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17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF CALIFORNIA – FRESNO

19 CENTRAL VALLEY CHRYSLER-JEEP, INC.,
20 et al,
21 Plaintiffs,

22 v.
23 Catherine E. WITHERSPOON, in her official
24 capacity as Executive Officer of the California
25 Air Resources Board,
26 Defendant,

27 THE ASSOCIATION OF INTERNATIONAL
28 AUTOMOBILE MANUFACTURERS
29 Plaintiff-Intervenor,

30 SIERRA CLUB, NATURAL RESOURCES
31 DEFENSE COUNCIL, ENVIRONMENTAL
32 DEFENSE, BLUEWATER NETWORK,
33 GLOBAL EXCHANGE and RAINFOREST
34 ACTION NETWORK,
35 Defendant-Intervenors.

CASE NO. CIV-F-04-6663-AWI-LJO

**BRIEF OF PLAINTIFF-INTERVENOR THE
ASSOCIATION OF INTERNATIONAL
AUTOMOBILE MANUFACTURERS
CONCERNING IMPACT OF
MASSACHUSETTS V. EPA**

DATE: October 22, 2007
TIME: 1:30 pm
JUDGE: Anthony W. Ishii

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1 Pursuant to order of this Court, Plaintiff-Intervenor, the Association of International
2 Automobile Manufacturers (“AIAM”), hereby respectfully submits this Brief concerning the impact
3 of *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), on the dispositive motions pending before this
4 Court.

5 I. INTRODUCTION

6 Under the Supremacy Clause of the United States’ Constitution, federal law preempts state
7 law where, as here, the federal law provides so explicitly and where the state law conflicts with the
8 federal law. Federal law does not preempt, however, other federal laws. For this reason, the
9 Supreme Court’s decision in *Massachusetts v. EPA* has no bearing on the questions raised in this
10 action. That case simply held that the Environmental Protection Agency has the authority under the
11 Clean Air Act to regulate carbon dioxide emissions from motor vehicles notwithstanding the
12 Department of Transportation’s concurrent authority to regulate such emissions through the federal
13 fuel economy program. This action presents two entirely different questions: whether the AB 1493
14 Regulations enacted by the State of California are “related to fuel economy standards” and thus
15 expressly preempted under the Energy Policy and Conservation Act of 1975 (“EPCA”), 49 U.S.C.
16 § 32919(a), and whether the regulations are impliedly preempted because they conflict with the goals
17 of EPCA.

18 AIAM demonstrated in its Motion for Summary Judgment that the answers to both of these
19 questions are indisputably “yes.” The Defendants’ primary basis for opposing AIAM’s motion rests
20 on their legal argument – originally expressed in their Motion for Judgment on the Pleadings – that
21 the AB 1493 Regulations are exempt from both EPCA’s express preemption provision and from
22 principles of implied conflict preemption. They cite two bases for this theory: California’s authority
23 under Section 209(b) of the Clean Air Act to obtain a waiver of preemption for its own vehicle
24 emissions standards and the requirement in Section 32902(f) of EPCA that NHTSA “consider” other
25 motor vehicle standards in setting fuel economy regulations. This Court has already rejected these
26 arguments when it denied the Defendants’ Motion for Judgment on the Pleadings, holding that
27 “Section 209(b) does not provide that the regulations, once EPA grants a waiver, become federal law
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1 and are thereby rendered immune from preemption by other federal statutes.” *Central Valley*
2 *Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1173 (E.D. Cal. 2006).

3 There is nothing in the Supreme Court’s decision in *Massachusetts v. EPA* that would breath
4 new life into the Defendants’ failed legal theories or call this Court’s prior determinations into
5 question. The Supreme Court did not even mention EPCA’s express preemption provision, let alone
6 decide how it impacts states’ authority to adopt greenhouse gas regulations that effectively regulate
7 fuel economy. Nor did it decide whether the particular regulations challenged in this action conflict
8 with the goals and purposes of EPCA or interfere with the federal government’s implementation of
9 the Corporate Average Fuel Economy (“CAFE”) program.

