compares the two types of implied preemption that are present in the field of nuclear safety—field

3. Agency for Toxic Substances & Disease Registry, HHS, Evaluation of Community Exposures Related to Coldwater Creek, at iii, v (2019), https://stacks.cdc.gov/view/cdc/78245/cdc_78245_DS1.pdf [https://perma.cc/2LL9-HQ34].

4. Id. at ii, iii.

5. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 566–67 (8th Cir. 2024) (holding that the federal standard of care does not preempt state standards of care).

6. Reply Brief of Appellants Cotter Corp. (N.S.L.); Commonwealth Edison Co.; and St. Louis Airport Authority, a Department of the City of St. Louis at *7–8, *Mazzocchio*, 120 F.4th 565 (No. 23-3709), 2024 WL 4612546.

7. *Mazzocchio*, 120 F.4th at 569 (noting its respectful disagreement with other circuits on the question of whether "federal law preempts state standards of care in a public liability action" under the PAA).

8. See In re Hanford Nuclear Rsrv. Litig., 534 F.3d 986, 1002 (9th Cir. 2008) (describing the existing consensus of federal courts).

and conflict—and discusses how they create the main question in *Mazzocchio*.

### A. *The Field of Nuclear Safety*

As the nuclear energy industry emerged in the 1950s, Congress recognized the need for a regulatory scheme to address the potentially massive liabilities associated with nuclear energy development and ensure private investment was not discouraged.[9] In 1957, that recognition culminated in the passage of the PAA, which governs, among other things, limits on liability for private actors and how plaintiffs may bring claims after nuclear accidents.[10] And in 1988, as courts were finally working through claims arising out of the Three Mile Island nuclear accident eleven years prior, Congress amended the PAA to create the modern "public liability action."[11] An expansive category, public liability actions cover "any suit asserting public liability" following a nuclear incident—anything from direct exposure following a partial reactor meltdown like that which occurred on Three Mile Island[12] to latent exposure from improper handling and disposal of the kind the plaintiffs alleged in *Mazzocchio*.[13] Though courts debated issues of jurisdiction prior to the 1988 amendments,[14] since then it has been uncontroversial that all public liability actions are heard in the federal district court in the district where the nuclear incident took place.[15] So while the *Mazzocchio* plaintiffs originally brought their claims in state court, the claims in this case are public liability actions properly heard in federal court.[16]

Public liability actions "[arise] under section 2210," of the PAA, and § 2014(ii) goes on to note that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions

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9. See In re Cotter Corp., 22 F.4th 788, 794 (8th Cir. 2022) (describing the history of the PAA).

10. See U.S. Dep't of Energy, Price–Anderson Act Report to Congress 2–3 (2023), https://www.energy.gov/sites/default/files/2023-02/PAA%20Report%20January%202023_0.pdf [https://perma.cc/USQ9-6ZPA].

11. See S. Rep. No. 100-218, at 13 (1988), as reprinted in 1988 U.S.C.C.A.N. 1476, 1488 (detailing the various amendments to the PAA, including the modern public liability action).

12. See Three Mile Island Accident, World Nuclear Ass'n, https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/three-mile-island-accident [https://perma.cc/8HCR-3BU7] (last updated Oct. 11, 2022).

13. For the definitions of public liability action and nuclear incident, see 42 U.S.C. § 2014 (2024).

14. See, e.g., In re TMI Litig. Cases Consol. II, 940 F.2d 832, 837 (3d Cir. 1991) ("Following our rulings . . . that the Price–Anderson Act created no federal tort cause of action and was not intended to confer jurisdiction upon the federal courts, the actions originally filed in the state courts were remanded . . . .").

