No. 07-4342-CV

Consolidated with No. 07-4360-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP; GREEN MOUNTAIN FORD MERCURY; JOE TORNABENE'S GMC; ALLIANCE OF AUTOMOBILE MANUFACTURERS; DAIMLERCHRYSLER CORPORATION; and GENERAL MOTORS CORPORATION

Plaintiff,

ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS

Plaintiff-Appellant,

v.

GEORGE CROMBIE, Secretary of the Vermont Agency of Natural Resources; JEFFREY WENNBERG, Commissioner of the Vermont Department of Environmental Conservation; and RICHARD VALENTINETTI, Director of the Air Pollution Control Division of the Vermont Department of Environmental Conservation

Defendants-Appellees,

CONSERVATION LAW FOUNDATION; ENVIRONMENTAL DEFENSE; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; VERMONT PUBLIC INTEREST RESEARCH GROUP; STATE OF NEW YORK; and DENISE M. SHEEHAN, in her official capacity as Commissioner of Environmental Conservation of the State of New York

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
THE HON. WILLIAM J. SESSIONS, III, PRESIDING
DISTRICT COURT CASE NO. 02:05-CV-302

OPENING BRIEF FOR PLAINTIFF-APPELLANT THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant, the Association of International Automobile Manufacturers, Inc., a Virginia not-for-profit corporation, states that it has no corporate parent company and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Oddly enough, the best way to understand this case may be to start with what this appeal is ***not*** about. It is *not* about whether motor vehicle greenhouse gas ("GHG") emissions may be regulated by the federal government under the Clean Air Act. They may be – that was decided by the Supreme Court last April in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Similarly, this appeal is *not* over whether automakers will be driven to achieve significant fuel economy improvements in their fleets. They will be – that was determined by the U.S. Congress's passage of the Energy Independence and Security Act of 2007 imposing an overall fleet standard of at least 35 miles per gallon (mpg) by 2020, which amounts to an increase in fuel economy of over 40%.

This case ***is*** about whether another goal of paramount importance to Congress — fostering a strong national marketplace for automobiles and guarding against the splintering of that market by a multiplicity of state laws — will be lost in the present enthusiasm to address global warming. In the two federal laws implicated by this appeal — the Clean Air Act ("CAA") and the Energy Policy and Conservation Act of 1975 ("EPCA") — Congress constructed a sophisticated regulatory program, but went to great lengths in both laws to ensure a national approach. If allowed to stand, the ruling of the trial court will mark the abandonment of that vital and long-standing congressional objective and the

balkanization of the U.S. automotive market into multiple state-specific fuel economy regimes.

Express preemption is the clearest possible manner for Congress to manifest its intent to ensure national uniformity in a regulatory program. In both the CAA and EPCA, Congress used broad express preemption clauses to memorialize exactly such intent.

EPCA, which established the federal Corporate Average Fuel Economy ("CAFE") program, provides that states "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). EPCA's preemption provision has no exception for state regulation of carbon dioxide emissions — regulation which the Congress, expert federal agencies and the trial court all understand to be indistinguishable from fuel economy standards.

Similarly, the CAA, which regulates motor vehicle emissions, provides that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). Section 209(b) has a limited exception for the State of California. *Id.* § 7543(b). This exception, however, contains a critical caveat – the United States Environmental Protection Agency ("EPA") must first "waive application of" the CAA's express preemption provision before California can

"adopt or attempt to enforce" an emissions regulation, and that waiver can be granted only if certain prerequisites are met. Once a waiver is granted, other states may then "adopt and enforce" California's regulations pursuant to Section 177 of the CAA. *Id.* § 7507.

This action concerns the application of these two express preemption provisions to GHG emissions regulations adopted by the State of Vermont (the "GHG Regulations"). Vermont's GHG Regulations are based on identical regulations enacted by the State of California before EPA even considered, much less decided, California's request for a waiver under Section 209(b) of the CAA. Because these regulations are "standard[s] relating to the control of emissions from new motor vehicles" under the CAA's express preemption provision, *id.* § 7543(a), and also are "regulation[s] related to fuel economy standards or average fuel economy standards" under EPCA's express preemption provision, 49 U.S.C. § 32919(a), they are expressly preempted by both federal statutes.

Despite the plain language of these two preemption provisions and the undisputed facts demonstrating that the GHG Regulations fall squarely within their bounds, the district court below declined to enjoin their enforcement. This decision was in error and should be reversed.

First, the GHG Regulations are indisputably preempted by the CAA because California has not obtained a Section 209(b) waiver. In fact, EPA recently denied

California's waiver request, concluding, *inter alia*, that automotive GHG emissions should be addressed under the CAA by a coordinated national approach. That decision by EPA is not subject to challenge in this action. Rather, the only salient point here is that the GHG Regulations are invalid and expressly preempted under the CAA absent this waiver.

