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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA- FRESNO DIVISION

CENTRAL VALLEY CHRYSLER-JEEP, INC.; et al.,

Plaintiffs,

v.

CATHERINE E. WITHERSPOON, in her official capacity as Executive Officer of the California Air Resources Board,

Defendant,

ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,

Plaintiff-Intervenor,

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE, BLUEWATER NETWORK, GLOBAL EXCHANGE and RAINFOREST ACTION NETWORK,

Defendant-Intervenors.

No. 1:04-CV-06663-AWI-NEW (TAG)

DEFENDANT AND DEFENDANT-INTERVENORS' OPENING SUPPLEMENTAL BRIEF REGARDING *MASSACHUSETTS v. EPA*

Date: October 22, 2007
Time: 1:30 p.m.
Courtroom: Two
Judge: Hon. Anthony W. Ishii

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INTRODUCTION

The Court has requested supplemental briefing on the impact on this case of the United States Supreme Court's decision in *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S. ____, 127 S.Ct. 1438 (2007) (Docket No. 616). As this Court recognized when it imposed a stay pending that decision, EPA's arguments in the Supreme Court "exactly mirror[ed] the structure and elements of the arguments" made by Plaintiffs here, and a Supreme Court decision in California's favor "will necessarily address and overcome Plaintiffs' claims." In this case, there is no basis for distinguishing between greenhouse gas emission standards adopted by EPA and those adopted by California and approved by EPA. Defendant and Defendant-Intervenors (collectively, "Defendants") submit that the Supreme Court's decision effectively resolves all of Plaintiffs' remaining claims in Defendants' favor, leaving no triable issues for this Court.

BACKGROUND

The only remaining claims under consideration by the Court are Plaintiffs' claims for preemption under the Energy Policy and Conservation Act (EPCA) and under foreign policy. Defendants have three pending summary judgment motions on the substantive issues: (1) Defendants' Counter Motion for Summary Judgment or, in the Alternative, Motion for Summary Adjudication (Docket No. 517); (2) Defendants' Motion for Summary Adjudication of Plaintiffs' EPCA Claim (Docket No. 427); (3) Defendants' Motion for Summary Judgment on the Foreign Affairs Claim (Docket No. 423). These motions contend that there can be no preemption of California's greenhouse gas emissions standards by EPCA or federal foreign policy.[1/] The Court stayed consideration of these motions and all other aspects of this case on January 12, 2007, to await the Supreme Court's disposition of *Massachusetts v. EPA*. Memorandum Opinion and Order on Defendants' Motion for Summary Judgment on the Issue of Ripeness and/or Mootness and Order for Stay of Further Proceedings ("Stay Order") (Docket No. 606), dated Jan. 12, 2007.

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1. If Defendants prevail on these three motions, Defendants' fourth pending motion, Defendants' Motion for Summary Judgment With Respect to Claims By the Automobile Trade Associations for Lack of Associational Standing (Docket No. 430) will be moot.

In addition to the *Massachusetts v. EPA* decision, there have been other developments at the federal level since the Court's stay order: (1) EPA has held two public hearings and taken public comments on California's waiver application[2/] and has promised to issue its decision by the end of 2007 (Request for Judicial Notice ("RJN"), Exhs. A, B); (2) the President has ordered EPA, working with other federal agencies, to propose federal greenhouse gas emission regulations for new vehicles and fuels, and to adopt those regulations by the end of 2008 (RJN, Exh. C); (3) in his State of the Union address, the President proposed to reduce U.S. oil consumption by increasing federal fuel economy standards by 4 percent a year and by increasing the use of alternative fuels (such as ethanol) five times, to 35 billion gallons (RJN, Exh. D); and (4) as the Court anticipated (Stay Order, p. 22), Congress is actively working on global warming and energy efficiency legislation (including, most notably, the U.S. Senate's passage of an energy bill that, if enacted, would increase federal fuel economy standards for cars and trucks to a combined average of 35 miles per gallon (RJN, Exhs. E, F)). Further, individual automobile manufacturers have made numerous announcements of plans to incorporate new technology and change the mix of models in response to higher gasoline prices and changing market demands. None of these other developments alters the basis for resolving this case for Defendants on summary judgment. But they would necessitate supplemental expert disclosures and further factual discovery if the case were to proceed to trial.[3/]

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2. *See* California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21,260 (April 30, 2007); California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 22,626 (May 10, 2007).