15. See Notice of Removal at 1, Mazzocchio, No. 4:22-CV-292-MTS, 2023 WL 5831960.

16. Id. at 1–3, *Mazzocchio*, No. 4:22-CV-292-MTS, 2023 WL 5831960.

of [§ 2210]."[17] Section 2210, however, does not speak to a standard of care.[18] On § 2210 alone, any potential jury in the *Mazzocchio* case would be at a loss in determining whether Cotter is liable for its handling and disposal of radioactive waste. Therein lies the question at the center of this circuit split: Should a state standard of care govern, or would any such standard be preempted by federal law? A federal standard of care could draw from Nuclear Regulatory Commission (NRC) dosage requirements, and both the petitioners and the District Court below have indicated that reliance on such a standard would show that Cotter is not liable.[19] A state standard of care, however, would allow a jury to consider the evidence in the case and decide whether Cotter met its burden under the common law tort principles of Missouri.

### B. *Issues of Implied Preemption*

All federal preemption doctrine is grounded first in the language of the Constitution's Supremacy Clause, which states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[20] But beyond sharing an original source, not all preemption doctrines are created equal. When answering the question posed in *Mazzocchio*, the Eighth Circuit was dealing with implied preemption.[21] As opposed to express preemption, in which specific statutory language does much of the interpretive work on its own,[22] implied preemption often requires courts to sift through statutory language, inquire into congressional intent, and consider how federal and state regulatory schemes will interact in practice.[23] Additionally, while courts and commentators agree that there are no airtight systems for categorizing implied preemption, two commonly accepted types are field and conflict preemption.[24]

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17. See 42 U.S.C. § 2014(ii) (2024).

18. See id. § 2210 (discussing waivers of defenses, indemnification, limits on liability, and more—with no mention of any standard of care).

19. See Mazzocchio v. Cotter Corp., No. 4:22-CV-292-MTS, 2025 WL 708379, at *2 (E.D. Mo. Mar. 5, 2025); Petition for a Writ of Certiorari at 5, Cotter Corp. v. Mazzocchio, No. 24-1001 (U.S. filed Mar. 10, 2025).

20. U.S. Const. art. VI, cl. 2.

21. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 568–69 (8th Cir. 2024).

22. See, e.g., Alan Untereiner, The Preemption Defense in Tort Actions: Law, Strategy and Practice 77 (2008) (noting the formulaic approach courts take with some familiar express preemption words or phrases).

23. See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (describing Congressional intent to occupy the field and a high potential for conflict between federal and state statutes as two circumstances that call for implied preemption).

24. See Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1092 (10th Cir. 2015) ("[I]t's fair to say the Court has distinguished between 'field' preemption (where Congress leaves 'no room' for state regulation in an entire area) and 'conflict' preemption (where Congress has expressed a more modest wish to displace individual state laws standing in the way of federal law)." (quoting Arizona v. United States, 567 U.S. 387, 397–400 (2012))).

Field preemption exists when the "scheme of federal regulation" is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"—that is, when "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[25] This type of implied preemption arises in areas such as aviation and immigration where there is a unique need for uniformity or where national security interests are at play.[26] On one reading, nuclear safety regulation fits neatly into field preemption. After all, the nuclear energy industry undeniably has roots in national security, and commentators often refer to it as an example of field preemption.[27] But the Supreme Court has taken a more nuanced approach, refusing to box nuclear safety regulation into any simple preemption category.[28]

Conflict preemption, on the other hand, asks courts to consider whether the state law in question would be an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[29] and "disrupt[] the delicate 'balance' Congress sought to achieve."[30] The simplest kind of conflict preemption occurs when compliance with federal and state law is actually impossible,[31] but in reality, conflict preemption often requires a more fine-tuned balancing.[32] In recent cases, building off the notion that Congress, not the judiciary, is in charge of preemption,[33] the Court has also indicated a shift away from a freewheeling inquiry and toward a balancing of costs and benefits that draws heavily from the statutory language.[34] In this case, it is entirely possible that a jury could decide that NRC federal dosage requirements should constitute Missouri's state standard of care, so the more extreme kind of conflict preemption is less relevant. But whether allowing individual juries to make that decision disrupts the balance Congress has sought to create in nuclear safety

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25. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983) (internal quotation marks omitted) (quoting Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

26. See, e.g., Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 368 (3d Cir. 1999) (noting that, through the FAA, Congress created a comprehensive scheme of air safety standards).

