UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-1250

AMMEX, INC.
Plaintiff-Appellant,

v.

GARY MCDOWELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT
Defendant-Appellee.

BRIEF OF APPELLANT AMMEX, INC.

Appeal from the Order of the United States District Court for the Eastern District of Michigan Dismissing Ammex, Inc.'s First Amended Complaint and Entering Judgment at Case No. 18-cv-10751

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-1250 Case Name: Ammex, Inc. v. Michigan Dep't of Agric.

Name of counsel: J. Manly Parks, Robert M. Palumbos, Amy E. McCracken, Leah A. Mintz

Pursuant to 6th Cir. R. 26.1, Ammex, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. Ammex, Inc. is not a subsidiary or affiliate of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No. There are no publicly owned corporations with a financial interest in the outcome of this appeal.

CERTIFICATE OF SERVICE

I certify that on June 3, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Robert M. Palumbos

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Ammex requests oral argument because this case involves complex issues regarding statutory and regulatory interpretation. This case presents important questions of first impression in this Circuit regarding the correct interpretation of customs statutes and environmental regulations. Oral argument will assist the Court in addressing these complex issues.

INTRODUCTION

Ammex is a unique business. It operates a duty-free store, which sells gasoline and other merchandise, at the base of the Ambassador Bridge connecting Detroit, Michigan and Windsor, Canada. Travelers going to Canada can refuel at the Ammex station without paying taxes, with the understanding that the conditionally duty-free fuel they purchase at the Ammex facility must be used in Canada. Because of its designation as a duty-free store, Ammex is subject to a litany of statutes and regulations imposed by Congress and U.S. Customs and Border Patrol ("U.S. Customs"), all of which Ammex follows. No other store in the United States sells duty-free gasoline.

This case is about whether the Michigan Department of Agriculture and Rural Development ("MDARD") can attempt to undermine the comprehensive federal scheme enacted by Congress and administered by U.S. Customs in the name the Clean Air Act (the "CAA"). MDARD claims the authority to regulate the merchandise that Ammex can sell, even though Congress has already spoken on the subject. MDARD seeks even more authority to regulate Ammex's business than U.S. Customs, which has already been rebuffed it its attempt to prevent Ammex from selling gasoline from its duty-free store. Without any indication that Congress meant for state or federal agencies to wield such power under the auspices of air quality regulation, MDARD's attempt to regulate Ammex's business should be rejected.

MDARD's threats of enforcement proceedings against Ammex not only conflict with U.S. customs law, they also contradict the regulations of the United

States Environmental Protection Agency ("EPA"). This Court has already determined that, under the CAA's structure of cooperative-federalism, MDARD enforces federal law. Here, however, the *federal* agency responsible for enforcing that law has said that fuel for export is not subject to air quality regulations. Because Ammex's conditionally duty-free gasoline is sold through a duty-free store, it is, by definition, fuel for export. The EPA regulations therefore do not apply. MDARD exceeds its authority in attempting to regulate Ammex's sale of gasoline.

STATEMENT OF JURISDICTION

The district court has federal question jurisdiction under 28 U.S.C. § 1331. On March 6, 2020, the district court entered an order granting Defendant Gary McDowell's motion to dismiss Ammex's First Amended Complaint. (Opinion and Order Granting Defendant's Motion to Dismiss ("Opinion & Order"), R. 61, PageID 1438-58.) The district court also entered judgment against Ammex the same day. (Judgment, R. 62, PageID 1459.)

Ammex filed a timely notice of appeal from the district court's order on March 16, 2020. (Notice of Appeal, R. 63, PageID 1460-62.) This Court has jurisdiction under 28 U.S.C § 1291.

STATEMENT OF ISSUES

1. Where federal customs statutes give Ammex the right to sell any goods but those specifically enumerated, but an EPA regulation purports to limit the goods that Ammex can sell, do the customs statutes supersede the EPA regulation and render the EPA regulation unenforceable against Ammex?

2. Do the Michigan Summer Fuel Requirements, as properly construed, apply to Ammex's duty-free sales of gasoline, even though Ammex's gasoline is for export only and has, at most, a *de minimis* effect on Michigan's environment?

3. Does the Director of MDARD's enforcement of the Michigan Summer Fuel Requirements against Ammex violate the dormant Foreign Commerce Clause of the U.S. Constitution, where the Michigan Summer Fuel Requirements (1) infringe on Congress's exclusive authority to regulate foreign commerce, (2) regulate commerce that occurs outside the state's borders, and (3) impose a burden on foreign commerce that is clearly excessive compared to the laws' local benefits?

4. Does federal customs law preempt the Michigan Summer Fuel Requirements, where (1) Congress has occupied the field regarding what goods can be sold in duty-free stores, and (2) Ammex either cannot comply with both federal customs law and state environmental law, or compliance is otherwise impractical?

STATEMENT OF THE CASE

I. Factual and Procedural Background

Ammex operates a duty-free store near the Ambassador Bridge that connects Detroit, Michigan and Windsor, Canada. (First Amended Complaint ("FAC"), R. 49, PageID 1206-07 at ¶¶ 2, 5.) The duty-free store is heavily regulated by U.S. Customs. (*Id.*, PageID 1207-08 at ¶¶ 5-6, PageID 1214 at ¶ 26.) Although Ammex's facility is located in Wayne County, Michigan, it is "beyond the exit point" established by U.S. Customs. (*Id.*, PageID 1207 at ¶ 5.) This exit point is the point at which a person approaching a border has "no practical alternative" but to exit the United States. 19

C.F.R. § 19.35(d). All access to the Ammex facility is through private roads, which are maintained and operated without any public assistance. (FAC, R. 49, PageID 1213-14 at ¶ 24.)

Through its facility at the base of the Ambassador Bridge, Ammex sells a variety of goods, including gasoline, duty free. (*Id.*, PageID 1207 at ¶ 3.) All goods, including this gasoline, are sold exclusively for use and consumption in Canada. (*Id.*, PageID 1216 at ¶ 35, PageID 1220 at ¶ 53.)

At issue in this case is whether MDARD can enforce certain environmental standards regarding gasoline against Ammex, despite Ammex's sale of gasoline for use exclusively in Canada and its location beyond the point of exit from the United States.

Specifically, MDARD seeks to enforce against Ammex—and has enforced against Ammex in the past—Michigan's Motor Fuels Quality Act and MDARD's companion regulations. Michigan's Motor Fuels Quality Act, codified at Mich. Comp. Laws §§ 290.642, 290.645(10), 290.650d, was approved and adopted by the EPA and incorporated by reference into the Code of Federal Regulations. *See* 40 C.F.R. § 52.1170. The Michigan statute and its companion EPA regulation are collectively referred to as the "Michigan Summer Fuel Requirements." These laws limit the Reid Vapor Pressure ("RVP") for gasoline sold within eight counties in southeast Michigan that have been designated as nonattainment areas for ozone under the Clean Air Act.

The Michigan Summer Fuel Requirements state, "Beginning June 1 through September 15 of 2007 and for that period of time each subsequent year, the vapor pressure standard shall be 7.0 psi for dispensing facilities in Wayne" and seven other

counties in southeast Michigan. Mich. Comp. Laws § 290.650d. A "dispensing facility," in turn, is defined as "a site used for gasoline refueling." *Id.* § 290.642(m).

Prior to 2012, Ammex sold gasoline that was not in compliance with the Michigan Summer Fuel Requirements because Ammex believed, given its unique location on the border of the United States and Canada and status as a customs-bonded, duty-free facility, that the Michigan Summer Fuel Requirements were inapplicable to its business. During that time, MDARD never sought to enforce the Michigan Summer Fuel Requirements against Ammex.

Nevertheless, in the summer of 2012, MDARD changed course and issued a "stop sale order" to Ammex. (FAC, R. 49, PageID 1208 at ¶ 7.) The parties eventually settled the dispute without Ammex admitting liability but with Ammex agreeing to sell only gasoline that complies with the Michigan Summer Fuel Requirements for three years and to pay a penalty of $100,000. (*Id.*, PageID 1209 at ¶ 8.)