3. Some of these developments may warrant reconsideration of justiciability issues, if the case is not resolved on summary judgment. The jurisdiction of the Court is subject to reexamination at all stages of litigation. *See DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006).

ARGUMENT

I. THE SUPREME COURT REJECTED THE CLAIM THAT CARBON DIOXIDE REGULATION UNDER THE CLEAN AIR ACT IS PRECLUDED BY EPCA OR CONFLICTS WITH EPCA.

A. The Supreme Court Held That EPA's Regulation of Carbon Dioxide Does Not Conflict with the Language or Purposes of EPCA, Even Though That Regulation Would Have the Effect of Requiring Higher Fuel Economy.

In the administrative action under review in *Massachusetts v. EPA*, EPA asserted that it lacked authority to regulate carbon dioxide under Section 202 of the Clean Air Act. One argument the agency offered was that carbon dioxide regulation would conflict with the authority of the Department of Transportation (DOT) and its subsidiary agency, the National Highway Transportation Safety Administration (NHTSA), to set fuel economy standards under EPCA. Control of Emissions from New Motor Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

EPA explained its argument in terms virtually identical to the arguments of the Plaintiffs in this case:

> Even if [greenhouse gases] were air pollutants generally subject to regulation under the [Clean Air Act], Congress has not authorized the Agency to regulate CO_2 emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks. No technology currently exists or is under development that can capture and destroy or reduce emissions of CO_2, unlike other emissions from motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO_2 is to improve fuel economy. Congress has already created a detailed set of mandatory standards governing the fuel economy of cars and light duty trucks, and has authorized DOT—not EPA—to implement those standards. . . .
>
> Given that the only practical way of reducing tailpipe CO_2 emissions is by improving fuel economy, any EPA effort to set CO_2 tailpipe standards under the CAA would either abrogate EPCA's regime (if the standards were effectively more stringent than the applicable CAFE standard) or be meaningless (if they were effectively less stringent).

Id. at 52,929.

In *Massachusetts v. EPA*, the Supreme Court found that Section 202(a)(1) of the Clean

Air Act, 42 U.S.C. § 7521(a)(1), "unambiguous[ly]" authorizes EPA to regulate greenhouse gases from new motor vehicles:

> [T]he first question is whether §202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a "judgment" that such emissions contribute to climate change. We have little trouble concluding that it does. . . .
>
> The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . . ." §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air." The statute is unambiguous.

127 S.Ct. at 1459-60 (footnotes omitted).

The Supreme Court also rejected EPA's argument that the regulation of greenhouse gas emissions under the Clean Air Act "would either conflict with [fuel economy] standards or be superfluous." 127 S.Ct. at 1451 (citing Control of Emissions from New Motor Vehicles and Engines, 68 Fed. Reg. at 52,927); *see also* 127 S.Ct. at 1461 ("EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles."). Specifically addressing EPCA, the Court said:

> EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. See 68 Fed. Reg. 52929. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," 42 U. S. C. §7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act, §2(5), 89 Stat. 874, 42 U. S. C. §6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

127 S. Ct. at 1461-62.

Finally, the Supreme Court rejected EPA's argument that new motor vehicle emission standards would make no difference in the fight against global warming:

> Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. . . . A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Id. at 1458 (footnote omitted).

B. Applying *Massachusetts v. EPA* to this Case Demonstrates That California's EPA-approved Clean Air Act Emission Standards Do Not Conflict with EPCA.