27. See Bryan L. Adkins, Alexander H. Pepper & Jay B. Sykes, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer 18, 20–22 (2023).

28. See Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 64 (1978) (noting the uniqueness of the nuclear power industry); see also El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 474 (1999) (describing the PAA's unusual preemption provisions).

29. See *Pac. Gas & Elec.*, 461 U.S. at 204 (internal quotation marks omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

30. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1907 (2019).

31. See, e.g., Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (requiring "no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce").

32. See id. at 144–45.

33. Chamber of Com. v. Whiting, 563 U.S. 582, 607 (2011).

34. See, e.g., *Va. Uranium, Inc.*, 139 S. Ct. at 1907.

regulation is at the heart of *Mazzocchio* and the other circuit opinions to have considered this question.[35]

## II. THE CIRCUIT SPLIT

The Eighth Circuit's decision represents a significant break from other circuit courts, which have largely held that any state standards of care are preempted in a public liability action. Thus, this Part catalogs the other circuits' decisions and reasonings and then makes an argument for why *Mazzocchio*, despite its marked departure and some potential problems, is still good law.

### A. *Other Circuits' Decisions*

The Third, Sixth, Seventh, Ninth, and Eleventh Circuits have all found that state standards of care are preempted by federal law in a public liability action, creating what the *Mazzocchio* petitioners describe as a five-to-one circuit split.

Following the 1988 amendments creating the modern public liability action, the Third Circuit was the first to consider whether a state or federal standard of care should apply.[36] After acknowledging the cases called for a case-by-case conflict preemption analysis, the Third Circuit ruled that "any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law."[37] This approach, while nominally an application of conflict preemption, carries echoes of field preemption,[38] and it is hard to imagine any state standard of care the Third Circuit would find to not be preempted. Just four years later, that ruling was affirmed in *In re TMI*, with the panel noting the need for a definitive standard and the dangers it saw in allowing juries to fix standards in each case.[39] The Third Circuit has signaled some willingness to reconsider this question,[40] but the *TMI* cases remain good law, and until the court says otherwise, the *Mazzocchio* respondents' arguments to the contrary are speculative.[41]

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35. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 568–70 (8th Cir. 2024).

36. See In re TMI Litig. Cases Consol. II, 940 F.2d 832, 858–59 (3d Cir. 1991). The Third Circuit was spurred into action by the litigation following the Three Mile Island accident.

37. Id.

38. See supra section I.B.

39. 67 F.3d 1103, 1115, 1117 (3d Cir. 1995).

40. See Est. of Ware v. Hosp. of the Univ. of Pa., 871 F.3d 273, 278 n.3 (3d Cir. 2017) ("Neither party offers any legal source that would limit liability under the Price–Anderson Act to cases where exposure exceeds § 20.1201's limits. But because Boyer accepts this limitation as true and failed to oppose summary judgment, we have no occasion to challenge it.").

41. See Brief in Opposition at 26, Cotter Corp. v. Mazzocchio, No. 24-1001 (U.S. filed June 26, 2025).

In 1994, the Seventh Circuit was the first to follow suit, describing adherence to federal regulatory standards as "a necessity."[42] That opinion similarly concluded by invoking conflict preemption and the "carefully crafted balance . . . that Congress has achieved."[43] But it also invoked the field of nuclear safety multiple times and emphasized that when nuclear safety is at issue, federal safety regulations are the only possible standard of care.[44] Despite § 2014(ii)'s clear command that state law should supply the substantive rules of decision, in the Seventh Circuit's view, it was "not appropriate" for anything but a federal regulatory standard to control, and all state standards were preempted.[45]