In the months leading up to the summer of 2018, it appeared that Ammex would be unable to secure gasoline that complied with both federal customs regulations regarding duty-free sales and the Michigan Summer Fuel Requirements. *Ammex, Inc. v. Wenk*, 936 F.3d 355, 358-59 (6th Cir. 2019). The source that Ammex used during the previous five summers for gasoline that complied with both federal customs regulations and the Michigan Summer Fuel Requirements was no longer available because of supply and storage issues. *Id.* Ammex unsuccessfully attempted to find other suppliers for gasoline meeting these varied requirements. *Id.* Faced with the reality that Ammex would effectively be prevented from selling gasoline during the summer of 2018 because it could not comply with the Michigan Summer Fuel

Requirements and federal customs statutes and regulations governing its business, Ammex sought a declaratory judgment and injunctive relief against then-Director Gordon Wenk, in his official capacity as Director of MDARD.[1] (*See generally* Complaint, R. 1.)

Ammex's complaint asserted that Director Wenk's enforcement of the Michigan Summer Fuel Requirements is unconstitutional under the dormant Foreign Commerce Clause and preempted by federal law. (*Id.*) On March 29, 2018, Director Wenk filed a motion to dismiss Ammex's complaint. (*See generally* Def.'s Mot. to Dismiss, R. 7.) The following day, Ammex filed a motion for a preliminary injunction, requesting an order from the district court enjoining Director Wenk from enforcing the Michigan Summer Fuel Requirements against Ammex during the pendency of the litigation. (*See generally* Mot. Prelim. Inj., R. 8.) After expedited briefing and a hearing, the district court, through an order issued on June 1, 2018, determined that Ammex failed to demonstrate a likelihood of success on the merits. (*See generally* Opinion & Order, R. 34.)

Ammex appealed the district court's denial of the motion for a preliminary injunction to this Court. In a published opinion, this Court affirmed the district court, but on different grounds. *Wenk*, 936 F.3d at 359-60. This Court held that Ammex was unlikely to succeed on the merits of its constitutional claims because the Michigan

[1] Ammex initially named MDARD as a defendant, in addition to Director Wenk. (Compl., R. 1, PageID 1.) By stipulation of the parties, MDARD was dismissed as a defendant on May 4, 2018. (Order, R. 28, PageID 843-44.)

Summer Fuel Requirements were federal law once the EPA Administrator approved, adopted, and listed them in the Code of Federal Regulations. *Id.* at 360.

Ammex then amended its complaint in the district court, reasserting its two constitutional claims to preserve them for further appeal, and adding two more counts. Count III of the Amended Complaint seeks declaratory relief stating that the Michigan Summer Fuel Requirements do not apply to Ammex because the gasoline that Ammex sells is for export only, and fuel that is only for export is not subject to the Michigan Summer Fuel Requirements. (FAC, R. 49, PageID 1220 ¶¶ 51-52.) Michigan's environmental laws also serve no purpose as to Ammex's fuel sales because "[e]missions of ozone precursors in Michigan with the conditionally duty-free gasoline sold at [Ammex] for export, if any, are *de minimis* and their control would provide minimal, if any, emissions benefit." (*Id.*, PageID 1221-22 at ¶ 61.)

Count IV of the Amended Complaint seeks a declaration that federal customs law supersedes the Michigan Summer Fuel Requirements because the Michigan Summer Fuel Requirements, in limiting the goods that Ammex can sell, conflict with federal customs law, which give Ammex the right to sell any product except those specifically listed in the statute. (*Id.*, PageID 1222.) Because statutes take precedence over regulations, MDARD cannot enforce the Michigan Summer Fuel Requirements against Ammex. (*Id.*) Ammex also substituted the new Director of MDARD, Gary McDowell, for Director Wenk. (*Id.*, PageID 1211 at ¶¶ 14-15.)

Director McDowell moved to dismiss Ammex's complaint, arguing that the Amended Complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). (*See generally* Motion to Dismiss Ammex Inc.'s First Amended Complaint,

R. 50, PageID 1226-67.) The district court agreed, dismissed Ammex's Amended Complaint with prejudice, and entered judgment in Director McDowell's favor. (Opinion & Order, R. 61, PageID 1438-58; Judgment, R. 62, PageID 1459.) Ammex filed a timely notice of appeal from the district court's order on March 16, 2020. (Notice of Appeal, R. 63, PageID 1460-62.)

II. Statutory and Regulatory Background

A. U.S. Customs Laws and Regulations Applicable to Ammex

Ammex operates a Class 9 bonded warehouse, otherwise known as a "duty-free store," which is authorized and regulated by U.S. Customs. (FAC, R. 49, PageID 1206-07 at ¶ 2.) Ammex therefore operates within Congress's "comprehensive customs system which includes provisions for government supervised bonded warehouses where imports may be stored duty-free." *Xerox Corp. v. Harris Cty.*, 459 U.S. 145, 150 (1982). The duty-free stores can then sell these imported goods for "reexport[] without payment of duty." *Id.*; *see also* 19 U.S.C. § 1555(b)(8)(D), (E). Indeed, "[o]nly if the goods are withdrawn for domestic sale . . . does any duty become due." *Xerox Corp.*, 459 U.S. at 150; *see also* 19 U.S.C. § 1555(b)(3)(C)(ii) (requiring purchasers of duty-free goods to declare and pay taxes on those goods if they are brought back into the United States).

In order to maintain the duty-free status of any goods sold through such stores, the goods are considered to be "in the joint custody of [U.S. Customs] and the warehouse proprietor," and are "under the continuous control and supervision of the local customs officers." *Xerox Corp.*, 459 U.S. at 150 (citing 19 U.S.C. § 1555). Furthermore, U.S. Customs promulgated and now enforces "[d]etailed regulations,"

which "control every aspect of the manner in which the warehouses are to be operated." *Id.*

Ammex complies with these regulations for its gasoline sales in a number of ways. First, Ammex imports its fuel from Canada or the specially-designated free trade zone in Toledo, Ohio. *See Wenk*, 936 F.3d at 358. Upon the gasoline's arrival in the United States, U.S. Customs requires Ammex to pay for a bond covering all U.S. taxes and duties that Ammex would owe in the event that the gasoline is not re-exported. *See* 19 U.S.C. § 1555(b)(3)(C)(ii). To ensure that all gasoline Ammex sells is exported, U.S. Customs has designated Ammex as a "sterile" facility (FAC, R. 49, PageID 1206 at ¶ 2), meaning "the physical design and operation of the facility guarantees the exportation" of all goods Ammex sells. *Ammex, Inc. v. United States*, 334 F.3d 1052, 1054 (Fed. Cir. 2003). Ammex complies with these regulations, and its sales operations are currently permitted, regulated, and audited in a comprehensive manner by U.S. Customs. (FAC, R. 49, PageID 1214 at ¶ 26.)

From the importation of Ammex's fuel until the moment that fuel crosses the Canadian border, it "remain[s] under the continuous control and supervision" of U.S. Customs. *Xerox Corp.*, 459 U.S. at 147. Through its bonding requirements, U.S. Customs ensures conditionally duty-free fuel never enters "into the commerce of, or for consumption in, the United States." 19 C.F.R. § 113.62(a); *see also id.* §§ 113.3, 144.13. U.S. Customs may not cancel these bonds until Ammex has demonstrated that it has satisfied all of the regulatory requirements relating to sale for exportation. 19 C.F.R. §§ 113.55(a), 144.37(h). If, for some reason, an Ammex customer were to return to Michigan without declaring that fuel, such conduct would constitute a

violation of federal law. *See* 19 U.S.C. § 1497. Similarly, if Ammex were unable to account for the fuel withdrawn from its facility as sales for exportation, it would incur liability under its bonds. *See generally* 19 C.F.R. § 144.37(h).

By use of the bonding requirements and the customs-bonded warehouse program, Congress designated the flow of goods from a Class 9 bonded warehouse to an international destination as foreign commerce—regardless of whether that stream physically occurs within a state's geographic borders. *United States v. Commodities Export Co.*, 972 F.2d 1266, 1269 (Fed. Cir. 1992) ("Title 19 requires . . . duties at the time foreign goods in a bonded warehouse enter into domestic commerce" not when they "enter the warehouse."); *see also Xerox Corp.*, 459 U.S. at 150 (recognizing that customs-bonded warehouses are a "link" in "foreign commerce"); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 427 (1940) (confirming merchandise under bond never enters United States commerce).