Plaintiffs' arguments here are no different from those rejected by the Supreme Court. As this Court noted:

> Nevertheless, the elements of the arguments regarding [EPCA] that are set forth in Massachusetts v. EPA *exactly mirror* the structure and elements of the arguments presented by Plaintiffs in this case. Fundamentally, that argument is that the regulation of carbon dioxide emissions from automobiles is tantamount to the regulation of fuel efficiency, which is an area exclusively delegated by Congress to DOT through EPCA.

Stay Order at 19 (emphasis added). If the Supreme Court overrides EPA's refusal to regulate greenhouse gases, the Court went on, "*that decision will necessarily address and overcome Plaintiffs claims* with respect to EPCA and foreign policy preemption." *Id.* at 21 (emphasis added). There is no reason to find otherwise.

First, there is no room for arguing that the Clean Air Act gives California any less authority to regulate greenhouse gases than EPA. Since 1967, Section 209 of the Act has authorized California to set its own vehicle emission standards. Section 209 permits California to regulate emissions of any "air pollutant" – the same term at issue in *Massachusetts v. EPA*. Furthermore, the law does not require California to wait for EPA to act first. The legislative history of the original 1967 California waiver provision is crystal clear that the State is authorized to set standards "more stringent than, or *applicable to emissions or substances not covered by*, the national standards." See H.R. Rep. No. 90-728 (1967)), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1958 (emphasis added). Congress amended Section 209 in 1977 – after enactment of EPCA in 1975 – "to ratify and strengthen the California waiver provision and affirm the underlying intent of that provision, i.e., to afford California the broadest possible

discretion in selecting the best means to protect the health of its citizens and the public welfare." H.R. Rep. No. 95-294, at 301-02 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1380-81. As the District of Columbia Circuit found:

> The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program . . . .

Motor & Equip. Mfrs. Ass'n v. Envtl. Prot. Agency, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979). *See also id.* at 1108 n.22, 1110 & n.31, 1128; *Ford Motor Co. v. Envtl. Prot. Agency*, 606 F.2d 1293, 1297 (D.C. Cir. 1979). After *Massachusetts v. EPA*, carbon dioxide and other greenhouse gases are pollutants to be regulated under the Clean Air Act, consistent with their impacts on public health and welfare.

Second, there is no room for arguing that California's authority to regulate greenhouse gases under Section 209 poses any greater conflict with EPCA than EPA's authority under Section 202. California's standards require an EPA waiver under Section 209. Under Section 209(b)(1)(A), EPA considers whether California's standards are "not consistent with Section 202." Under this provision, EPA has historically considered whether waiver opponents have demonstrated that California has provided "'inadequate lead time to permit the development of the technology necessary to implement the new procedures, giving appropriate consideration to the cost of compliance.'" *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 & n.13 (D.C. Cir. 1998) (quoting Federal Register notice in explaining waiver test). EPCA *itself* provides that once EPA grants a waiver for California standards, those standards stand in the same position with respect to EPCA as standards that EPA itself has promulgated under Section 202. EPCA's 49 U.S.C. section 32902(f) provides that *both* have equal *federal* status – they are both "motor vehicle standards of the Government."[4/] As standards with federal status under

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4. 49 U.S.C. section 32902(f) provides: "In determining the maximum feasible level, the Secretary shall consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United

EPCA, California standards approved by EPA under the Clean Air Act are not within the set of state standards subject to either express or implied preemption under EPCA. As we explained in our summary judgment briefing, neither NHTSA nor a court has any more power to disregard or set aside California standards approved under Section 209 of the Clean Air Act than an EPA standard set under Section 202 of that Act.

Third, there is no room for arguing that California's authority is diminished if regulating a particular air pollutant produces an effect – even a substantial effect – on fuel economy. In *Massachusetts v. EPA*, the Supreme Court held that EPA and NHTSA have "wholly independent" missions: "protecting the public's 'health' and 'welfare'" (which expressly

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States to conserve energy." From the start, EPCA put EPA and California emission standards on the same plane. Section 502(e) of the original 1975 EPCA stated:

> For purposes of this section, in determining maximum feasible average fuel economy, the Secretary shall consider—
> (1) technological feasibility;
> (2) economic practicability;
> (3) *the effect of other Federal motor vehicle standards on fuel economy*; and
> (4) the need of the Nation to conserve energy.