The Sixth and Ninth Circuits came next, and though their decisions largely agreed with the earlier preemption analyses, they added some important language to the precedent supporting Cotter's argument in *Mazzocchio*.[46] First, the Sixth Circuit noted that public liability actions are "derived from state law . . . to the extent [that] it is not inconsistent with federal law."[47] This is a subtle shift away from the exact language of § 2014(ii), but one key to holding that federal law outside of § 2210, primarily federal dosage requirements, can preempt state standards of care. The Ninth Circuit for its part chose to emphasize how "the federal government is in charge of nuclear safety."[48] This line of reasoning, while undisputed by any court,[49] again prioritizes field preemption concepts over the preemption language found in § 2014(ii). Rounding out the circuit split, the Eleventh Circuit first held in 1998 that state standards of care would necessarily be preempted if they were inconsistent with federal radiation exposure regulations.[50] And while the court more recently held state law to at least supply the relevant statute of limitations, it reiterated that it is "beyond dispute that Congress intended for the federal

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42. O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1103 (7th Cir. 1994).

43. Id. at 1105.

44. Id. at 1103–04.

45. Id.

46. See In re Hanford Nuclear Rsrv. Litig., 534 F.3d 986, 1002 (9th Cir. 2008) (deciding that the Price–Anderson Act preempts reliance on federal common law doctrine); Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir. 1997) ("Because the Price–Anderson Act . . . specifically dictates that state law applies only to the extent it is not inconsistent with federal law and because we agree with the analyses of preemption in *O'Conner* and *TMI II*, we hold that the Price–Anderson Act preempts Nieman's state law claims . . . .").

47. *Nieman*, 108 F.3d at 1553.

48. *In re Hanford*, 534 F.3d at 1003.

49. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 567–68 (8th Cir. 2024) ("[T]he Supreme Court has similarly recognized that 'the federal government maintains complete control of the safety and "nuclear" aspects of energy generation . . . .'" (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983))). Even the Eighth Circuit, in creating the circuit split, recognized the control the federal government wields over nuclear energy in general.

50. See Roberts v. Fla. Power & Light Co., 146 F.3d 1305, 1307 (11th Cir. 1998).

government, and not the states, to have control over issues of nuclear injury."[51]

Though the *Mazzocchio* petitioners did not describe it as part of the circuit split,[52] the Tenth Circuit has also considered this question on at least two occasions. First, in 2010, the court acknowledged that there was no express preemption of a state standard of care and that defendants would bear the burden of showing that state and federal law conflict.[53] And while it admitted that sources of federal law outside of § 2210 could preempt state standards of care, it found that the record showed nothing to that effect at the time and directed the district court on remand to allow the defendants to identify other sources of federal law they believed would preempt a state standard of care.[54] Just five years later, the same parties came before the Tenth Circuit again, and the court had another opportunity to discuss § 2014(ii), even though the defendants had forfeited all preemption arguments other than those about express preemption.[55] Notwithstanding that procedural defect, the Tenth Circuit still discussed what it described as § 2014(ii)'s "modest form of conflict preemption."[56] The court distinguished this from other, clearer cases of field preemption, and it emphasized that state law should apply unless it specifically conflicts with § 2210.[57] Though this opinion is of lesser precedential value given the court chose not to rule on an issue forfeited by the defendants, the Tenth Circuit's reasoning laid a framework that the Eighth Circuit built on in *Mazzocchio*.

### B. *The Eighth Circuit in* Mazzocchio

Despite the fact that the circuit split may not be as severe as petitioners contend, Judge Morris Sheppard Arnold rightly acknowledged in his opinion that a split nonetheless exists.[58] In just six pages, *Mazzocchio* focuses on showing that (a) the entire field of nuclear safety is not preempted and (b) state standards of care have an undeniable role to play in public liability actions. The opinion begins by responding to the arguments of other circuits that sound in field preemption, noting that Congress intended to accept the tension that comes with an overlapping

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51. Pinares v. United Techs. Corp., 973 F.3d 1254, 1259–60 (11th Cir. 2020).

52. See Petition for a Writ of Certiorari at 3, Cotter Corp. v. Mazzocchio, No. 24-1001 (U.S. filed Mar. 10, 2025) (describing how "the uniform view across every court of appeals to confront the question—the Third, Sixth, Seventh, Ninth, and Eleventh Circuits—had been that 'federal law determines the standard of care and preempts state tort law'" (quoting Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir. 1997))).