10 Indeed, to the extent that the *Massachusetts v. EPA* holding offers any insight to the Supreme
11 Court’s views concerning these issues, it forcefully supports EPCA’s goal of ensuring national
12 uniformity in the field of fuel economy regulation, as evidenced by EPCA’s express preemption
13 provision. The Court specifically recognized that EPA’s regulation of greenhouse gas emissions
14 might “overlap” with the National Highway Traffic Safety Administration’s (“NHTSA”)
15 administration of the federal fuel economy program, but, because NHTSA and EPA are sister
16 agencies within the same Executive Branch, the Justices concluded that “both [Agencies can]
17 administer their obligations and yet avoid inconsistency.” *Massachusetts*, 127 S.Ct. at 1462. This
18 goal of a coordinated national approach to reducing greenhouse gas emissions through improved fuel
19 economy has been buttressed by a recent Executive Order declaring that “[i]t is the policy of the
20 United States to ensure the coordinated and effective exercise of the authorities of the President and
21 the heads of the Department of Transportation, the Department of Energy, and the Environmental
22 Protection Agency to protect the environment with respect to greenhouse gas emissions from motor
23 vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis
24 of benefits and costs, public safety, and economic growth.” Exec. Order No. 13432, 72 Fed. Reg.
25 27717 (May 14, 2007).

26 The Supreme Court’s decision in *Massachusetts v. EPA*, therefore, did nothing more than
27 pave the way for a coordinated inter-agency approach *at the federal level* to regulating greenhouse
28 gas emissions that takes into account the goals and purposes of a number of federal statutes as well as

1 the various pertinent national and international initiatives. Nothing in the Court’s opinion supports
2 the notion that the State of California can enact regulations that are “related to fuel economy
3 standards” or that frustrate the objectives of EPCA. Because AIAM has demonstrated that the AB
4 1493 Regulations are both expressly and implied preempted by EPCA, summary judgment should be
5 entered in its favor.

6 **II. THE SUPREME COURT’S OPINION DOES NOT RESOLVE AIAM’S**
7 **CAUSE OF ACTION UNDER EPCA**

8 **A. Overview Of The Supreme Court’s Decision in *Massachusetts v EPA***

9 *Massachusetts v. EPA* involved a challenge to the determination by EPA not to regulate motor
10 vehicle emissions of greenhouse gases. The Supreme Court addressed two questions on the merits of
11 the case:

- 12 1. Whether the EPA Administrator may decline to issue emission standards for
13 motor vehicles based on policy considerations not enumerated in section 202(a)(1) [of
14 the Clean Air Act, 42 U.S.C. § 7521(a)(1)] and
- 15 2. Whether the EPA Administrator has authority to regulate carbon dioxide and
16 other air pollutants associated with climate change under section 202(a)(1).

17 See <http://www.supremecourtus.gov/qp/05-01120qp.pdf>. Since the Court cannot “address those two
18 questions unless at least one petitioner has standing to invoke . . . jurisdiction under Article III of the
19 Constitution,” *Massachusetts*, 127 S.Ct. at 1446-47, it first addressed this preliminary standing issue.

20 On the threshold justiciability question, the Court determined that the State of Massachusetts
21 had standing to pursue a challenge to EPA’s failure to regulate. Part of the rationale for this
22 conclusion was the fact that the regulation of CO2 is a federal matter and that Massachusetts had
23 consequently ceded its sovereign power to regulate these emissions from automobiles:

24 When a State enters the Union, it surrenders certain sovereign prerogatives.
25 Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas
26 emissions, it cannot negotiate an emissions treaty with China or India, and in some
27 circumstances the exercise of its police powers to reduce in-state motor-vehicle
28 emissions might well be pre-empted. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*
ex rel. Barez, 458 U. S. 592, 607 (1982) (“One helpful indication in determining
whether an alleged injury to the health and welfare of its citizens suffices to give the
State standing to sue *parens patriae* is whether the injury is one that the State, if it
could, would likely attempt to address through its sovereign lawmaking powers”).

These sovereign prerogatives are now lodged in the Federal Government, and
Congress has ordered EPA to protect Massachusetts (among others) by prescribing
standards applicable to the “emission of any air pollutant from any class or classes of

1 new motor vehicle engines, which in [the Administrator’s] judgment cause, or
2 contribute to, air pollution which may reasonably be anticipated to endanger public
health or welfare.” 42 U. S. C. §7521(a)(1).