EPCA, Pub. L. No. 94-163, 1975 U.S.C.C.A.N. (89 Stat.) 871, 905 (emphasis added). Section 502(d)(3)(D) stated:

> Each of the following is a category of Federal standards;
> (i) Emissions standards under section 202 of the Clean Air Act, and *emissions standards applicable by reason of section 209(b) of such Act*.

Id., 1975 U.S.C.C.A.N. at 905 (emphasis added).

The only difference between the original and current language is that "other Federal motor vehicle standards" was changed in 1994 to "other motor vehicle standards of the Government." Congress did not intend for this change in terminology to have any substantive effect. In 1994, Congress recodified the CAFE provisions of EPCA into title 49 of the U.S. Code. Act of July 5, 1994, Pub. L. No. 103-272, 1994 U.S.C.C.A.N. (108 Stat.) 745. The House Report explained that the purpose of the bill was "to restate [transportation laws] in comprehensive form, *without substantive change* . . . and to make other technical improvements in the Code. In the restatement, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete laws have been eliminated." H.R. Rep. No. 103-180, at 1-2, *reprinted in* 1994 U.S.C.C.A.N. 818, 818-19 (emphasis added). The Report describes a global change in terminology: "'United States Government' is substituted for 'United States' (when used in referring to the Government), 'Federal Government', and other terms identifying the Government the first time the reference appears in a section. Thereafter, in the same section, 'Government' is used unless the context requires the complete term to be used to avoid confusion with other governments." *Id*. at 4, 1994 U.S.C.C.A.N. at 821.

includes "climate") versus "promot[ing] fuel efficiency." 127 S.Ct. at 1462. In dismissing EPA's arguments, the Supreme Court did not think it was relevant that there might be a close connection between carbon dioxide emissions and fuel economy. The obvious implication of the Supreme Court's ruling is that it is acceptable for a carbon dioxide emission standard to lead to higher fuel economy than what NHTSA would require. Indeed, as shown in our summary judgment briefing, Congress *encouraged* the setting of vehicle emission standards that have the effect of improving fuel economy. (*See* Defendant and Defendant-Intervenors' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment of Association of International Automobile Manufacturers (Docket No. 494), at 41 & n.17, 42 & n.18 (and legislative history cited there, and attached to concurrently filed appendix).)[5/] The Supreme Court stated "The two obligations [protecting health and welfare and improving energy efficiency] may overlap, but there is no reason to think that the two agencies cannot both administer their obligations and yet avoid inconsistency." 127 S.Ct. at 1462.

Plaintiffs may argue that a trial is still needed to consider factual evidence that supposedly will demonstrate "inconsistency" between California's standards and EPCA.[6/] But the two statutes prescribe the federal agency forum and the criteria for reviewing California's standards.

As explained above, Clean Air Act section 209(b)(1)(A) provides for EPA to review whether California emission standards are "not consistent" with Section 202. Under that provision, the automobile industry can present its factual concerns about technological

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5. This 1975 EPCA legislative history (as well as that from the 1977 Clean Air Act amendments) confirms Congress knew that both EPA and California emission standards could have an effect on fuel economy, sometimes negative and sometimes positive. To accommodate those interactions, the statute directed NHTSA to consider "the effect of other Federal motor vehicle standards on fuel economy" and empowered the agency to make adjustments in fuel economy standards – downward or upward – where these interactions warranted. But there was no indication *whatsoever* that Congress intended these California standards, which significantly affected fuel economy, to be preempted.

6. It bears mentioning that Plaintiffs have never advanced the position that it would be impossible to meet both federal fuel economy standards and California's greenhouse gas emission standards. That may be all the Supreme Court was referring to with the term "inconsistency."

feasibility, cost, lead-time, and safety to EPA. If EPA determines, after evaluating those concerns under its statute, that the waiver should be issued, California's standards will have federal status as "other motor vehicle standards of the Government" under EPCA section 32902(f). In addition, the automobile industry can ask NHTSA to address California emission standards and any alleged inconsistencies (pursuant to 49 U.S.C. section 32902(f)) in the course of NHTSA's proceedings to set federal fuel economy standards.