B. Michigan's Development of the Michigan Summer Fuel Requirements

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, has often been hailed as "a model of cooperative federalism." *Sierra Club v. Korleski*, 681 F.3d 342, 343 (6th Cir. 2012) (quoting *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004)). Through the CAA, Congress directed the EPA to establish National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409. Rather than directing the EPA to enforce these standards, Congress decided that "the primary responsibility for assuring" that these standards are met "lies with the States." *Sierra Club*, 681 F.3d at 343 (quoting 42 U.S.C. § 7407(a)). Thus, "[t]he EPA itself does not typically regulate individual sources

of emissions. Instead, decisions regarding how to meet NAAQS are left to individual states." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 687 (6th Cir. 2015) (quoting *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013)); *see also* 42 U.S.C. § 7410(a)(1).

Under the Clean Air Act, states must create a state implementation plan, or "SIP," "which provides for implementation, maintenance, and enforcement" of the NAAQS for that state. 42 U.S.C. § 7410(a)(1). After providing "reasonable notice and public hearings," the state is required to submit the SIP to the EPA Administrator. *Id.* The Administrator must then determine whether the SIP meets certain minimum criteria, and, if so, approve the SIP. *Id.* § 7410(k)(1)(B), (3). The EPA must also "assemble and publish a comprehensive document for each State" listing the requirements of the SIP, and "publish notice in the Federal Register of the availability of such documents." *Id.* § 7410(h)(1).

In 2004, the EPA informed Michigan that eight counties in southeast Michigan, including Wayne County, were "nonattainment" areas for the ozone NAAQS. Approval and Promulgation of Air Quality Implementation Plans; Michigan; Control of Gasoline Volatility, 71 Fed. Reg. 46879, 46880 (Aug. 15, 2006). In response, Michigan enacted Mich. Comp. Laws § 290.650d, which instituted the 7.0 psi RVP limit for gasoline sold during summer months in those counties. After Michigan passed this law, it asked the EPA to incorporate § 290.650d into its SIP. The EPA reviewed Michigan's request and, upon determining it met the Clean Air Act's requirements, incorporated § 290.650d into Michigan's SIP. Approval and Promulgation of Air Quality Implementation Plans; Michigan; Control of Gasoline

Volatility, 72 Fed. Reg. 4432, 4434 (Jan. 31, 2007). EPA approval was required before Michigan could include an RVP limit in its SIP because Congress has set a national RVP limit of 9.0 psi. 42 U.S.C. § 7545(h); *see also id.* § 7545(c)(4)(C) (allowing the Administrator to grant exceptions to the 9.0 RVP standard in limited circumstances).

MDARD later amended its fuel quality regulations to include the same RVP limits as § 290.650d. Mich. Admin. Code R. 285.561.2-.3. However, the regulations differ from the statute in a few key respects. Most notably, the regulations exempt vehicle manufacturers' dispensing facilities from the 7.0 psi RVP limit for gasoline used at the manufacturers' testing facilities or used to fuel the vehicles for relocation within the plant or for distribution. Mich. Admin. Code R. 285.561.7. In other words, MDARD allows automobile manufacturers to fill their vehicles with fuel that does not comply with the Michigan Summer Fuel Requirements even though those very same vehicles may be distributed within the geographic area covered by Michigan's SIP. Unlike with § 290.650d, MDARD never submitted its regulations, and therefore never submitted these exemptions, to the EPA for approval and incorporation into Michigan's SIP.

STANDARD OF REVIEW

This Court reviews a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) under a de novo standard of review. *Wilmington Tr. Co. v. AEP Generating Co.*, 859 F.3d 365, 370 (6th Cir. 2017). The Court "take[s] as true all well-pleaded material allegations in the opposing party's pleadings, and affirm[s] the district court's grant of the motion only if the moving party is

entitled to judgment as a matter of law." *Id.* Similarly, "[a] matter requiring statutory interpretation is a question of law requiring de novo review." *Roberts v. Hamer*, 655 F.3d 578, 582 (6th Cir. 2011).

SUMMARY OF THE ARGUMENT

Congress allows Ammex to sell gasoline of whatever characteristics and quality through its duty-free store. Such merchandise, sold for export, is subject to the customs laws and regulations of any foreign country to which the merchandise is taken. Here, that country is Canada. Nevertheless, MDARD seeks to enforce U.S. environmental regulations against Ammex and prevent it from selling Canadian-compliant, but Michigan-non-compliant, gasoline. MDARD lacks this authority.

Congress has already determined what goods can be sold at duty-free stores like Ammex. The list of Congress-approved goods is expansive, with only a few specifically delineated exceptions. Because of the broad language Congress used when detailing the goods that can be sold, administrative agencies—including U.S. Customs—lack the ability to curtail that list. Here, MDARD is nevertheless seeking to prevent Ammex's sales of certain types of gasoline by invoking a federal environmental regulation promulgated under the CAA. This MDARD cannot do. The customs statutes leave no room for such regulation, and Congress never indicated that it expected the EPA and state agencies to be able to exercise such power.

Recognizing the apparent conflict, the district court tried to reconcile the customs statutes and the EPA regulation. To do so, the district court ignored the plain, unambiguous text of the statute and contravened various canons of statutory

interpretation. Because no reconciliation is possible, the customs statutes supersede the EPA regulation and the Michigan Summer Fuel Requirements as to the Ammex facility, and the RVP limit cannot be enforced against Ammex.

The Michigan Summer Fuel Requirements also are not enforceable against Ammex because Ammex sells fuel for export. The EPA has previously explained that its RVP regulations do not apply such fuel. The district court erred in reading the EPA guidance as not exempting Ammex's operations and in deferring to a litigation-driven position taken by the EPA stating that Ammex is subject to the Michigan Summer Fuel Requirements. The regulation, by the agency's own legitimate interpretation, does not apply to Ammex's business.

Finally, contrary to this Court's prior opinion, when MDARD enforces the Michigan Summer Fuel Requirements, it is enforcing state law. The Michigan Summer Fuel Requirements are therefore subject to the Constitution's limits on state authority. Here, the Michigan Summer Fuel Requirements run afoul of the dormant Foreign Commerce Clause and are preempted by federal customs law.

ARGUMENT

I. The Michigan Summer Fuel Requirements conflict with federal customs statutes, as applied to Ammex, and cannot be enforced.

A. Federal customs statutes conflict with and therefore supersede the Michigan Summer Fuel Requirements as applied to Ammex.

In the hierarchy of primary federal law, statutes trump regulations promulgated by administrative agencies. An agency's power to promulgate regulations to administer a federal statute "is not the power to make law. Rather it is 'the power to adopt

regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)). "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). For this reason, "regulation contrary to a statute is void." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009); *see also Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 874 (D.C. Cir. 2019) (Henderson, J., concurring in part) ("It is hornbook law that an agency cannot grant itself power via regulation that conflicts with plain statutory text."). Indeed, the subordinate nature of regulations requires them to "give way" to conflicting statutes. *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 549 (6th Cir. 2002).

Here, federal customs law stands directly at odds with the Michigan Summer Fuel Requirements as applied to Ammex. Section 1557 of Title 19 states that "[*a*]*ny* merchandise subject to duty (including international travel merchandise), with the exception of perishable articles and explosive substantives other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner[,] purchaser, importer, or consignee." 19 U.S.C. § 1557(a)(1) (emphasis added). Congress defines "merchandise" as "goods, wares, and chattels of *every description*." 19 U.S.C. § 1401(c) (emphasis added).

When § 1557(a)(1) and § 1401(c) are read together, the statute's plain language instructs that "any merchandise subject to duty" of "every description," with only

specifically enumerated exceptions, may be entered into a customs-bonded warehouse and withdrawn for export. *See* 19 U.S.C. §§ 1401(c), 1557(a)(1). Congress has not created an exception for fuel, or any description, type, or kind of fuel, in writing its definition of merchandise.

For this reason, the Court of International Trade overruled U.S. Customs' attempt to prohibit Ammex's sale of duty-free gasoline. *Ammex, Inc. v. United States*, 24 C.I.T. 851, 857 (2000). In that case, U.S. Customs claimed that Ammex could not sell gasoline duty-free because gasoline is an "unidentifiable fungible" that could not be labeled or tracked. *Id.* at 851. The Court of International Trade dismissed these concerns and U.S. Customs' related statutory arguments, holding that U.S. Customs' decision to prohibit Ammex from selling duty-free gasoline and diesel fuel was contrary to law. *Id.* at 853-55. The court explained that, "[o]n its face, the plain language of § 1557(a)(1) shows Congress' intent that there be *only two restrictions* on the type of dutiable merchandise that may be stored or withdrawn from a bonded warehouse." *Id.* at 854 (emphasis added). Because gasoline did not fall within the two exceptions, and because Ammex is a bonded warehouse, "the plain language of § 1557(a)(1) makes both items eligible for sale from duty-free stores." *Id.* at 854-55. The court also rejected U.S. Customs' attempt to read any additional exceptions into the statute. *Id.* at 856-57. The court noted that, "[h]ad Congress intended Customs to restrict the sale of gasoline, diesel fuel, or other such fungible merchandise through duty-free stores, as the government claims, it could have included language to this effect in the statute. That Congress failed to identify such an intention in either the

language or legislative history of § 1555(b), however, persuades this court that the statute contains no such restriction." *Id.* at 857.