3 *Id.* at 1454.

4 On the merits, the Court concluded that carbon dioxide is an “air pollutant” under the Clean
5 Air Act, and that Section 202(a)(1) of the Act authorizes EPA to regulate carbon dioxide emissions
6 from new motor vehicles if the Agency makes an “endangerment finding” – i.e., a finding that such
7 emissions “may reasonably be anticipated to endanger public health or welfare.” *Id.* at 1459-60
8 (quoting 42 U. S. C. §7521(a)(1)). Relying on the broad definition of “air pollutant,” the Court
9 rejected EPA’s argument that CO2 is not an “air pollutant” within the meaning of the Clean Air Act
10 because Congress did not intend it to regulate substances that contribute to global climate change. *Id.*
11 at 1460-61. The Court further explained that EPA has authority to regulate CO2 emissions even
12 though doing so may implicate the Department of Transportation’s regulation of fuel economy. *Id.* at
13 1462. The Court observed, however, that although the obligations of EPA and DOT “may overlap,”
14 “there is no reason to think the two agencies cannot both administer their obligations and yet avoid
15 inconsistency.” *Id.*

16 The court next addressed the question of whether EPA abused its discretion in deciding that it
17 would be unwise to regulate greenhouse gas emissions at this time. In holding that EPA had abused
18 its discretion, the Court found that the Agency’s decision “rests on reasoning divorced from the
19 statutory text,” *id.*, because the Agency offered “no reasoned explanation for its refusal to decide
20 whether greenhouse gases cause or contribute to climate change,” *id.* at 1463. The Court therefore
21 remanded the matter to EPA for reconsideration in light of the requirements of the Clean Air Act.
22 Significantly, the Court’s ultimate holding was very narrow and did not “reach the question whether
23 on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s
24 actions in the event that it makes such a finding.” *Id.* Rather, the Court simply held that “EPA must
25 ground its reasons for action or inaction in the statute.” *Id.*

26 The Court further observed that in the event that EPA makes an “endangerment finding,” the
27 Agency possesses broad discretion in determining what standards it should set, including
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1 coordination with its sister agencies. “EPA no doubt has significant latitude as to the manner, timing,
2 content, and coordination of its regulations with those of other agencies.” *Id.* at 1462.

3 **B. The Supreme Court’s Decision Did Not Address State Authority To Enact**
4 **Greenhouse Gas Regulations That Fall Under EPCA’s Express Preemption**
5 **Provision**

6 A review of the Supreme Court’s decision in *Massachusetts v. EPA* clearly shows that the
7 Court said nothing that would save the AB 1493 Regulations from either express or implied conflict
8 preemption under EPCA. Indeed, the opinion repeatedly reaffirms the national nature of global
9 warming policy and the primacy of federal measures to address it.

10 Most fundamentally, the Supreme Court’s decision is silent on the issue of express
11 preemption under EPCA. This, of course, is not surprising since that action concerned only whether
12 EPA has concurrent federal authority to regulate greenhouse gases. The Court, therefore, never
13 interprets the scope or the meaning of EPCA’s express preemption provision. By its very terms, that
14 provision restrains only state authority in the field of fuel economy regulation, but has no impact on
15 federal authority. EPCA’s express preemption provision states in pertinent part:

16 When an average fuel economy standard prescribed under this chapter [49 U.S.C. §§
17 32901 et seq.] is in effect, *a state or a political subdivision of a state* may not adopt or
18 enforce a law or regulation related to fuel economy standards or average fuel economy
19 standards for automobiles covered by an average fuel economy standard under this
20 chapter [49 U.S.C. §§ 32901 et seq.].

21 49 U.S.C. § 32919(a) (emphasis added).

22 The Supreme Court did implicitly accept one of the fundamental aspects of AIAM’s case –
23 the fact that a carbon dioxide emission standard is directly related to a fuel economy standard. The
24 Supreme Court’s decision noted that depending on the action it took, EPA’s regulation of greenhouse
25 gas emissions could potentially impact NHTSA’s fuel economy regulation under EPCA.¹ However,
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¹ As discussed above, the Supreme Court did not direct EPA to take any particular action in the event the Agency were to make an endangerment finding, recognizing instead that “EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.” *Massachusetts*, 127 S.Ct. at 1462. Thus, EPA is free to regulate greenhouse gas emissions in a manner other than setting tailpipe limits of carbon dioxide if it determines that doing so would conflict with NHTSA’s administration of EPCA.