When boiled down to its essentials, Plaintiffs' complaint is that Congress has assigned to EPA, not to NHTSA or a district court, the authority to pass on the consistency of California's standards with federal law. Plaintiffs complaint is that EPA (and California) will make the judgment about what level of regulation is appropriate to protect public health and welfare. That is, however, the congressional design.

It has also been NHTSA's consistent understanding. From the first CAFE rulemaking in 1977 through the light truck rulemaking in 2006, NHTSA's unbroken practice in administering EPCA has been to interpret the phrases "Federal standards" and "other motor vehicle standards of the Government" synonymously and to include Section 209(b) California emission standards.[7/] In all 20 of the rulemakings spanning this period, NHTSA has viewed its obligation the same way:

> The third consideration in determining "maximum feasible average fuel economy" levels is "the effect of other Federal motor vehicle standards on fuel economy. *This term is interpreted to call for making a straight-forward adjustment to the fuel economy improvement projections to account for the impacts of other Federal standards*, principally those in the areas of *emission control*, occupant safety, vehicle damageability, and vehicle noise.

Passenger Automobile Average Fuel Economy Standards, 42 Fed. Reg. 33,534, 33,537 (June 30, 1977) (emphasis added).

Plaintiffs will surely argue that this case is different from *Massachusetts v. EPA* because

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7. *See, e.g.*, Average Fuel Economy Standards for Nonpassenger Automobiles, 42 Fed. Reg. 13,807, 13,814-15 (March 14, 1977) (analyzing fuel economy impacts in section entitled "Effect of California emissions standards"); Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566, 17,642-43 (April 6, 2006) (California standards assessed in section entitled "Federal Motor Vehicle Emission Standards").

it involves the interaction between a federal law and a state law, rather than two federal laws.[8/] But that argument ignores that California's emission standards have federal status under EPCA once they are approved by EPA. It also ignores that 49 U.S.C. section 32902(f) – the only express provision dealing with how these two statutes interact – makes no distinction between EPA and California emission standards. Moreover, to prove even conflict preemption, Plaintiffs would have to show that Congress expressed an "unambiguous" and "clear and manifest" intent to preempt state laws. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *see also Chamber of Commerce v. Lockyer*, 422 F.3d 973, 993 (9th Cir. 2005), *rev'd on other grounds*, 463 F.3d 1076 (9th Cir. 2006) (the "categorical nature of" federal preemption "automatically commands that 'no set of circumstances exists under which the [statute] would be valid'" (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). That is an even higher burden than "inconsistency," which EPA was unable to show in *Massachusetts v. EPA*. In addition, EPCA's express preemption provision, even if applicable, would do nothing more than direct the court to look at the underlying congressional purposes. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) ("We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the [applicable federal] statute as a guide to the scope of the state law that Congress understood would survive."). Those are the same congressional purposes that led the Supreme Court to rule that Clean Air Act emission standards did not conflict with federal fuel economy standards. *Massachusetts*, 127 S.Ct. at 1462-63.

In short, whether undertaken by California or EPA, the regulation of carbon dioxide emissions under the Clean Air Act does not conflict with fuel economy regulation under EPCA. It does not matter whether the regulation is *adopted* by EPA or *approved* by EPA. Both are federal standards for the purposes of EPCA, to be taken into account by NHTSA. Thus, there

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5. Plaintiffs will also point to the Supreme Court's reference that "in some circumstances the exercise of [Massachusetts's] police powers to reduce in-state motor-vehicle emissions might well be preempted." *See Massachusetts*, 127 S.Ct. at 1454. But that is just a reference to the fact that the Clean Air Act generally preempts state motor vehicle emission standards – subject, of course, to the California waiver provision. *See* 42 U.S.C. § 7543(a), (b).

can be no express or implied EPCA preemption of California's greenhouse gas emission standards. Accordingly, the Court should grant Defendants' pending motions as to EPCA.