Section 290.650d of the Michigan Compiled Laws, by contrast, forbids gas stations in eight counties from selling gasoline during the summer months except gasoline with an RVP below 7.0 psi. According to an earlier decision by this Court, that Michigan statute became an EPA regulation when it was approved and adopted by the EPA's Administrator and then incorporated by reference into the Code of Federal Regulations.[2] *Wenk*, 936 F.3d at 360. MDARD takes the position that the Michigan statute and its companion federal regulation apply to Ammex, as Ammex is physically located in Wayne County, albeit beyond the point of exit designated by U.S. Customs.[3] (FAC, R. 49, PageID 1207 at ¶ 5.) Under the Michigan Summer Fuel Requirements, then, the EPA and MDARD purport to limit the gasoline that Ammex can sell.

The customs statute and the EPA regulation are therefore at irreconcilable odds. Congress has given Ammex, as a duty-free store, the right to sell "*any* merchandise subject to duty" of "*every* description." 19 U.S.C. §§ 1401(c), 1557(a)(1) (emphasis added). Yet the EPA adopted regulations that *limit* the type of merchandise

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[2] Ammex disagrees with this Court's holding that the Michigan Summer Fuel Requirements codified in Mich. Comp. Laws § 290.650d became federal law when the Michigan statute was approved by the EPA and incorporated into the Code of Federal Regulations. However, this Court's determination in Ammex's prior appeal is binding at this stage of the litigation. Therefore, for purposes of this argument only, Ammex accepts that the Michigan Summer Fuel Requirements are federal regulations.

[3] As argued in more detail below, Ammex disputes that the Michigan Summer Fuel Requirements are fairly interpreted as applying to its duty-free sale of gasoline.

Ammex can sell for 3½ months of every year. The EPA regulation therefore conflicts with the customs statute and, under established precedent, is void as applied to Ammex. *See R.R. Ventures, Inc.*, 299 F.3d at 549; *Orion Reserves*, 553 F.3d at 703.

B. The District Court's rationale for finding that the customs statute and the EPA regulations can be reconciled does not withstand scrutiny.

Despite this obvious conflict between the customs law and the EPA regulation, the district court rejected Ammex's argument on two bases. First, the court determined that it had an obligation to harmonize the customs statutes and the EPA regulations if possible. (Opinion & Order, R. 61, PageID 1455.) The court then attempted to interpret the statute and the regulation in such a way as to reconcile the two provisions, such that Ammex could follow both. The district court legally erred at both phases of its analysis.

1. Courts do not have an absolute duty to interpret regulations and statutes as capable of being harmonized.

The district court first determined that Ammex was asking the court "to seek out conflict between two federal laws," and that such an inquiry was inappropriate because courts generally "try to harmonize two federal laws." (*Id.*) Prior to this case, courts have never imposed such a strong duty on themselves to avoid conflict between a statute in one substantive area of federal law and a regulation in a separate substantive area. To the contrary, a federal statute should always take precedence over a regulation. *See R.R. Ventures, Inc.*, 299 F.3d at 549; *Orion Reserves*, 553 F.3d at 703.

The cases cited by the district court are inapposite. The court relied on *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018), even though that case involved a

conflict between two federal statutes, not a regulation and a statute. The duty to reconcile two statutes makes eminent sense because the same governmental body—namely, Congress—enacted both. As the Supreme Court explained in *Epic Systems*, respect for Congress and the separation of powers constrain the role of the courts to saying what the law is, rather than what the law should be. *Id.* The courts' "rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not [a] Court by supposition, both to write the laws and to repeal them." *Id.*

The same concerns do not counsel in favor of reconciling regulations and legislation at all costs, especially in this case. Congress enacted the customs laws but did not enact the Michigan Summer Fuel Requirements. In fact, *no* federal actor even crafted the Michigan Summer Fuel Requirements; rather, the Michigan legislature enacted a statute, and the EPA Administrator approved that statute and incorporated it into the Code of Federal Regulations. Because the same legislative body did not enact both the customs statute and the environmental regulation at issue, this case does not involve the "strong presumption that repeals by implication are disfavored" under the assumption that "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* (alterations and quotations omitted). Nor would the result of such a conflict be a court choosing between two equally situated laws. The Court's concerns in *Epic Systems* are simply inapplicable to conflicts between statutes and regulations.

The district court's invocation of *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006 (9th Cir. 2017), fares no better. That case involved two federal regulations

promulgated by the same agency in order to administer the same federal statute. *Id.* at 1016. Indeed, the neighboring regulations both dealt with accommodations for personal assistive devices under the ADA. *Id.* at 1015-16. Thus, it makes sense to try to read those complementary provisions in harmony. The same cannot be said for the provisions here, which were enacted by different bodies, in different branches and levels of government, with varying degrees of specialized expertise. Unlike in *Karczewski*, there is no reason to think that the EPA meant to create a unified scheme with customs law. It is unclear that the EPA even knew about, let alone considered, customs law when it approved the Michigan Summer Fuel Requirements. Finding a conflict between the EPA's regulation and the customs statute would not undermine a coherent scheme crafted by a single agency, like it would in *Karczewski*.

The district court also cited *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Management Commission*, 866 F.2d 616, 623 (3d Cir. 1989), for the proposition that a federal statute and its implementing regulation should be reconciled. (Opinion & Order, R. 61, PageID 1455.) This case, however, does not deal with a statute and its implementing regulation. It addresses a conflict between a customs statute and an EPA regulation. Unlike in *LaVallee*, where the agency used its expertise to promulgate regulations in the face of "unquestionably vague" statutory language, 866 F.2d at 823, there is no reason to assume that the EPA was trying to clarify the mandates of customs law. Another agency is responsible for such interpretation, if such interpretation were necessary. And although not discussed in *LaVallee*, other important principles of interpretation, such as *Chevron*-deference, require courts to defer to an administrative agency's regulations as long as they are consistent with the

agency's statutory authority. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). The same considerations are lacking where, as here, an agency interprets "another agency's statutes and regulations." *Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981); *see also Shanty Town Assocs. Ltd. P'ship v. E.P.A.*, 843 F.2d 782, 790 n.12 (4th Cir. 1988) (explaining that the court is not required to defer to the EPA's interpretation of statutes it does not administer "or to its resolution of any conflict between" the statute it does administer and those it does not).[4]

The Supreme Court has recognized the importance of an administrative rule or determination yielding to clearly expressed Congressional policy. In *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002), for example, the Court rejected the National Labor Relations Board's interpretation of its power to issue remedial awards of backpay where such an award clearly conflicted with immigration statutes. In that case, an undocumented worker was laid off for supporting a campaign to unionize his company's labor force. *Id.* at 140. The NLRB determined that the company's decision was unlawful and awarded the worker backpay, despite his immigration status. *Id.* at 140-41. The Supreme Court reversed the award, explaining that, "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Id.* at 147. The Court determined that "awarding backpay to illegal aliens runs counter to policies

[4] The district court also cited *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010). That case is even farther afield, as it addresses conflicts between circuits, not conflicts between regulations and statutes.

underlying [the Immigration Reform and Control Act of 1986], policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion." *Id.* at 149; *see also Epic Systems*, 138 S. Ct. at 1629 (rejecting interpretation by NLRB that sought to interpret its statute "in a way that limits the work of a second statute" because "on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer").