1 the Supreme Court recognized that EPA may exercise its regulatory authority so long as it did so in
2 coordination with NHTSA to ensure that its actions do not conflict with EPCA’s goals.

3 *Massachusetts v. EPA*, however, does not support the proposition that a state may enact a
4 greenhouse gas regulation that is “related to fuel economy standards.” Indeed, the Court never cites
5 49 U.S.C. § 32919(a) or address the issue of how that preemption provision bars state greenhouse gas
6 regulations. Rather, the Court’s holding is limited to the narrow issue of whether EPA has the
7 authority under Section 202(a) of the Clean Air Act to regulate emissions of CO2 and other
8 greenhouse gases from motor vehicles and whether EPA acted arbitrarily and capriciously in failing
9 to “ground its reasons for . . . inaction in the statute.” *Massachusetts*, 127 S.Ct. at 1463.

10 Plainly, the Supreme Court’s statement that NHTSA’s authority to regulate fuel economy did
11 not limit EPA’s authority to regulate CO2 emissions under the Clean Air Act says nothing about state
12 authority to promulgate such regulations. On its face, the Court’s opinion addresses only the
13 allocation of regulatory authority as between two sister agencies within the Executive Branch. *See*
14 *id.* at 1462 (“The two obligations may overlap, but there is no reason to think the two agencies cannot
15 both administer their obligations and yet avoid inconsistency.”) Indeed, it is not unusual for
16 Congress to grant two federal agencies with overlapping authority to regulate the same subject matter
17 with the understanding that those two agencies will chart a single, coordinated and nationwide
18 course. *See, e.g., United States v. S. Cal. Edison Co.*, 300 F.Supp.2d 964, 983-84 (E.D.Cal. 2004)
19 (noting that although FERC is responsible for the issuance of hydroelectric licenses, “this power was
20 not intended by Congress to ‘interfere with the special responsibilities which . . . [other] Departments
21 have over the National Forests, public lands and navigable rivers.’ The fact that federal agencies
22 have overlapping authority and work for the common purpose of protecting and advancing the
23 interests of the United States is evidenced by subsections of enabling statutes such as 16 U.S.C.
24 § 803(a), which specifically acknowledge the fact that agencies are to work together”); *see also Rice*
25 *v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993) (in resolving a conflict between two
26 different regulations on accounting for government contracts, the court explained that “we keep in
27 mind the canon of statutory construction, equally applicable to regulations, that ‘where the text
28 permits, statutes dealing with similar subjects should be interpreted harmoniously. We begin,

1 therefore, with a preference for finding a reasonable interpretation of the regulations that does not
2 create unnecessary conflict between them.’’) (citation omitted).

3 The fact that EPA may enact a federal regulatory program that “may overlap” with NHTSA’s
4 administration of the federal fuel economy program says nothing about whether the State of
5 California may enact a regulation that is indisputably “related to fuel economy standards” in direct
6 contravention of EPCA’s express preemption provision. 49 U.S.C. § 32919(a). As AIAM discussed
7 in its Motion for Summary Judgment, well-settled principles of express preemption prevent the State
8 from doing so.

9 **C. The Supreme Court’s Decision Did Not Address State Authority To Enact**
10 **Greenhouse Gas Regulations That Conflict With The Goals Of EPCA And That**
11 **Circumvent A Coordinated National Approach**

12 Even if the Supreme Court had reached the issue of express preemption and held that the
13 broad preemption provision of 49 U.S.C. § 32919(a) does not prevent the State of California from
14 enacting greenhouse gas emissions standards, such a holding would not render the regulations
15 immune from conflict preemption analysis. As the Supreme Court held in *Geier v. American Honda*
16 *Motor Co.*, 529 U.S. 861 (2000), even where a state law or regulation is saved from express
17 preemption pursuant to a federal statute, that does “*not* bar the ordinary working of conflict pre-
18 emption principles.” *Geier*, 529 U.S. at 869 (italics in original). As the Court observed, it “has
19 repeatedly declined to give broad effect to saving clauses where doing so would upset the careful
20 regulatory scheme established by federal law.” *Id.* at 870 (citing *United States v. Locke*, 529 U.S. 89
21 (2000); *Am. Tele. & Tele. Co. v. Cent. Office Tele., Inc.*, 524 U.S. 214, 227-28 (1998) and *Tex. &*
Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907)).