The district court erred in refusing to reach the issue of CAA preemption, holding instead that this claim was mooted by Vermont's willingness to delay enforcement of the GHG regulations until a waiver was secured. Of course, a promise by a state agency not to enforce a preempted regulation does not render a challenge to that regulation moot. Accordingly, the district court erred in not declaring the GHG Regulations preempted under the CAA and in failing to enjoin their enforcement.

The district court's dismissal of the CAA preemption claim also ignores a fatal flaw that renders the GHG Regulations permanently deficient. Section 209(a) of the CAA unambiguously prevents any state from *adopting or attempting to enforce* an emissions regulation absent a CAA waiver. In other words, pursuant to the clear language of the statute, California cannot adopt an emissions regulation unless it has first submitted the proposed regulations to EPA and secured a waiver covering those regulations. California failed to obtain such a waiver prior to adoption.

California's unlawful enactment of its regulations and Vermont's subsequent adoption of them is significant because, by the California Air Resources Board's ("CARB") own admission, the timeline for emission reductions set forth in the GHG Regulations effectively required manufacturers to take steps toward compliance immediately following California's adoption. Manufacturers, therefore, are put in the untenable position of choosing to either expend vast and unrecoverable sums now to comply with these unquestionably preempted regulations or do nothing and face the risk of sanctions for noncompliance should the GHG Regulations become effective in the future. Section 209(a)'s plain terms were deliberately crafted to prohibit this Hobson's choice. Thus, the only proper remedy under the CAA is a declaration that the GHG Regulations are entirely invalid under Section 209(a) of the CAA and issuance of a permanent injunction prohibiting enforcement.

Separate and apart from preemption under the CAA, the GHG Regulations also are preempted under EPCA. The regulations are overwhelmingly focused on a single greenhouse gas: carbon dioxide ("CO2"). Because CO2 emissions are a direct function of the amount of carbon-containing fuel consumed by a vehicle, a CO2 emission regulation is undeniably "related to" fuel economy standards. Unlike other emissions historically regulated by EPA and California, CO2 emissions cannot be reduced by capture or chemical alteration. In other words, no

matter what pollution control devices are added to a gasoline-powered car, if it gets 40 miles per gallon, then it will emit roughly 222 grams of CO2 per mile driven; and the only way to reduce those CO2 emissions is to improve the vehicle's fuel economy.

For these reasons, it is impossible to regulate motor vehicle CO2 emissions without directly regulating fuel economy. The National Highway and Traffic Safety Administration ("NHTSA"), the federal agency charged with administering EPCA, recognized this fact, explaining that "a State GHG standard is [a] fuel economy standard in almost all but name and stated purpose. It would have virtually the same effects as a fuel economy standard." Average Fuel Economy Standards For Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566, 17,657 (Apr. 6, 2006) (the "Light Truck Standards"). Based on this analysis, NHTSA concluded that "[s]tate regulation of motor vehicle tailpipe emissions of CO2 is both expressly and impliedly preempted by" EPCA. *Id.* at 17,654.[1]

Without even mentioning the opinion of the expert agency, the district court held that the GHG Regulations are not preempted under EPCA. Significantly, the

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[1] In *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007), the Ninth Circuit reversed and remanded NHTSA's final rule setting fuel economy standards for light duty trucks. The basis for the remand was unrelated to NHTSA's discussion of preemption of state greenhouse gas emissions. The Ninth Circuit expressly noted that its decision did not address this issue. *See id.* at 513 n.1.

district court did not reach this opposite conclusion based on a factual finding that there is no — or a merely tangential — relationship between regulating CO2 emissions and fuel economy standards. Sharply to the contrary, the court found that "there is a mathematical relationship between fuel consumption and carbon dioxide emissions" and that it is therefore "possible to express these emissions standards as fuel economy standards in miles traveled per gallon of gasoline consumed." *Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F.Supp.2d 295, 342 n.49 (D. Vt. 2007).

To achieve its extraordinary result, the district court resorted to extraordinary means – finding that the GHG Regulations are absolutely immune from federal preemption. The court reached this conclusion by constructing a legal fiction – namely that the GHG Regulations are not *state* standards but rather CARB has enacted *federal* law if it can secure a Section 209(b) waiver for the underlying California emissions regulations.

The district court's novel ruling restricts the scope of federal preemption in an unprecedented fashion. Never before has a state regulation that falls squarely within the scope of an express preemption provision been immune from federal preemption. This holding ignores not only the plain language of both EPCA and the CAA, but also long-standing precedent concerning federal preemption and the

views of the expert agency on the topic. The decision is clearly erroneous and should be reversed.

JURISDICTIONAL STATEMENT

This district court possessed jurisdiction over this action pursuant to 42 U.S.C. §§ 1331, 1343(a)(3) and 1983 because this is an action for declaratory and injunctive relief under the Supremacy Clause in Article VI of the United States Constitution, and because the Defendants are the state officers charged with implementing and enforcing the preempted regulation.