The same is true in this case, albeit with a conflict between a federal statute and a federal regulation that started as a state law. Like the Board in *Hoffman Plastic*, MDARD and the EPA have broad discretion to administer the CAA and develop laws to bring nonattainment areas into compliance with the limits set by the EPA for certain pollutants. *See Texas v. U.S. E.P.A.*, 690 F.3d 670, 675-76 (5th Cir. 2012); 42 U.S.C. § 7545. However, that discretion, "though generally broad, is not unlimited." *Hoffman Plastic*, 535 U.S. at 142-43 (citations omitted). When the chosen remedies of the EPA conflict with clear congressional policy over which the EPA has no authority—like the policy to promote duty-free stores and allow for duty-free sales of "any merchandise subject to duty" of "every description," 19 U.S.C. §§ 1401(c), 1557(a)(1)—the agency's chosen remedial scheme must yield. *Hoffman Plastic*, 535 U.S. at 147, 149. Because Congress's policy and express enactments that allow Ammex to sell all gasoline of "every description" conflict with the EPA's regulation that Ammex can only sell gasoline with an RVP below 7.0 psi, the EPA's regulation cannot stand. This Court should therefore hold that Mich. Comp. Laws § 290.650d and its counterpart in the Code of Federal Regulations cannot be enforced against Ammex.

2. The district court's method of reconciling the customs statute with the Michigan Summer Fuel Requirement contravenes established methods of statutory interpretation.

After the district court concluded that it must reconcile the provisions at issue, the court determined that the Michigan Summer Fuel Requirements and the customs statutes "can be read in harmony by allowing Ammex to sell 7.0 RVP gasoline." (Opinion & Order, R. 61, PageID 1456.) But the court did not read the provisions in harmony. Rather, it ignored the plain, unambiguous text of 19 U.S.C. §§ 1401(c) and 1557(a), which gives Ammex the right to sell any merchandise subject to duty of every description (subject only to the included exceptions). The district court's proffered construction also converts the EPA's limited authority to grant exceptions to the national 9.0 RVP standard into the expansive power to regulate the methods of sales at duty-free stores. There is no statutory support for implying such a broad delegation by Congress. This Court should reverse the district court's mistaken construction.

The controlling principle of statutory interpretation "is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). Text is the "starting point for interpretation, and . . . the ending point if the plain meaning of that language is clear." *Davenport v. Lockwood, Andrews & Newnam, Inc.*, 854 F.3d 905, 909 (6th Cir. 2017) (alternation in original) (quotation omitted). Courts have no ability to "arbitrarily *constrict*" language "by adding limitations found nowhere in [the statute's] terms." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (emphasis in original). Nor may courts create exceptions not appearing within the statutory text. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)

(recognizing the Court "may not engraft [its] own exceptions onto the statutory text"); *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) (holding that the "absence of any textual basis for [the proposed] exception" suggested "that Congress did not intend . . . to limit" the President's authority). Furthermore, "additional exceptions are not to be implied" where Congress has already "explicitly" enumerated certain exceptions in a statute. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quotation omitted).

Here, Congress has expressed a policy decision that customs-bonded warehouses, like Ammex, can sell *any* merchandise of *every* description as long as it is subject to duty and does not fall within a limited list of enumerated exceptions, such as perishables and explosives. 19 U.S.C. §§ 1401(c), 1557(a)(1). In finding that the statutes can be harmonized with the EPA regulation as long as Ammex sold only gasoline with an RVP below 7.0 psi during the summer months, the district court refused to give the words "any" and "every" their plain meaning.

The Supreme Court has repeatedly recognized that the word "any" commands a "broad interpretation." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 10 (2011); *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (explaining that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'"). Moreover, "every" means "each individual or part of a group without exception." Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Yet the district court chose to interpret "any" and "every" to mean only "some," *i.e.*, Ammex is allowed to sell only *some* types gasoline, such as that with an RVP of 7.0 psi or below. This is neither a "broad interpretation" nor an "expansive meaning." *Kasten*,

563 U.S. at 10; *Rucker*, 535 U.S. at 131. And it is certainly not consistent with the Supreme Court's recognition that, "[w]hen used (as here) with a 'singular noun in affirmative contexts,' the word 'any' ordinarily 'refer[s] to a member of a particular group or class without distinction or limitation' and in this way 'impl[ies] *every* member of the class or group.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (emphasis in original) (second and third alterations in original) (quoting Oxford English Dictionary (3d ed. Mar. 2016)). The statute and regulation at issue cannot be reconciled by finding that the words "any" and "every" do not actually have their ordinary meaning. The district court's proffered interpretation therefore does not pass muster.

The district court's opinion also potentially creates as many new regulatory conflicts as it solves. U.S. Customs has long operated under the assumption that customs-bonded warehouses can accept products that would not be legal for sale in the domestic market. That is why U.S. Customs has allowed free trade zones and customs-bonded warehouses to import and export air-conditioning units that do not comply with the Department of Energy's efficiency standards. *See* U.S. Customs Ruling Letter, HQ W231173 (Mar. 24, 2006).[5] The district court's opinion introduces new tensions between the EPA's and U.S. Customs' regulatory authority.

The district court's decision in this case violates another rule of statutory construction: because Congress has chosen to enumerate exceptions in a statute, courts cannot imply the existence of other exceptions. *TRW Inc.*, 534 U.S. at 28. Here,

[5] Available at: https://rulings.cbp.gov/ruling/W231173 (last visited June 3, 2020).

Congress already imposed three distinct limitations on the goods that a customs-bonded warehouse such as Ammex can sell. The merchandise must first be "subject to duty." 19 U.S.C. § 1557(a)(1). This provision prevents Ammex from warehousing and selling contraband, as merchandise cannot be "subject to duty" if it is "contrary to law"; merchandise that is "contrary to law" is subject to seizure and forfeiture, not duty. *See* 19 U.S.C. § 1595a(c). Second, Congress has expressly determined that perishable items cannot be warehoused in or sold by entities such as Ammex. 19 U.S.C. § 1557(a)(1). Finally, no explosives, other than firecrackers, can be sold in duty-free stores. *Id.* By specifically excepting these three categories of goods from the reach of § 1557, Congress implicitly signaled that no other exceptions were approved. *See Demarest v. Manspeaker*, 498 U.S. 184, 187-88 (1991) (statute granting witness fees to all witnesses except "paroled or deportable aliens" means that incarcerated witnesses are also entitled to receive witness fees). By adopting a construction of § 1557 that allows the EPA to prevent the sale of gasoline with an RVP over 7.0 psi, the district court ran afoul of this rule of statutory construction.

The district court also found that the EPA regulation and customs statute can be read together because the regulation applies only to refueling sites. (Opinion & Order, R. 61, PageID 1456.) Thus, in the district court's view, Ammex can comply with both provisions by selling "only sealed, air-tight containers of 9.0 RVP gasoline in the summer," because those sales would not make Ammex a "site for 'gasoline refueling.'" (*Id.*) The district court's finding lacks legal support.

The district court's "sealed containers" idea "runs afoul of the usual rule that Congress 'does not alter the fundamental details of a regulatory scheme in vague

terms or ancillary provisions—it does not, as one might say, hide elephants in mouseholes.'" *Epic Systems*, 138 S. Ct. at 1626-27 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). There is no indication that Congress, in giving the EPA Administrator the power to approve RVP limits below 9.0, in contravention of 42 U.S.C. § 7545(h), *see id.* § 7545(c)(4)(C)(ii), also gave the EPA Administrator and state agencies the ancillary authority to regulate the methods in which customs-bonded warehouses such as Ammex can sell goods intended for use solely in another country. Congress could not have intended to grant this entirely new regulatory power to the EPA and to the states through such a limited delegation of rule-making authority. An interpretation to the contrary would clearly be hiding an elephant in a mousehole and cannot be sustained.

It is undisputed that, but for the EPA regulation, Ammex could sell gasoline through fuel pumps rather than in sealed containers. And indeed, Ammex does just that—in accordance with all customs statutes and regulations—for almost nine months of every year. The district court nevertheless found, without citing any statutory support, that the EPA and MDARD can force Ammex to abandon its congressionally approved method of selling gasoline by enacting limiting regulations. This was error.