53. See Cook v. Rockwell Int'l Corp., 618 F.3d 1127, 1143 (10th Cir. 2010).

54. See id. at 1144.

55. See Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1092 (10th Cir. 2015).

56. Id. at 1095.

57. See id.

58. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 570 (8th Cir. 2024) ("[W]e instead take a path different from our sister circuits . . . .").

system of federal and state law.[59] The court reasoned that though the Supreme Court in *Silkwood v. Kerr-McGee Corp.* had only dealt with the issue of punitive damages, it spoke to the larger issue of Congress's intent in creating a system for regulating nuclear energy that combines state and federal elements.[60] Other authority from the Supreme Court, it reasoned, also made clear that there are places in the field of nuclear safety where regulatory authority is "expressly ceded to the states," pointing against field preemption despite the federal government's overall firm grip on nuclear energy.[61] Finally, *Mazzocchio* rightly points out the insufficiency of arguments for field preemption that rely on the inability of states to enact before-the-fact regulations.[62] Public liability actions, subject to a preemption analysis, draw their rules of decision from state law.[63] It has been undisputed for nearly one hundred years that "state law" includes not just state statutes or regulations but also state common law, and that remains true here.[64]

After dispensing with arguments that state standards of care are preempted anywhere in the field of nuclear safety, *Mazzocchio* turns to the specific language of § 2014(ii). Despite the fact that preemption analysis has historically made much of the inquiry into Congress's intent, with the Supreme Court at times describing congressional purpose as "the ultimate touchstone in every pre-emption case,"[65] *Mazzocchio* follows the more recent trend of respecting what Congress did *and* did not write.[66] The opinion argues that when § 2014(ii) states that public liability actions draw their substantive rules of decision from state law unless that state law is inconsistent with "such section," with such section referring only to § 2210, no other federal law can be said to preempt state law.[67] This approach eschews reading into the intent of either Congress or any given state in

59. Id. at 568.

60. Id. ("The defendants emphasize that the Court in *Silkwood* wrestled with whether a plaintiff was entitled to a particular remedy under state law and not with whether state standards of care apply. But the Court spoke about the role of state tort law in broad terms . . . ."); see also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256–58 (1984).

61. Pac. Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983).

62. See *Mazzocchio*, 120 F.4th at 567–68.

63. See id.; see also 42 U.S.C. § 2014(ii) (2024) ("A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs . . . .").

64. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

65. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotation marks omitted) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

66. See Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1900 (2019) ("Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders.").

67. *Mazzocchio*, 120 F.4th at 569.

favor of adhering to exactly what the statute says. While other circuits, in conducting a balancing test, were wary of other federal regulations,[68] the Eighth Circuit in *Mazzocchio* adopted the Supreme Court's language and referred to those regulations, outside the scope of § 2014(ii)'s text, as merely a "brooding federal interest."[69] More than 100 years ago, Justice Oliver Wendell Holmes, Jr., wrote that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified."[70] Justice Holmes, writing in the era before *Erie*, was worried about the lack of definite authority behind the general federal common law endorsed by *Swift v. Tyson*,[71] but it is not hard to see the similarity between that worry and the "brooding federal interest" language appearing in modern preemption cases. Just as Justice Holmes went on, in another forceful dissent prior to *Erie*, to write that law does not exist "without some definite authority behind it,"[72] Justice Neil Gorsuch recently made clear that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law."[73] Here, such a brooding federal interest still might be compelling if the entire field of nuclear safety were preempted or if Congress had not expressly ceded some authority to states in § 2014(ii), but there is nothing in § 2210, the only section given authority to displace state rules of decision in public liability actions, that speaks to a standard of care.

### C. *Potential Issues with* Mazzocchio

Though the Eighth Circuit's reasoning in *Mazzocchio* is sound, the opinion faces several problems when applied to the specific field of nuclear safety. First, nuclear safety implicates serious national security issues.[74] The United States currently sources around one-fifth of its energy supply from nuclear power,[75] and politicians from both parties see it as the future of clean energy.[76] But the high costs of nuclear power and blemishes

68. See supra section II.A.

69. *Mazzocchio*, 120 F.4th at 569 (internal quotation marks omitted) (quoting Kansas v. Garcia, 140 S. Ct. 791, 801 (2020)).

70. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), overruled by, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

71. 41 U.S. 1, 12 (1842) (relying on "the principles established in the general commercial law"), overruled by *Erie*, 304 U.S. 64.

72. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting), overruled by *Erie*, 304 U.S. 64.

73. *Va. Uranium*, 139 S. Ct. at 1901.

74. See, e.g., Tim Echols, Why Nuclear Energy Is a Matter of National Security, Pub. Utils. Fort., Sep. 2017, at 54, 66 (discussing the importance of nuclear energy in international relations, military strength, and secure power generation).

75. U.S. Nuclear Plants, Nuclear Energy Inst., https://www.nei.org/resources/fact-sheets/u-s-nuclear-plants [https://perma.cc/J747-N62T] (last updated Nov. 2024).

76. See Mike Mueller, Nuclear Power Is the Most Reliable Energy Source and It's Not Even Close, U.S. Dep't of Energy (Mar. 4, 2021), https://www.energy.gov/ne/articles/

on its record make the industry very sensitive to changes in regulation,[77] so a sea change in the way nuclear energy companies are subject to liability may come at too high a price. Second, the staggering damages amounts and spillover effects that can come from a single nuclear incident may make nuclear safety ill-suited to the ad hoc decisionmaking of a jury in any given state.[78] The facts of the *Mazzocchio* case center around radioactive waste disposal in the suburbs of St. Louis, and Cotter currently faces at least two other suits from similarly situated plaintiffs.[79] But nuclear incidents can also have more widespread effects, and it's not hard to imagine a scenario in which, after this case, a jury in the Eighth Circuit awards a plaintiff a large sum while an identical plaintiff in the neighboring Seventh Circuit would recover nothing. Finally, fears over modern lay jurors' ability to determine whether private actors have met state standards of care may be well founded. In particular, nuclear energy safety and handling radioactive waste are likely distinguishable from other examples the opinion cites, such as motor vehicle safety and medical devices.[80] Courts have been willing to allow some breathing room for after-the-fact tort suits in those cases, but many more jurors are likely familiar with motor vehicles or medical devices than with nuclear safety or handling radioactive waste. Federal regulatory standards for nuclear safety are developed by agencies with professional and scientific expertise,[81] and states, still barred from creating their own before-the-fact regulations for nuclear safety,[82] might be unable to catch up.

## III. EXPANDING THE EIGHTH CIRCUIT'S REASONING BEYOND THE FIELD OF NUCLEAR SAFETY

When the Eighth Circuit broke from every other circuit to have considered the question at issue in this case, it was necessarily only ruling

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nuclear-power-most-reliable-energy-source-and-its-not-even-close [https://perma.cc/NLG6-AXB3] ("[N]uclear energy has by far the highest capacity factor of any other energy source."); see also Secretary Chris Wright Delivers Welcome Remarks to DOE Staff, U.S. Dep't of Energy (Feb. 5, 2025), https://www.energy.gov/articles/secretary-chris-wright-delivers-welcome-remarks-doe-staff [https://perma.cc/S8PX-N3D8] ("The rise of nuclear could meaningfully lower the greenhouse gas intensity of our energy production system.").

77. E.g., World Nuclear Ass'n, Nuclear Power Economics and Project Structuring 29 (2017), https://world-nuclear.org/images/articles/REPORT_Economics_Report_2017.pdf [https://perma.cc/83DF-9Q6G].

78. See, e.g., Brief for Amici Curiae Nuclear Energy Institute, Inc. et al. in Support of Petitioners at 5, 11, Cotter Corp. v. Mazzocchio, No. 24-1001 (U.S. filed Apr. 21, 2025).

79. Petition for a Writ of Certiorari at 19–20, *Cotter*, No. 24-1001 (U.S. filed Mar. 18, 2025).

80. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 570 (8th Cir. 2024).