This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291. AIAM filed its Notice of Appeal on October 5, 23 days after entry of the court's entry of final judgment on September 12, 2007.

ISSUES PRESENTED FOR REVIEW

Section 209(a) of the CAA provides that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). Section 209(b) allows EPA to "waive application of this section," thereby allowing the State of California to adopt or enforce an emissions regulation if certain conditions in that statute are met. In light of Vermont's and California's adoption of the GHG Regulations without a waiver of preemption and EPA's denial of California's waiver request, this action presents two issues under the CAA:

1. Whether the district court erred in dismissing the cause of action alleging preemption under the CAA as moot; and
2. Whether the GHG Regulations should be declared unlawful and permanently enjoined because California and Vermont adopted the regulations without a CAA preemption waiver.

Additionally, EPCA expressly preempts any state "law or regulation related to fuel economy standards or average fuel economy standards" under 49 U.S.C. § 32919(a). In light of the lower court's finding that there is a direct and mathematical relationship between fuel economy standards and CO2 emissions, this matter raises two questions under EPCA:

3. Whether the district court erred in holding that principles of express and implied federal preemption do not apply to these state regulations; and
4. Whether the district court erred in finding that the GHG Regulations are not preempted under EPCA's express preemption provision, 49 U.S.C. § 32919(a).

Finally, NHTSA has determined that a state GHG standard is a law or regulation "relating to fuel economy standards" "because it has the direct effect of regulating fuel consumption." Light Truck Standards, 71 Fed. Reg. at 17,654. NHTSA also found that such a state standard "would frustrate the objectives of

Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA." *Id.* at 17,667. Given these conclusions by the expert agency, a final issue presented is:

5. Whether the district court erred in failing to consider NHTSA's opinion in determining whether the GHG Regulations are expressly or impliedly preempted by EPCA.

STATEMENT OF THE CASE

The Association of International Automobile Manufacturers, Inc. ("AIAM") filed its complaint in this action on November 18, 2005, alleging that Vermont's GHG Regulations are preempted under both EPCA (First Claim For Relief) and the CAA (Second Claim For Relief).

AIAM and the Defendants filed dispositive motions on November 13, 2006. AIAM's Motion for Summary Judgment argued that the GHG Regulations are expressly and impliedly preempted by EPCA on their face based on undisputed facts demonstrating the direct relationship between CO2 emissions and fuel economy and the conflict between the state law and EPCA. The Defendants' Motion for Judgment on the Pleadings argued that a waiver by EPA of CAA preemption would immunize the GHG Regulations from preemption under EPCA as a matter of law.

Despite the absence of any material issue of disputed fact, the court did not grant either cross motion.[2] Rather, the court concluded that it was "inclined to hold the motions in abeyance and proceed to the trial." JA at ___ [TR 03/02/2007 Motions Hearing at 82:18-20].

Trial was conducted over sixteen days in April and May 2007. On September 12, 2007, the court issued its opinion and order, entering judgment in favor of the Defendants on Count I and holding that the GHG Regulations are not expressly or impliedly preempted by EPCA. The district court also dismissed Count II, holding that the issue of preemption under the CAA was moot in light of the Defendants' concession that the GHG Regulations are unenforceable absent a

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[2] In their opposition to AIAM's Motion for Summary Judgment, the Defendants conceded that "summary adjudication for either party is . . . appropriate because with respect to the EPCA claim the Defendants maintain that there are no material facts in dispute." JA at ___ [Defendants' and Defendant-Intervenors' Opposition to Plaintiff Association of International Automobile Manufacturers' Motion for Summary Judgment (ECF 191) at 2]. However, the evening before the hearing on the cross motions, the Defendants filed a surreply brief wherein they argued that AIAM's summary judgment motion should be denied because they purported to dispute a limited number of the facts set forth in AIAM's Statement of Undisputed Material Facts. During the oral argument on AIAM's motion, the court noted that, although the Defendants had claimed to dispute some of the facts cited by AIAM, "I couldn't quite see how they were disputing" those facts. JA at ___ [TR 03/02/2007 Motions Hearing at 62:10-12].

waiver of CAA preemption from EPA. AIAM noticed an appeal on October 5, 2007.

STATEMENT OF FACTS[3]

I. The GHG Regulations Were Enacted Without a Waiver of CAA Preemption

Section 5-1103(b) of Subchapter XI of the Vermont Air Pollution Control Regulations adopts and incorporates by reference regulations enacted by the California Air Resources Board and codified under Title 13, Section 1961.1 of the California Code of Regulations. These regulations set fleet average emission limits for the combination of four GHGs: CO2, methane, nitrous oxide, and hydrofluorocarbons from air conditioning systems.