Finally, the district court simply failed to do the work necessary to support its "sealed container" interpretation. The district court assumed that Ammex would be able to sell sealed containers of gasoline while complying with customs statutes and U.S. Customs regulations, but neither the record nor the district court's legal analysis support that conclusion. At the pleading stage, there was no evidence before the

district court to support the notion that Ammex could source sealed containers of duty-free gasoline, as it must in order to sell the gasoline duty-free. *See* 19 U.S.C. § 1555(b)(8)(E); 19 C.F.R. § 19.36(e). And the district court did not consider that, if Ammex cannot source sealed containers of gasoline, it may not be allowed to create sealed containers of gasoline without crossing the line from repackaging, which duty-free stores can do, into manufacturing, which duty-free stores cannot do. *See* 19 U.S.C. § 1555. Nor did the district court analyze whether Canada would allow the importation of gasoline in sealed containers—another necessary condition for Ammex to be able to sell gasoline duty-free. *See id.* At a minimum, requiring Ammex to sell only sealed containers of gasoline would impose significant burdens on Ammex's ability to sell duty-free gasoline, which is "directly contrary to Congress' intent, as evidenced in the relevant conference report, that Customs impose the least restrictions possible on the sale of duty-free merchandise." *Ammex*, 24 C.I.T. at 856 (citing House Conf. Rep. No. 100-576, at 769-90 (1988)). And it runs afoul of the Court of International Trade's holding that Ammex can sell fungible goods, such as gasoline, without being required to package it into saleable units. *Id.* at 856-57. Because the district court did not even consider these realities before proclaiming that Ammex could sell gasoline duty-free in sealed containers, its rationale cannot stand.

The district court also did not consider whether the EPA would allow Ammex to sell sealed containers of gasoline with an RVP exceeding 7.0 psi. In adopting Mich. Comp. Laws § 290.650d as a federal regulation, the EPA stated that it is "approving a SIP revision . . . establishing a 7.0 psi RVP fuel requirement for gasoline *distributed* in Southeast Michigan." Approval and Promulgation of Air Quality Implementation

Plans; Michigan; Control of Gasoline Volatility, 72 Fed. Reg. 4432, 4434 (Jan. 31, 2007) (emphasis added). In its announcement of its decision to accept the amendment to the SIP, the EPA did not expressly limit the rule to dispensing facilities. Instead, it appears to have adopted a broader limitation prohibiting the distribution of all gasoline with an RVP higher than 7.0 psi during the summer months. Selling sealed containers of 9.0 RVP gasoline would appear to constitute a distribution of prohibited gasoline and thus still violate the EPA's regulation. The district court did not address such a possibility, but instead presumed that its solution would be both feasible and legal. By relying on its own hypothetical, without analyzing the consequences and implications of the hypothetical, the district court erred.

II. Properly construed, the Michigan Summer Fuel Requirements do not apply to Ammex's duty-free sales of gasoline.

The EPA and MDARD have sought to regulate the RVP for gasoline sold in southeastern Michigan in order to bring the ozone levels in that area into compliance with federal standards. *See* Approval and Promulgation of Air Quality Implementation Plans; Michigan; Control of Gasoline Volatility, 72 Fed. Reg. 4432, 4434 (Jan. 31, 2007). That is a worthy goal. But that goal does not implicate Ammex's duty-free sales of gasoline at the base of the Ambassador Bridge because all of the gasoline that Ammex sells is for export to and use in Canada. (FAC, R. 49, PageID 1220, ¶¶ 51-53.) The Michigan Summer Fuel Requirements are intended to apply only to gasoline sold in the domestic stream of commerce. The gasoline Ammex sells, as a matter of law, never enters and is not sold in the domestic stream of commerce. Therefore the Michigan Summer Fuel Requirements do not apply to Ammex's gasoline sales.

Furthermore, the "[e]missions of ozone precursors in Michigan associated with the conditionally duty-free gasoline sold at [Ammex] for export, if any, are *de minimis* and their control would provide minimal, if any, emissions benefit." (*Id.*, PageID 1221-22 at ¶ 61.) Ammex therefore states a claim that the EPA regulation, interpreted according to its purpose, does not apply to its operations.

A. The EPA previously agreed that RVP limits do not apply to fuel for export.

As part of earlier notice-and-comment processes to adopt RVP standards, the EPA acknowledged that "gasoline which is exported is not covered by the volatility regulations." Volatility Regulations for Gasoline and Alcohol Blends Sold in Calendar Years 1989 & Beyond, 54 Fed. Reg. 11868, 11871 (Mar. 22, 1989). The EPA, in regulating RVP levels, explained that its definition of "gasoline" excludes articles not "enter[ing] the domestic market." *Id.* The EPA relied on 40 C.F.R. § 80(c), which defines gasoline as "*any fuel* sold in *any State* for use in motor vehicle engines." 40 C.F.R. § 80(c) (emphasis added). While § 80(c) literally applies to "any State," just as Michigan's Summer Fuel Requirements include all of Wayne County, the EPA recognized that exports occupy a unique stream of foreign commerce. Through its 1989 notice, EPA therefore narrowed its interpretation of 40 C.F.R. § 80(c) to exclude gasoline not "intended for domestic sale" if "the product is clearly labeled as for export only, and the evidence supports this classification." 54 Fed. Reg. at 11871.

Ammex has alleged facts in its Amended Complaint demonstrating that its fuel is for export only—not for domestic use—and is clearly labeled as such. For example, Ammex expressly pled that "conditionally duty-free gasoline sold at [Ammex] is for

export only." (FAC, R. 49, PageID 1220 at ¶ 51.) The customers who purchase gasoline from Ammex "do so beyond the exit point of the Customs territory, and they purchase that gasoline for use in Canada." (*Id.* at ¶ 53.) "As required under 19 C.F.R. § 19.2, Ammex implements procedures providing reasonable assurance that its conditionally duty-free gasoline will be exported after sale." (*Id.* at ¶ 54.) For example, "Ammex provides its customers with clear notice that the conditionally duty-free gasoline sold at the Ammex [f]acility is for export only." (*Id.* at ¶ 55.) Customers are made aware that, if they purchase gasoline from Ammex and attempt to reenter the United States with that gasoline, they are required to declare and pay appropriate duties on the gasoline. (*Id.*, PageID 1221 at ¶ 56.) The prospect of paying additional duties or, alternatively, being liable for criminal and civil penalties if caught with undeclared gasoline, deters customers from reentering the United States with Ammex fuel. (*Id.* at ¶¶ 57-60.) The allegations in the Amended Complaint therefore demonstrate a plausible claim that Ammex's gasoline sales are exempted from EPA regulation.

B. The district court erroneously rejected Ammex's argument.

The district court found that Ammex could not rely on the EPA's 1989 notice because EPA has spoken on the subject more recently. (Opinion & Order, R. 61, PageID 1451-52.) The district court pointed to a recent letter from the director of the EPA's compliance division of its Office of Air and Radiation. (Exhibit A to Defendant's Reply in Support of the Motion to Dismiss the First Amended Complaint ("EPA Letter"), R. 58-1, PageID 1403-05.) That letter informed Ammex of its view that the Michigan Summer Fuel Requirements apply to Ammex's operation

of its duty-free store at the base of the Ambassador Bridge, notwithstanding customs statutes that conflict with the regulations. (*Id.*)

The district court was wrong to defer to the EPA's recent interpretation. The letter clearly represented the EPA's attempt to interpret both the CAA and federal customs statutes. As explained before, courts owe no deference to an agency's interpretation of a statute it does not administer. *See, e.g.*, *Epic Systems*, 138 S. Ct. at 1629; *Tsosie*, 651 F.2d at 722; *Shanty Town Assocs. Ltd. P'ship*, 843 F.2d at 790 n.12.

The EPA's letter presents a similar question as in *Epic Systems* and warrants the same conclusion. In that case, the Court addressed whether an employment contract's requirement that any dispute be resolved through one-on-one arbitration, rather than through a class action lawsuit, is illegal under the National Labor Relations Act (the "NLRA"). *Epic Systems*, 138 S. Ct. at 1619. The plaintiffs in *Epic Systems* argued that the NLRA overrode the Federal Arbitration Act, which requires arbitration agreements like the plaintiffs' to be enforced, by guaranteeing workers the right to self-organize and bargain collectively. *Id.* at 1624. In support of this argument, the plaintiffs argued that the Court should defer to an opinion by the NLRB "suggesting the NLRA displaces the Arbitration Act." *Id.* at 1629. The Supreme Court refused plaintiffs' request. *Id.*

This case, like in *Epic Systems*, perfectly exemplifies "why the 'reconciliation' of distinct statutory regimes 'is a matter for the courts,' not agencies." *Id.* (quoting *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 685-86 (1975)). As Justice Gorsuch explained, "[a]n agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second

statute's scope in favor of a more expansive interpretation of its own—effectively 'bootstrap[ping] itself into an area in which it has no jurisdiction." *Id.* (second alteration in original) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)). The EPA succumbed to that impulse here, giving short shrift to the importance and impact of federal customs regulation in order to expand its own authority. For example, the EPA's letter demonstrates that it considers Ammex's gasoline to enter the domestic market, even though federal customs law mandates the opposite. As Justice Gorsuch feared, the result "threatens to undo rather than honor legislative intentions." *Id.* "To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment." *Id.* Because the district court did not do so, but instead deferred to the EPA's interpretation of a conflict between a statute it does not administer and its own regulation, the district court erred.