22 Here, the purpose of EPCA is to secure a delicate balance between fuel economy, consumer
23 choice, economic impact on the industry, employment, and safety. Based on these criteria, NHTSA
24 determines the “maximum feasible” fuel economy level. *See, e.g.*, Average Fuel Economy Standards
25 For Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566, 17569 (Apr. 6, 2006) (the “Light
26 Truck Standards”) (stating that NHTSA “balanced the express statutory factors and other relevant
27 considerations, such as safety concerns, effects on employment and the need for flexibility to
28 transition to a Reformed CAFE program that can achieve greater fuel savings in a more economically

1 efficient way” and “determined that the standards ... represent the maximum feasible fuel economy
2 level ...”). Even if a state were not expressly preempted from enacting a regulation that is “related
3 to fuel economy standards” under EPCA, nothing in the Supreme Court’s opinion can be read to
4 countenance a state regulation that presents an actual conflict with the goals of EPCA.

5 Indeed, the Supreme Court implicitly recognized the potential for a conflict between a carbon
6 dioxide emissions regulation enacted by EPA and NHTSA’s implementation of the federal fuel
7 economy program under EPCA. The Court concluded, however, that the remedy for such a potential
8 conflict is not to deprive EPA of the authority to regulate at all, but rather to recognize that two sister
9 agencies can and presumably will coordinate their efforts to “avoid inconsistency” between their
10 respective programs. *Massachusetts*, 127 S.Ct. at 1462. *See also id.* (“EPA no doubt has significant
11 latitude as to the manner, timing, content, and coordination of its regulations with those of other
12 agencies.”). Such coordination at the federal level is further mandated by Executive Order No.
13 13432, 72 Fed. Reg. 27717 (May 14, 2007) (setting forth “the policy of the United States to ensure
14 the coordinated and effective exercise of the authorities of the President and the heads of the
15 Department of Transportation, the Department of Energy, and the Environmental Protection Agency
16 to protect the environment with respect to greenhouse gas emissions from motor vehicles ...”).
17 Accordingly, if and when EPA sets emissions standards for CO₂ under Section 202 of the Clean Air
18 Act, it will coordinate with NHTSA to ensure that those standards do not conflict with the goals and
19 objectives of EPCA.

20 As both the Supreme Court and Executive Order No. 13432 recognize, the establishment of
21 greenhouse gas emissions standards without giving due consideration to NHTSA’s implementation of
22 the federal CAFE program may well lead to a conflict with EPCA – hence the requirement of
23 coordination between the federal agencies. Here, in contrast, the State of California neither consulted
24 nor coordinated with NHTSA or any other federal agency in crafting its AB 1493 Regulations. For
25 its part, NHTSA has concluded “that the State GHG standard, to the extent that it regulates tailpipe
26 CO₂ emissions, would frustrate the objectives of Congress in establishing the CAFE program and
27 conflict with the efforts of NHTSA to implement the program in a manner consistent with the
28 commands of EPCA.” *Light Truck Standards*, 71 Fed. Reg. at 17667. Thus, while *Massachusetts v.*

1 EPA paves the way for EPA to cooperate with NHTSA to enact greenhouse gas emissions regulations
2 that do not conflict with the federal fuel economy program – assuming that EPA first makes an
3 “endangerment finding” under Section 202(a)(1) – that certainly does not mean that California’s AB
4 1493 Regulations are *a fortiori* exempt from well-established principles of conflict preemption.