The underlying California regulations were adopted by CARB on September 23, 2004, pursuant to California Assembly Bill 1493. Cal. Health & Safety Code § 43018.5; *see also* Cal. Air Res. Bd. Resolution 04-28 (Sept. 23, 2004), *available at* http://www.arb.ca.gov/regact/grnhsgas/res0428.pdf. The California regulations became effective by their own terms on January 1, 2006. Cal. Code Regs. tit. 13,

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[3] This statement of facts is based principally upon the record that was before the trial court on AIAM's Motion for Summary Judgment. *See Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d. 171 (2d Cir. 2007) (explaining that the appellate court should stand in the shoes of the district court at the time of summary judgment to assess the propriety of its disposition). However, where appropriate, AIAM will cite this Court to the subsequent trial record to demonstrate that the evidence presented at trial was entirely consistent with the undisputed facts offered by AIAM.

§ 1961.1(g). California did not submit the regulations to EPA for a waiver of CAA preemption prior to adoption. Vermont adopted its GHG Regulations on November 7, 2005, and they became effective on November 22, 2005. *See* Vt. Dept. of Envt. Conservation, Recently Adopted And Proposed Regulations, http://www.anr.state.vt.us/ air/htm/ProposedAmendments.htm#cars.

California finally applied for a waiver from preemption on December 21, 2005, just eleven days before the regulations became effective in that state and one month after they became effective in Vermont. After conducting two public hearings, *see* EPA-HQ-OAR-2006-0173, EPA denied California's application for a waiver of Clean Air Act preemption on February 29, 2008. *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008) (the "GHG Waiver Decision").

II. Vermont's GHG Regulations Require Reductions in the Amount of CO2 Emitted from New Motor Vehicles

Vermont's GHG Regulations require dramatic emission reductions from new motor vehicles commencing with the 2009 model year ("MY"), which began as early as January 2, 2008 for some manufacturers. *See* 40 C.F.R. §§ 85.2302, 85.2304. The GHG emissions limits are expressed in terms of grams of "carbon

dioxide equivalent" emitted per mile traveled. The "carbon dioxide equivalent" (or CO2-e) is determined by measuring the amount of CO2 emitted per mile driven and then adjusting it to account for the "global warming potential" of the other greenhouse gas emissions. *See* 12-031-001 Vt. Code R. 5-1102(a) (adopting Cal. Code Regs. tit. 13, § 1961.1(a)(1)(B)).

After MY 2009, the emissions limits become increasingly stringent until MY 2016. For example, a manufacturer's fleet of PC/LDT1[4] vehicles must meet a fleet-average requirement of 323 g/mi in MY 2009, decreasing to 205 g/mi in MY 2016. Cal. Code Regs. tit. 13, § 1961.1(a)(1)(A). The LDT2/MDPV[5] fleet must meet an average of 439 g/mi in MY 2009, decreasing to 332 g/mi in MY 2016. *Id*.

These reductions are dramatic, particularly in light of the extremely tight timeframe for compliance. Making the design and manufacturing changes necessary to produce cars meeting these new requirements would take a

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[4] The term "PC" refers to passenger cars. The term "LDT1" refers to light duty trucks with a loaded vehicle weight of 0-3,750 pounds. Cal. Code Regs. tit. 13, § 1961. Unlike EPCA, these two classes of vehicles are combined for the purposes of determining compliance with the California and Vermont standards. *Id.* § 1961.1(a)(1)(A).

[5] The term "LDT2" refers to light-duty trucks with a loaded vehicle weight of 3,751 pounds to a gross vehicle weight of 8,500 pounds. Cal. Code Regs. tit. 13, § 1961. The term "MDPV" refers to medium-duty passenger vehicles with a gross vehicle weight rating of at least 8501 pounds and less than 10,000 pounds. *Id.*

considerable amount of lead time.[6] For example, undisputed testimony by CARB's designated witness on lead time, Steve Albu, established that it will take some manufacturers up to six years to bring their fleets into compliance with the 2011 MY standards and up to seven years to comply with the 2012 MY standard. JA at ___. [Albu Depo. at 258:20- 259:10; 272:15-273:19]. These admissions demonstrate that the states anticipated that manufacturers would be forced to immediately expend unrecoverable sums to comply with the GHG Regulations, even though no waiver has been granted by EPA.[7]

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[6] Citing the cognizable harm caused by the manufacturers' immediate obligation to comply with the regulations, the district court denied a motion to dismiss this action on ripeness grounds. *Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse*, No. 2:05-CV-304, 2006 U.S. Dist. LEXIS 86805 (D. Vt. Nov. 30, 2006). That decision is not on appeal.