The letter is entitled to even less deference because it fundamentally misunderstands Ammex's business. The EPA bases its conclusion that Ammex cannot avail itself of the 1989 guidance because Ammex's gasoline "enters the domestic market." (EPA Letter, R. 58-1, PageID 1404.) The EPA is mistaken. Ammex's gasoline never enters the domestic market for consumption. All gasoline sold by Ammex must be used in Canada. Ammex's gasoline, as a matter of law, does not enter the domestic stream of commerce. The error in the EPA's factual premise undermines its conclusion. Ammex's gasoline *is* for export and, as a result, is outside the EPA's jurisdiction.

The district court also disagreed with Ammex's interpretation of the 1989 EPA notice. But in so doing, the district court focused on the wrong section of the notice.

The EPA first addressed the locations at which the new fuel volatility regulations would apply. *See* 54 Fed. Reg. at 11870-71 (section labeled "Locations at Which Standard Applies). As part of this discussion, the EPA explained that the regulations do not apply to gasoline destined for export, even if the gasoline is at a location within the United States. *Id.* at 11871. Indeed, the EPA explained that it will "assume that all gasoline found in the United States is intended for domestic sale and thus subject to the RVP standards *unless* the product is clearly labeled as for export only, and the evidence supports this classification." *Id.* (emphasis added). The EPA therefore recognized that fuel for export is exempt from the regulations despite its physical presence in the United States. Only once it is determined that the gasoline is for "domestic sale" do the RVP standards come into play. *Id.*

Rather than focusing on this section of the notice—where the EPA determines if the RVP limitations are applicable at all—the district court cherry-picked language from the section of the notice addressing "Prohibited Activities." (Opinion & Order, R. 61, PageID 1452, citing 54 Fed. Reg. at 11872.) In explaining what activities are prohibited, the EPA notes that dispensing non-compliant gasoline, in addition to selling, offering for sale, supplying, offering for supply, or transporting non-compliant gasoline, is prohibited. 54 Fed Reg. at 11872. The prohibited activities, however, are only relevant if the gasoline being sold must adhere to the new RVP limits. *See id.* at 11871-72. Dispensing gasoline violates the EPA regulation if and only if the gasoline being dispensed must comply with the RVP standards but does not. *Id.* And here, the EPA had just explained that gasoline for export is not "gasoline" within the meaning of the regulation and is not required to conform to the RVP standards. The section

discussing the inclusion of dispensing non-compliant gasoline does nothing to alter the EPA's earlier conclusion that fuel for export is not subject to the regulation at all. The district court's reasoning is legally flawed.

Contrary to the district court's determination, Ammex has alleged facts showing that all of its fuel is for export, it is clearly labeled as being for export, and that it never enters the domestic market. (FAC, R. 49, PageID 1220-22 at ¶¶ 51, 53-61.) And under the EPA's authoritative interpretation, fuel for export is not subject to RVP limitations. 54 Fed. Reg. at 11871. The district court therefore erred in dismissing Ammex's claim that the Michigan Summer Fuel Requirements do not apply to its sales of duty-free gasoline.

C. The district court's holding puts the EPA at odds with other regulatory agencies.

In holding that the EPA can regulate fuel for export at the Ammex facility, the district court gave the EPA a special status among administrative agencies. No other regulatory agency (as opposed to Congress) has been able to regulate the types of goods that Ammex sells in its duty-free store. Indeed, U.S. Customs tried specifically to prevent Ammex from selling gasoline, but its attempts were resoundingly rejected by the Court of International Trade. *Ammex, Inc.*, 24 C.I.T. at 854-56. The district court and Director McDowell have failed to explain why MDARD and the EPA should be able to regulate the types of goods that Ammex can sell through its duty-free store when the Court of International Trade has held that the federal agency charged with administering customs statutes lacks such a power. *See id.*

The district court's opinion is even more surprising because of MDARD's and the EPA's inconsistent and minimal enforcement of the EPA regulations. MDARD, for example, has decided not to enforce the Michigan Summer Fuel Requirements against vehicle manufacturers and testing sites, adopting a regulation that specifically exempts these locations from the 7.0 psi RVP limit. *See* Mich. Admin. Code R. 285.561.7(2). MDARD adopted this exception without EPA approval, and the exception is not included in the SIP or EPA regulation. *See* 40 C.F.R. § 52.1170.

As the district court noted, MDARD has not articulated a rationale for such an exception.[6] MDARD could have created the exception purely for political reasons "because the vehicle-manufacturing lobby is strong in Michigan and pressed for the carve out." (Opinion & Order, R. 61, PageID 1449.) The Michigan Summer Fuel Requirements, however, are a federal regulation under this Court's opinion. Therefore, MDARD itself is violating federal law by creating and adhering to its regulation.[7]

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[6] Because Ammex states a claim that the Michigan Summer Fuel Requirements, correctly interpreted, do not apply to fuel sold outside the domestic stream of commerce, the district court should have allowed this case to proceed to discovery. Through discovery proceedings, Ammex may be able to learn the rationale for the vehicle manufacturer exceptions and demonstrate the impact on the environment from these exceptions. Such evidence may lend further support to Ammex's claims that the Michigan Summer Fuel Requirements do not apply to refueling stations with a *de minimis* effect on the environment, like Ammex's facility.

[7] The only other conclusion is that MDARD is actually administering state law when it enforces the Michigan Summer Fuel Requirements. Under such a scheme, MDARD may have the authority to promulgate reasonable regulations that exempt certain industries from the RVP limits. This Court, however, foreclosed such a possibility by ruling that MDARD is enforcing federal law. *Wenk*, 936 F.3d at 362-63.

The EPA, too, has been lackadaisical in its enforcement of its regulation. Ammex has been selling gasoline for the entire period in which the EPA regulation in Michigan has been effective. And for years, Ammex sold gasoline that does not comply with the EPA regulations. (FAC, R. 49, PageID 1208 at ¶ 7.) Yet the EPA did not institute an enforcement action against Ammex or sanction MDARD for its failure to enforce the SIP.[8] Nor, to Ammex's knowledge, has the EPA sanctioned MDARD for allowing the vehicle manufacturing lobby to enjoy special privileges, even though the exception for vehicle manufacturers and testing grounds violates federal law.

Given the lack of any strong interest MDARD and the EPA seem to have regarding the Michigan Summer Fuel Requirements, the district court should not have endowed these agencies with a veto power that even U.S. Customs cannot exercise. This Court should not compound the error by affirming the district court.

III. The Michigan Summer Fuel Requirements, as applied to Ammex, are unconstitutional under the Foreign Commerce Clause.[9]

Article I, section 8, clause 3 of the Constitution grants Congress the exclusive authority to "regulate Commerce with foreign Nations." *See also United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is

[8] Ammex is also entitled to discovery to verify that MDARD has never been approached by the EPA for failing for enforce the RVP standards in its SIP.

[9] Ammex recognizes that this Court held in *Wenk*, 936 F.3d at 362-63, that "MDARD's enforcement of the Summer Fuel Law is enforcement of federal law." Ammex's dormant Foreign Commerce Clause claim is premised on its position that MDARD is enforcing state, not federal, law. Ammex includes a succinct summary of its Foreign Commerce Clause argument in order to preserve the issue for review by this Court *en banc* or by the Supreme Court.

vested in the national government exclusively."). State action can violate the Foreign Commerce Clause in three distinct ways, any one of which is sufficient to render the state action unconstitutional. First, a state law violates the Foreign Commerce Clause when it infringes on the federal government's authority to "speak with one voice" on matters of foreign concern. *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434, 449 (1979). Second, a state law runs afoul of the Foreign Commerce Clause if it has the effect of regulating commercial activity that occurs outside its borders. *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). Finally, a state law violates the Foreign Commerce Clause if it imposes a burden on foreign commerce that is clearly excessive when compared to the law's local benefit. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Here, contrary to this Court's prior holding, MDARD is enforcing state, not federal, law. The Michigan laws and statutes regulating RVP levels are enacted through distinct processes from those by which the EPA approved the SIP. The EPA's adoption of federal regulations approving Michigan's SIP does not strip the underlying laws of their state origin and character. Moreover, MDARD's regulations include substantive differences from the SIP that the EPA approved. These substantive differences include the exception for dispensing facilities at vehicle manufacturing testing facilities. 40 C.F.R. § 52.1170; Mich. Admin. Code R. 285.561.7. If MDARD were actually enforcing federal law, those state exemptions would be void and MDARD would be derelict in allowing manufacturing testing facilities to use non-compliant gasoline. Finally, nothing in the Clean Air Act suggests states will carry out

their "primary responsibility" for enforcing environmental standards by suing under federal law as opposed to their own state laws. *Sierra Club*, 681 F.3d at 343 (quoting 42 U.S.C. § 7407(a)). Rather, the CAA's structure as "a model of cooperative federalism" instead suggests the opposite—that states will enforce the CAA's standards under their own laws. *See id.* (quoting *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004)). Tellingly, MDARD itself sought to enforce only state law in its 2012 enforcement action against Ammex.