5 **III. THE SUPREME COURT’S OPINION DOES NOT ALTER THIS**
6 **COURT’S SEPTEMBER 25, 2006, ORDER DENYING DEFENDANTS**
7 **MOTION FOR JUDGMENT ON THE PLEADINGS**

8 The Supreme Court’s decision in *Massachusetts v. EPA* also left untouched the sole legal
9 basis advanced by the Defendants for why the AB 1493 Regulations are not preempted under EPCA
10 – the notion that through the application of Section 209(b) of the Clean Air Act and/or Section
11 32901(f) of EPCA, the AB 1493 Regulations will be effectively “federalized” and immune from
12 federal preemption if California is successful in obtaining an EPA waiver under Section 209(b) of the
13 Clean Air Act. Indeed, the Court does not even mention Section 209(b) of the Clean Air Act or
14 address whether California’s authority to regulate motor vehicle emissions under that statute
15 abrogates both the terms of EPCA’s express preemption provision and the principles of implied
16 conflict preemption. Nor did the Court consider whether the provision in 49 U.S.C. § 32902(f) that
17 NHTSA consider “other motor vehicle standards of the Government” in setting fuel economy
18 standards places any implicit limitations on EPCA’s express preemption provision.

19 This Court has already addressed these issues, and has rejected the Defendants’ legal theories.
20 In their Motion for Judgment on the Pleadings, the Defendants argued that “California emission
21 standards that qualify for a section 209(b) waiver are effectively ‘federalized’ under the Clean Air
22 Act” and are therefore immune from preemption under EPCA. Defendant and Defendant-
23 Intervenors’ Memorandum of Points and Authorities in Support of their Motion for Judgment on the
24 Pleadings (ECF 232) (“Def’t MJOP”) at 10. Relying on the plain language of Section 209(b), this
25 Court correctly rejected this argument, holding that Section 209(b) “does not provide that the
26 regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from
27 preemption by other federal statutes.” *Central Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1173.
28 Rather, a Section 209(b) waiver is explicitly limited to express preemption under “*this section*,” 42

1 U.S.C. § 7543(b)(1) (emphasis added), and does not therefore amount to a waiver of preemption
2 under EPCA. *See also Id.* § 7543(b)(3) (“compliance with such State standards shall be treated as
3 compliance with applicable Federal standards *for purposes of this title* [42 U.S.C. §§ 7521 et seq.]”) (emphasis added).

4
5 This Court also dismissed the Defendants’ contention that “requiring NHTSA to consider the
6 California regulations made them ‘part of EPCA’” and that “the requirement that NHTSA consider
7 the California regulations [under Section 32902(f)] amounts to Congressional authorization of such
8 regulation, regardless of their effects on the EPCA’s goals.” *Central Valley Chrysler-Jeep*,
9 456 F. Supp. 2d at 1174-73. The court reasoned:

10 Defendants appear to read into this language a mandate that the EPCA accommodate
11 other regulations, including those granted an EPA waiver.

12 * * *

13 However, a congressional requirement that a decision maker “consider” a factor does
14 not deserve the weight that Defendants place on it. Congress’s use of the term
15 “consider” in a statute requires an actor to merely “investigate and analyze” the
16 specified factor, but not necessarily act upon it. ... The language of section 32902(f)
17 merely requires NHTSA to investigate and analyze what effect the “other” regulations
18 will have on fuel economy.

19 *Id.* (citing *City of Davis v. Coleman*, 521 F.2d 661, 679 (9th Cir. 1975); *J.H. Miles & Co., Inc. v.*
20 *Brown*, 910 F. Supp. 1138, 1156 (E.D. Va. 1995); *T.S. v. Ridgefield Bd. of Educ.*, 808 F. Supp. 926,
21 931 (D. Conn. 1992); and *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 (1st Cir. 1991)). This
22 Court’s conclusion concerning the application of 49 U.S.C. § 32902(f) is in accord with NHTSA’s.
23 That agency addressed the same question and concluded:

24 EPCA does not include any exception to its preemption provision that would cover
25 State GHG and CO2 standards. Nevertheless, some commenters opposing preemption
26 suggested that Section 32902(f), which lists the factors that NHTSA must consider in
27 determining the level at which to set fuel economy standards, prevents preemption by
28 requiring consideration, by NHTSA, of the effect of other Government standards,
including emissions standards, on fuel economy.

EPCA’s decisionmaking factor provision is neither a saving clause nor a waiver
provision. Nor does NHTSA interpret it as saving state emissions standards that
effectively regulate fuel economy from preemption. The agency interprets that
provision only to direct NHTSA to consider those State standards that can otherwise
be validly adopted and enforced under State and Federal law.

Light Truck Standards, 71 Fed. Reg. at 17669.