81. See U.S. Nuclear Regul. Comm'n, NRC: An Independent Regulatory Agency, https://www.nrc.gov/docs/ML2028/ML20282A656.pdf [https://perma.cc/G6FF-4JXY] (last visited Feb. 6, 2026) (describing the NRC's expertise and functions).

82. See Jason O. Heflin, Cong. Rsch. Serv., R41984, State Authority to Regulate Nuclear Power: Federal Preemption Under the Atomic Energy Act (AEA) 2 (2023).

on the PAA and the field of nuclear safety. The path charted in *Mazzocchio*, however, offers a template for how federal and state governments could operate under a new default rule, and this Part argues that it enables more durable and tailored policymaking.

### A. *A New Default Rule*

Preemption is a commonly encountered doctrine, but it is also highly complicated, and even courts sometimes labor to fit cases neatly into the existing preemption taxonomy.[83] Additionally, for areas like conflict preemption, commentators have advocated a variety of tests, including focusing on either the motives behind or the effects of state laws.[84] *Mazzocchio*, however, takes good advantage of a clearly written preemption provision. State law gives the rules of decision in public liability actions unless § 2210 says otherwise.[85] While Congress may be ill suited to drafting complex preemption provisions,[86] the case provides a template for when Congress seeks to have overlapping regimes of federal and state law: "In X area, state law applies unless Y says otherwise." This approach isn't revolutionary, but it is clear. "Y" might be a specific statutory section, as it is in this case, or it might be a whole statute or a federal agency. For example, Congress could have specified that the NRC and its regulatory requirements would override state law, but it chose not to. Balancing tests might still be necessary if, for example, state law had to be weighed against an entire statute or regulatory scheme, but this approach would avoid scenarios like the one in this case in which courts are split on whether a preemption provision, clear on its face, calls for further inquiry. Congress, not the judiciary, is supposed to control the levers of preemption,[87] and this default rule would make clear when courts should and should not be stepping in.

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83. See Jamelle C. Sharpe, Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence, 18 Geo. Mason L. Rev. 367, 367 (2011) (describing preemption as "frequently recurring and perplexing").

84. See, e.g., Katherine B. Wells, Legislative Intent to Trick: Three Decades On, Why *Vermont Yankee*'s Outcome Demands a Re-Working of *Pacific Gas*, 3 LSU J. Energy L. & Res. 535, 537 (2015) (advocating for a test measuring the effect of state laws).

85. See 42 U.S.C. § 2014(w) (2024).

86. See Daniel J. Meltzer, Preemption and Textualism, 112 Mich. L. Rev. 1, 57 (2013) (arguing that "at least with respect to federal statutes of any complexity, Congress can rarely craft statutory language that will adequately resolve the full range of preemption issues").

87. See Chamber of Com. v. Whiting, 563 U.S. 582, 607 (2011) ("Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that pre-empts state law.'" (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment))).

B. *Durable and Tailored Policymaking*

Such a new default rule, beyond being easier to administer, would invite more state action and likely have additional positive effects. Currently, other circuits' interpretation of preemption provisions similar to § 2014(ii) would always call for a larger inquiry into congressional intent and an involved balancing test.[88] Especially in areas other than nuclear safety, where states are allowed to enact before-the-fact regulations, the danger that any state law might be preempted likely stunts some state action. But states have a growing role to play as administrative bodies of their own,[89] and courts should adopt a default rule like the one proposed above that takes advantage of states' unique position. First, states have an important role in shaping national policy, especially with pendulum swings in policy between presidential administrations.[90] An increased skepticism of the federal administrative state has accompanied the rise in prominence of the unitary executive theory,[91] so many major policy initiatives of the last several years have been carried out through informal means or executive orders, only to be overturned at the start of the next administration or shift in power.[92] California and New York, for example, have already begun responding by filling in policy gaps that appear in areas such as environmental regulation when national policies are hard to rely on.[93] Second, states can enact policies that are geared toward their own constituencies and likely more responsive to local or regional interests than federal, one-size-fits-all policies. All states lack the resources and reach of the federal government, and within states as well there are serious resource disparities. But state policymaking can happen on a much smaller scale, and public officials can craft policies that represent a larger share of their state's electorate.[94]