[7] In fact, despite the absence of a waiver from EPA, California is still effectively requiring manufacturers to comply with the 2009 standards now. CARB's executive orders certifying 2009 model year test groups contain the following representation:

> The test group listed in this Executive Order is certified based on the manufacturer's reported emissions and attestation that it meets all applicable certification requirements currently in effect and enforceable for the 2009 model year, as described above. A January 16, 2007 Order currently enjoins the Executive Officer from enforcing any provision of California Health and Safety Code section 43018.5(b)(1) concerning certification to the requirements for 2009 and subsequent model passenger cars, light-duty trucks and medium-duty vehicles adopted pursuant to AB 1493. If said injunction ceases to be in effect, the manufacturer will have ***45 days*** from the ARB notification to demonstrate compliance with AB 1493 requirements

[Footnote continued on next page]

III. Motor Vehicle CO2 Emissions Are Inextricably Linked to Fuel Economy

Cutting a vehicle's CO2 emissions is fundamentally a question of reducing the amount of carbon-based fuel that is burned by the vehicle. When a carbon-based fuel, such as gasoline, diesel, natural gas or ethanol is combusted completely in an automobile engine, CO2 and water are the two natural and unavoidable byproducts of the fuel. Light Truck Standards, 71 Fed. Reg. at 17,659.

The vast majority of vehicles sold in the U.S. today run on conventional gasoline. Gasoline is a rich mixture of hydrocarbons, consisting almost entirely of carbon and hydrogen atoms arranged in various molecules. JA at ___ [Haskew Aff. ¶ 10]. A gallon of typical commercial grade gasoline contains approximately 5.5 pounds of carbon. Light Truck Standards, 71 Fed. Reg. at 17,659 n.201. Thus, according to NHTSA, "[b]ased on its content (carbon and hydrogen), as a matter of

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[Footnote continued from previous page]

> ***including the determination of the greenhouse gas values for the test group*** listed in this Executive Order. Nothing in this Executive Order is intended to constitute enforcement of any requirement under AB 1493 for 2009 model year vehicles.

The only way a manufacturer could *demonstrate* compliance on a 45-day turnaround would be if the fleets were already in compliance.

basic chemistry, the burning of a gallon of gasoline produces about 20 pounds of CO2." *Id.* at 17,659.[8]

Although incomplete combustion can result in trace amounts of carbon monoxide ("CO") and unburned hydrocarbons ("HC"), CO2 comprises the overwhelming share of the carbon-containing compounds in the exhaust because pollution control measures developed over the past three decades have reduced emissions of HC and CO to near zero levels. Accordingly, NHTSA has noted that "CO and HC play an increasingly and extremely minor role in the measurement of fuel economy, such that fuel economy has become virtually synonymous with CO_2 emission rates." *Id*. at 17,660-61.[9]

Indeed, CO2 emissions and fuel economy are so closely linked that a formula can mathematically convert the GHG Regulation standards to fuel economy levels required to comply.[10] The district court agreed, stating: "[b]ecause

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8 The district court found that "[t]here is indeed a mathematical relationship between the carbon content of a fuel and the carbon which is released through emissions of hydrocarbons, carbon monoxide, or carbon dioxide." *Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F.Supp.2d 295, 351 (D. Vt. 2007).

9 The district court agreed that there is "near perfect correlation between fuel consumed and carbon dioxide released . . . ." 508 F.Supp.2d at 352.

10 As explained by NHTSA, fuel economy can be calculated with the following equation:

[Footnote continued on next page]

there is a mathematical relationship between fuel consumption and carbon dioxide emissions, it is possible to express these emissions standards as fuel economy standards in miles traveled per gallon of gasoline consumed." 508 F.Supp.2d at 342 n.49. The court further cited with approval to the undisputed evidence proffered by AIAM and the other plaintiffs that "for PC/LDT1s the mileage equivalents are 27.6 mpg in model year 2009, increasing to 43.7 mpg in model year 2016. For LDT2s, they calculate the mileage equivalents as 20.3 mpg in model year 2009, increasing to 26.9 mpg in model year 2016." *Id.*[11]

[Footnote continued from previous page]

$$\text{mpg} = \frac{2{,}421}{((0.868 \times \text{HC}) + (0.429 \times \text{CO}) + (0.273 \times \text{CO2}))}.$$

Where: HC = hydrocarbon emission rate (grams per mile)
CO = carbon monoxide emission rate (grams per mile)
CO2 = carbon dioxide emission rate (grams per mile)

Light Truck Standards, 71 Fed. Reg. at 17,661. Assuming near-zero emissions of HC and CO, a CO2 emission rate of 205 grams per mile equals 43.3 miles per gallon.