II. THE SUPREME COURT'S DECISION DEFEATS PLAINTIFFS' FOREIGN POLICY ARGUMENT BECAUSE IT REJECTS THEIR BARGAINING CHIP THEORY AS A BASIS FOR NON-IMPLEMENTATION OF DOMESTIC LAW.

The Supreme Court's decision is also fatal to Plaintiffs' foreign policy claim. In *Massachusetts v. EPA*, EPA argued that "regulating greenhouse gases might impair the President's ability to negotiate with 'key developing nations" to reduce emissions." 127 S.Ct. at 1463 (quoting Control of Emissions from New Motor Vehicles and Engines, 68 Fed. Reg. at 52,931). The Supreme Court flatly rejected this contention, finding: "In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Id.* The Court explained:

> Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

Id. at 1462 (citation omitted).

In this case, Plaintiffs make the same foreign policy argument regarding California's standards that EPA offered and the Supreme Court rejected. Plaintiffs argue that California's greenhouse gas standards interfere with an alleged Presidential foreign policy objective of withholding any action – federal or state – as a bargaining chip in international negotiations. The Supreme Court made short work of these arguments, however, finding that "they have nothing to do with whether greenhouse gas emissions contribute to climate change," *id.* at 1463, the governing criterion under Section 202 of the Clean Air Act. Likewise, the bargaining chip theory has "nothing to do" with the criteria for EPA's waiver determinations under Section 209. The Supreme Court stated that while the "President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Id.* Just as the bargaining chip theory gives EPA no authority to withhold federal action under Section 202, it gives EPA no authority to deny California a waiver under Section 209. And it provides no basis for a court

to find that California's federally-sanctioned regulations conflict with U.S. foreign policy.

Moreover, as demonstrated in Defendants' pending motion for summary adjudication of the foreign policy claim, there *is* no federal foreign policy of withholding state action as a bargaining chip in international negotiations. Indeed, in a recent draft report to the international climate negotiations, the Executive Branch has recently stated *explicit support* for the very California standards at issue in this case.[9/]

Accordingly, this Court should now grant judgment in Defendants' favor on Plaintiffs' foreign policy claim.

CONCLUSION

Defendants respectfully request that the Court enter judgment in Defendants' favor in this action, by denying Plaintiff-Intervenor Association of International Automobile Manufacturers' motion for summary judgment [Docket No. 398]; granting Defendants' counter motion for summary judgment or summary adjudication [Docket No. 517]; granting Defendants' motion for summary adjudication on the EPCA preemption claim [Docket No. 427]; and granting

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9. The most recent and most explicit example is found in the draft of the *Fourth U.S. Climate Action Report*, released for public comment on May 4, 2007. (*See* RJN, Exh. G.) The *Climate Action Report* is a periodic report required by Article 4 of the United Nations Framework Convention on Climate Change (UNFCCC), to which the United States is a party. Preparation of Fourth U.S. Climate Action Report, 72 Fed. Reg. 25676 (May 4, 2007). This report to other nations on U.S. efforts specifically lauds the "Vehicle GHG Emission Standards" adopted by California and 10 other states. Chapter 4 of the *Climate Action Report*, entitled "Policies and Measures," includes a section on "Nonfederal Policies and Measures" that begins as follows: "In addition to the national effort, state and local governments and private and nonprofit organizations are taking a variety of steps that contribute to the overall GHG intensity reduction goal. *These nonfederal climate change activities are vital for the success of emission reduction policies*." (RJN, Exh. G, at 14, 16 (emphasis added).) Table 4-1 of that report, entitled "State Actions on Climate Change," specifically lists the adoption of California's greenhouse gas emission standards by a total of 11 states. (*Id.*, Exh. G, at 15.)

Defendants' motion for summary judgment on the foreign affairs claim [Docket No. 423].

Dated: July 20, 2007

Respectfully submitted,

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