As Judge Bush recognized in his separate concurrence, the Court's holding also approves of an unconstitutional delegation of federal executive power to state officials. The Constitution "makes the President accountable to the people for executing the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010). Under the Court's prior opinion, however, the President is not accountable for how Michigan state officials execute federal law, because he has no ability to control those officials. "To use a state government as a kind of administrative hand puppet of the federal government would seem to invite the kind of blurred lines of responsibility that" a majority of the Supreme Court has "found objectionable." Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 Duke L.J. 1599, 1650 (2012). "The diffusion of power [contemplated by the Court] carries with it a diffusion of accountability." *Free Enter. Fund*, 561 U.S. at 497.

The EPA's sanction power is not a substitute for the elements of "meaningful Presidential control" established by Supreme Court precedent. According to the

Court's conception of the CAA, once the EPA approves a SIP, a state must either enforce federal law or face sanctions. That interpretation is contrary to the principle that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). "Congress may not simply conscript state [agencies] into the national bureaucratic army." *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012) (alteration in original) (quotation omitted). A state cannot be sanctioned for choosing not to implement any aspect of federal regulations directly. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1471 (2018). If MDARD is enforcing federal law by enforcing the Michigan Summer Fuel Requirements, the threat of sanctions for non-enforcement makes the CAA's supposedly cooperative federalism scheme unconstitutional. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after* NFIB, 101 Geo. L.J. 861, 917 (2013).

Because MDARD is actually enforcing state law, Director McDowell's enforcement of the Michigan Summer Fuel Requirements against Ammex violates the dormant Foreign Commerce Clause in all three ways possible. First, by enforcing the Michigan Summer Fuel Requirements against Ammex, whose business solely involves foreign commerce, Director McDowell is infringing on Congress's exclusive right to speak with one voice regarding all matters relating to foreign commerce. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). In *Hostetter*, the New York State Liquor Authority sought to enforce a licensing statute against a duty-free store that would prevent the store from selling alcoholic beverages. *Id.* at 325. The Supreme Court reasoned that the alcohol's "ultimate delivery and use is not in New York, but

in a foreign country." *Id.* at 333. As a result, "the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do." *Id.* at 334. *Hostetter* controls this case as well.

Second, because Ammex sells gasoline solely for use in Canada, the Michigan Summer Fuel Requirements regulate commerce outside Michigan's borders, which it cannot lawfully do. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). In both a factual and legal sense, Ammex's sales never touch the domestic stream of commerce, and thus any attempt by MDARD to regulate this commerce violates the extraterritoriality principle.

Finally, Director McDowell cannot show that the Michigan Summer Fuel Requirements' burden on foreign commerce is excessive when compared to the benefits to Michigan, meaning his enforcement of these laws against Ammex is unconstitutional. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

IV. The Michigan Summer Fuel Requirements are unenforceable against Ammex because they are preempted by the vast array of customs laws governing customs-bonded duty-free warehouses such as Ammex.

The Michigan Summer Fuel Requirements are unenforceable against Ammex because they are preempted by federal customs law.[10] The doctrine of preemption is

[10] As with its prior argument, the Court disagreed with the premise of Ammex's preemption argument—that the Michigan Summer Fuel Requirements are state law—in *Wenk*, 936 F.3d at 362-63. Ammex again includes a succinct summary of the argument in order to preserve the issue for later review.

based on the constitutional mandate that federal law is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus, any state law that "interferes with or is contrary to federal law" is invalid. *Free v. Bland*, 369 U.S. 663, 666 (1962).

The Michigan Summer Fuel Requirements are preempted under the doctrine of field preemption because, in creating customs-bonded warehouses such as Ammex, "Congress established a comprehensive customs system." *Xerox Corp.*, 459 U.S. at 150. This system "provides for continual federal supervision of warehouses, strict bonding requirements, and special taxing rules." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 71 (1993). "Detailed regulations control every aspect" of operations at these warehouses, *Xerox Corp.*, 459 U.S. at 150, including prescribed storage periods, deposits, withdrawals, bonding requirements, and supervision of merchandise. *See* 19 U.S.C. §§ 1555, *et seq.*; 19 C.F.R. §§ 19.1-19.36. Moreover, federal law fully governs what *type* of merchandise an operator of a duty-free store can sell. 19 U.S.C. § 1557(a)(1). Congress has fully occupied the field regarding the types of goods that can be sold duty free, and there is no room for Michigan to require Ammex to adhere to its fuel standards.

Enforcement of the Michigan Summer Fuel Requirements is also preempted by the doctrine of conflict preemption as such enforcement is an obstacle to Congress's goals for duty-free stores. Congress recognizes the importance of duty-free sales, through customs-bonded warehouses, to the national economy and to trade relations with citizens of foreign nations. *See* Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, § 1908(a), 102 Stat. 1107, 1315 (1988); S. Rep. No. 100-71, at 230 (1987); Advance Notice of Proposed Customs Regulations Amendments

Relating to Duty-Free Stores, 48 Fed. Reg. 33318, 33318 (July 21, 1983). By being part of Congress's comprehensive duty-free customs scheme, Ammex helps Congress carry out those goals.

Director McDowell's enforcement of the Michigan Summer Fuel Requirements against Ammex impedes Ammex's ability to further those goals in two ways. First, because Ammex could not obtain gasoline that complied with both federal customs law and the Michigan Summer Fuel Requirements during the summer of 2018, Ammex was forced to choose between complying with federal law or with state law. The Michigan Summer Fuel Requirements thus "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *State Farm Bank v. Reardon*, 539 F.3d 336, 342 (6th Cir. 2008), regarding Congress's promotion of duty-free sales.

Second, the Michigan Summer Fuel Requirements, as enforced against Ammex, conflict with Congress's goals for duty-free stores even when Ammex can source 7.0 psi RVP gasoline that complies with customs law because Ammex is forced to sell gasoline that is not attractive for export. Ammex's customers have no reason to pay more for fuel that meets inapplicable environmental standards. The Michigan Summer Fuel Requirements therefore interfere with one of Congress's chosen methods for encouraging international trade. *Millsaps v. Thompson*, 259 F.3d 535, 548 (6th Cir. 2001).

CONCLUSION

For the foregoing reasons, the district court erred in granting Director McDowell's motion to dismiss Ammex's First Amended Complaint and entering

judgment in favor of Director McDowell. This Court should therefore reverse the district court's order and entry of judgment and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,141 words, excluding the portions exempted by 6 Cir. R. 32(b)(1).

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CERTIFICATE OF SERVICE

I, Robert M. Palumbos, certify that on June 3, 2020, I served the foregoing Brief of Appellant Ammex, Inc. with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, which will send notice to all registered CM/ECF users. Counsel for all participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

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ADDENDUM

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Ammex, Inc. has designated the following docket entries:

Docket No.	Description	PageID Range
R. 1	Complaint	PageID 1-16
R. 7	Motion to Dismiss Plaintiff's Complaint	PageID 29-60
R. 8	Plaintiff's Motion for a Preliminary Injunction	PageID 61-92
R. 28	Order	PageID 843-844
R. 34	Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction	PageID 888-930
R. 49	First Amended Complaint	PageID 1206-1225
R. 50	Motion to Dismiss Ammex Inc.'s First Amended Complaint	PageID 1226-1267
R. 58-1	Exhibit A to Defendant's Reply in Support of the Motion to Dismiss the First Amended Complaint	PageID 1402-1405
R. 61	Opinion and Order Granting Defendant's Motion to Dismiss	PageID 1438-1458
R. 62	Judgment	PageID 1459
R. 63	Notice of Appeal	PageID 1460-1462

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