[11] One of the Defendants' experts, K.G. Duleep, made the same calculation, the only difference being that he assumed that manufacturers made use of air conditioning credits, thus reducing the minimum fuel economy required in 2016 to 40.45 mpg for the PC/LDT1 fleet and 25.4 mpg for the LDT2/MDPV fleet. JA at ___ [DX 2688]; *id.* at ___ [TR Vol. 12-A, 111:10-11]

IV. Based on Currently Available Technology, GHG Regulations Require Manufacturers to Improve the Fuel Economy of Their Vehicle Fleets in Order to Comply

Unlike other emissions traditionally regulated under the CAA, there is no "bolt on" aftertreatment device such as a catalytic converter that can capture or chemically alter CO2 emissions. Indeed, "the technologies that produce … reductions in air pollution [caused by CO and HC] do so by more completely converting CO and HC ***to CO[2]*** (and water)." Light Truck Standards, 71 Fed. Reg. at 17,660 (emphasis added). In contrast, the only way to cut tailpipe emissions of CO2 is to reduce the amount of carbon that is combusted in the vehicle. JA at ___ [Haskew Aff. ¶ 19]; *see also* Light Truck Standards, 71 Fed. Reg. at 17,656. In other words, manufacturers must improve fuel economy to decrease CO2 emissions.

Manufacturers cannot comply with the GHG Regulations by reducing the other GHGs covered by the regulation. As discussed above, the GHG Regulations cover not just tailpipe emissions of CO2 but also tailpipe emissions of methane and nitrous oxide as well as direct and indirect emissions of refrigerant and CO2 attributable to the operation of the vehicle's air conditioning system. Cal. Code Regs. tit. 13, § 1961.1(a)(1)(B). The regulations also provide credits for vehicles that are actually run on an alternative fuel, such as E85 (a blend of ethanol and gasoline) and electricity. *Id.* § 1961.1(a)(1)(B)(1)(d)-(e).

However, the undisputed evidence presented in connection with AIAM's Motion for Summary Judgment and at trial demonstrated that the emissions reductions from these aspects of the regulation are comparatively insignificant from a compliance standpoint (in the case of methane and nitrous oxide emissions and air conditioning credit) or not presently viable (in the case of alternative fuels). Indeed, California regulators admitted that roughly 90% of the reductions in CO2-equivalents required under the regulations must result from fuel economy improvements. JA at ___ [Hughes Depo. at 162:2-11; Albu Depo. at 437:19-22].

First, the methane and nitrous oxide components of the GHG Regulations are trivial. CARB staff estimated at the time of the rulemaking that a typical baseline vehicle emits 0.005 grams per mile of methane, which, when adjusted for the global warming potential for methane of 23, yields a CO2-equivalent value of 0.115 grams per mile. JA at ___ [Request for Judicial Notice (Docket No. 160) Exh. 1 (California Environmental Protection Agency, Air Resources Board, Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles ("ISOR")) at 79]. Similarly, the GHG Regulations allow manufacturers to use a default value of 0.006 grams per mile for nitrous oxide in lieu of actually measuring emissions of that gas, which yields a CO2-equivalent value of 1.78 grams per mile. JA at ___ [ISOR at 79]. Thus, the complete

elimination of methane and nitrous oxide would only reduce the CO2-e emissions by 1.895 g/mi – hardly a dent in the required reductions for the PC/LDT1 classification of 90 g/mi by MY 2012 and 118 g/mi by MY 2016.

To account for air conditioning emissions, the GHG Regulations allow credits for reducing direct emissions of refrigerant and indirect emissions of CO2 from the operation of the air conditioning. Cal. Code. Regs. tit. 13, § 1961.1(a)(1)(B)(1)(b). These credits could be as high as 13.0 grams per mile for the short term standards (MY 2009 through 2012) and as high as 18.5 grams per mile for the long terms standards (MY 2013 through 2016). JA at ___ [ISOR at 110]. Although these credits may assist manufacturers in reducing their CO2-e emissions to a limited extent, they also fall far short of the requirement that CO2-e emissions be reduced by 118 g/mi for the PC/LDT1s or 107 g/mi reduction for the LDT2/MDPVs. The district court agreed and cited with approval the undisputed testimony of AIAM's expert that "eliminating methane emissions entirely and obtaining all available air conditioning credits would not enable a manufacturer to comply with the regulation without improving fuel economy." 508 F.Supp.2d at 352.

The undisputed evidence also established that the various levels of credit provided for alternative fueled vehicles, *see* Cal. Code. Regs. tit. 13, § 1961.1(a)(1)(B)(1)(d)-(e), do not relieve manufacturers from the obligation to

reduce CO2 emissions through improving fuel economy. These provisions for alternative fueled vehicles only come into play if a manufacturer can demonstrate that the vehicles sold were ***actually run*** on the alternative fuel in the previous model year; simply manufacturing vehicles capable of running on alternative fuels does not entitle manufacturers to any credit.[12] *Id.* § 1961.1(a)(1)(B)(2)(a)(i).