In an era when seismic policy shifts accompany each change in administration and policy is made through less formal and more temporary means, states have an enormous potential to step in and add value in the ways described above. But states could be hesitant to enter the fray if there is uncertainty as to whether regulations they pass could be preempted down the line. Additionally, a default rule like the one proposed gives the federal government a new option when making national policy. With this default rule, the federal government could pass legislation on any subject

88. See supra section II.A.

89. See Jessica Bulman-Pozen, Administrative States: Beyond Presidential Administration, 98 Tex. L. Rev. 265, 270–71 (2019) (noting that "[s]tates critically supplement federal agency policymaking and may succeed where federal agencies ultimately fail").

90. Id. at 309.

91. Id. at 281–83.

92. See id. at 314 ("[T]he most contentious executive branch policymaking of recent years has concerned questions about which Congress has not clearly spoken . . . .").

93. Id. at 268–69.

94. Id. at 320.

that leaves enforcement up to individual states, perhaps allowing the federal government to more easily generate consensus in scenarios where states agree something should be done but disagree about what to do.[95] Adopting a simpler default rule for preemption language can help invite state action and create longer-lasting policies that are tailored to what different regions of the country need.

## CONCLUSION

The victory won by the plaintiffs before the Eighth Circuit in *Mazzocchio* may end up being short lived. The Supreme Court has called for the Solicitor General to file a brief in the case expressing the views of the United States,[96] signaling that the Court views this as an important issue and may step in to clarify this unsettled area of the law.[97] And particularly in the area of nuclear safety, a preference for the federal government in the driver's seat may eventually win out, especially with states unable to make before-the-fact regulations.[98] Even so, skepticism of a "brooding federal interest" has been a consistent and growing throughline in recent preemption cases, and the Eighth Circuit's creation of a circuit split here may be a sign of more preemption problems to come.[99] Rather than craft increasingly intricate, case-by-case distinctions, courts should follow the approach in *Mazzocchio* and give Congress a clear default rule to work with when creating regulatory schemes that mix federal and state law. This is especially important given the rise of states as administrative bodies,[100] and creating a default rule that errs on the side of inviting state action can help to harness states' policymaking ability. And while disagreements between states may create patchworks of regulation in some areas, this approach will allow policymaking that is more

95. See Cristina M. Rodríguez, Negotiating Conflict Through Federalism: Institutional and Popular Perspectives, 123 Yale L.J. 2094, 2131–32 (2014) ("[C]onsensus often exists only when principles are stated at a high level of generality. It is in the implementation of consensus that things begin to fracture into competing visions . . . . [T]he popular interest depends on having a system of government that makes ongoing negotiation possible . . . .").

96. See Call for the Views of the Solicitor General, Cotter Corp. v. Mazzocchio, No. 24-1001 (U.S. filed Oct. 6, 2025) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States.").

97. See Lisa Tucker, "CVSG"s in Plain English, SCOTUSblog (Feb. 10, 2010), https://www.scotusblog.com/2010/02/last-week-in-plain-english-2/ [https://perma.cc/Y6YA-JCRQ] ("[T]he Court may ask the SG to file an amicus curiae brief expressing the views of the United States; the brief that the SG files will then usually recommend whether cert. should be granted or denied and—if cert. is granted—who should win the case and why." (quoting Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1098 (10th Cir. 2015))).

98. See Mazzocchio v. Cotter Corp., 120 F.4th 565, 568 (8th Cir. 2024) (acknowledging states' inability to "enact and enforce 'before-the-fact nuclear safety' . . . regulations" absent an explicit agreement with the NRC).

99. See, e.g., Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901, 1904 (2019).

100. See supra section III.B.

regionally tailored and able to outlast drastic swings in power without completely upending the current system of delegation to the federal administrative state.