This requirement of proving actual use of the alternative fuel eliminates this compliance option as a practical matter because the fuel must be readily available to consumers and be cost-competitive. For example, the Defendants' own expert on alternative fuels submitted a declaration in connection with AIAM's summary judgment motion stating that "[f]or alternative fuels to be a viable compliance strategy for the manufacturers there has to be a viable business case to sell the alternative fuel(s) to the consumer . . . .Thus, fuel supply and availability will be necessary as well as price competitiveness with gasoline." JA at ___ [Jackson Decl. ¶ 16]. The declaration then concedes that these prerequisites do not currently exist and that it is uncertain whether they will exist in the near future. For example, he states that "there are only a few E85 stations in California" and does not identify any in Vermont. JA at ___ [Jackson Decl. ¶ 18]. He further explains

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12 The federal fuel economy program also gives credit for producing vehicles capable of running on alternative fuels, but does not require the actual use of the alternative fuel before credit may be earned. 49 U.S.C. § 32905.

that "there is still much work that will need to be accomplished to have a sustainable E85 market." JA at ___ [Jackson Decl ¶ 20]. Because the provisions for alternative fuel credits are not a viable compliance option for the manufacturers, even CARB did not view alternative fuels as a cost-effective means of complying with the regulations. JA at ___ [Albu Depo. at 435:20-436:22].

V. Despite the Direct Relationship Between the GHG Regulations and Fuel Economy Standards, the District Court Determined that the GHG Regulations Are Not Preempted by EPCA

Despite its findings establishing the direct relationship between the GHG Regulations and fuel economy standards, the trial court held that the GHG Regulations are not preempted by EPCA. In reaching this result, the court concluded that if EPA grants a waiver of preemption to California for its GHG regulations, these regulations become federal law and cannot be preempted under EPCA because NHTSA must "consider" such regulations as "other motor vehicle standards of the Government" in setting fuel economy standards. As such, the court exempted the regulations entirely from a preemption analysis because "the preemption doctrines do not apply to the interplay between Section 209(b) of the CAA and EPCA, [which is] in essence a claim of conflict between two federal regulatory schemes." *Id.* at 350.

As an alternative basis, the district court found that the GHG Regulations are not barred by EPCA's express preemption provision. The court determined that

"[c]onstruing the statute as a whole, Congress could not have considered an EPA-approved California emissions standard to be automatically subject to express preemption as a 'law or regulation relating to fuel economy standards,' because it required that NHTSA take into consideration the effect of such standards when determining maximum feasible average fuel economy." *Id.* at 354.

The district court also dismissed AIAM's CAA preemption count as moot, explaining that "parties agree that enforcement of Vermont's GHG standards is preempted by Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), unless and until the EPA Administrator grants California a waiver under Section 209(b), 42 U.S.C. § 7543(b), for its identical GHG regulations." *Id.* at 343 n.50.

SUMMARY OF ARGUMENT

The CAA and EPCA expressly preempt state law "related to" motor vehicle emissions or fuel economy standards, respectively. The United States Supreme Court has consistently held that "related to" preemption provisions are "clearly expansive," and that a state law or regulation that falls within the preempted field is invalid. *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001); *see also Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Morales v. Trans Word Airlines, Inc.*, 504 U.S. 374, 383-84 (1992); *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), abrogated

on other grounds by *Ky. Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983). Like these cases, this action involves the application of two broadly worded express preemption provisions to a state regulation that fall within an area reserved for federal regulation by Congress.

With respect to AIAM's CAA count, the lower court plainly erred in dismissing the claim as moot. Under Section 209(a) of the CAA, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). Section 209(b) allows EPA to "waive application of this section" for the State of California, *id.* § 7543(b), but unless and until EPA does so, neither California nor Vermont may adopt *or* attempt to enforce a motor vehicle emissions regulations. The regulations challenged in this action were unlawfully adopted without a waiver, and EPA has denied California's waiver application. Accordingly, AIAM's cause of action for preemption under the CAA presents a justiciable controversy, and the district court erred in not enjoining the Vermont GHG Regulations. Moreover, because California and Vermont unlawfully adopted their respective regulations without a waiver, they are incurably flawed and their enforcement should be permanently enjoined.

The district court also erred in holding that the GHG Regulations are not preempted under EPCA. EPCA's express preemption provision prohibits states from adopting "a law or regulation related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). The undisputed facts demonstrate that the GHG Regulations amount to a direct state regulation of the fuel economy performance of new motor vehicles, which falls squarely within EPCA's express preemption provision.

In reaching its contrary conclusion, the district court ignored long-standing Supreme Court and Second Circuit precedent and read an exception into the preemption clause that does not appear in its language and is not supported by any legal authority. A waiver of preemption under Section 209(b) does not operate to "federalize" the California law or render it immune from preemption under any other federal statute. The plain language of Section 209(b) only waives preemption under the CAA.

This Court, therefore, should reverse the district court and hold that the GHG Regulations should be permanently enjoined on both of these independent bases – preemption under Section 209(a) of the Clean Air Act and preemption under EPCA. If, however, the Court were to conclude that the regulations should be permanently enjoined under the CAA because of California's failure to obtain a waiver of CAA preemption before adopting the regulations, the Court could

decline to reach the merits of EPCA preemption. In that case, Supreme Court and Second Circuit precedent would require *vacatur* of the district court's opinion on the EPCA issue.

If, on the other hand, this Court were to determine that AIAM is not entitled to a permanent injunction under Section 209 of the CAA, then it must reach the merits of the EPCA preemption claims. So long as the possibility remains that California may eventually obtain a waiver of CAA preemption for the GHG Regulations, AIAM members will continue to face the untenable choice between expending unrecoverable resources now to comply with these regulations or doing nothing and risk serious penalties should the regulations spring back to life.

STANDARD OF REVIEW

The district court failed to grant AIAM's Motion for Summary Judgment based on the undisputed facts. The failure to grant a motion for summary judgment is reviewed *de novo* by this Court. *Wray v. City of New York*, 490 F.3d 189, 192 (2d Cir. 2007).

Furthermore, the core of this action presents a question of federal preemption. As such, the action "involves the application of a federal statute to state regulations" and is therefore "a matter of law that the [Court of Appeals] review[s] *de novo*." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 199 (2d Cir. 1998).

Finally, the district court's dismissal of AIAM's CAA cause of action as moot is also reviewed *de novo*. *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 167 (2d Cir. 2007).

ARGUMENT

I. AIAM's Claim for Preemption Under the CAA Presents a Justiciable Controversy and Entitles AIAM to a Permanent Injunction Preventing the Enforcement of the GHG Regulations

AIAM's claim for preemption under the CAA rests upon three undisputed facts: (1) the GHG Regulations are "standard[s] relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a); (2) California and Vermont adopted the regulations without California first obtaining a waiver of CAA preemption; and (3) EPA has denied the requested waiver. Based on these facts, the district court erred in dismissing this count as moot, and AIAM is entitled to an injunction permanently preventing the enforcement of these GHG Regulations.

A. The District Court Erred in Dismissing AIAM's CAA Claim as Moot

The district court erroneously dismissed AIAM's CAA count as moot based on the Defendants' current concession that Vermont would not enforce its GHG standards until an EPA waiver was secured. 508 F.Supp.2d at 343 n.50. This concession, however, does not justify the dismissal of this cause of action.

"A case does not become moot . . . if an appellant retains some interest in the case so that a favorable decision could redound to its favor." *Conn. Office of Prot.*

& Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229, 237 (2d Cir. 2006). Thus, it is well established that an informal agreement does not render a case moot. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466 (1978) ("In view of the tentative nature of the settlement, this case is not moot."). A party claiming that its voluntary agreement moots a case "bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur." *Seidemann v. Bowen*, 499 F.3d 119, 128-29 (2d Cir. 2007).

In *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), this Court held that a state agency's letter of commitment to remedy deficiencies in its EPA-approved Title V program did not render a challenge to EPA's approval of the program moot. The Court explained that:

> Attempting to meet this burden [of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur], the DEC points to the implementation of a number of the changes promised in its letter of commitment. Although indicative of a degree of good faith, we nevertheless conclude that the DEC has not carried the formidable burden of making "absolutely clear," that the problems identified both by NYPIRG and the EPA "could not reasonably be expected to recur."

Id. at 327 (citing *Friends of the Earth v. Laidlaw Envtl. Servs*., 528 U.S. 167, 190-93 (2000)).

Here, the mere recognition by the State of Vermont that enforcement of the GHG Regulations is preempted in the absence of a Section 209(b) waiver does not

render this action moot. Absent a court order, there is nothing preventing the Defendants from reconsidering their prior concession, adopting a different legal position, and requiring manufacturers to comply with the standards even if a waiver is never granted.[13] The law does not require AIAM to wait until Vermont actually attempts to enforce the GHG Regulations before it is entitled to a court-ordered injunction. The district court's dismissal of AIAM's CAA count was clear error and should be reversed with instructions to enjoin the enforcement of the GHG Regulations.

B. The GHG Regulations Should Be Permanently Enjoined Because They Were Unlawfully Adopted Without a Waiver

The district court further erred in its assumption that preemption under the CAA may be cured if a waiver were ultimately to be granted. *See* 508 F.Supp.2d at 343 n.50 (stating that the regulations are not enforceable "unless and until the EPA Administrator grants California a waiver under Section 209(b)"). Rather, the enforcement of the regulations should be permanently enjoined because the

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[13] Indeed, CARB originally maintained that no new waiver was required for its greenhouse gas regulations either because greenhouse gas emissions were not covered by Section 209(a) or because the regulations fall within the scope of an existing waiver. *See* Reply Memorandum of Points and Authorities in Support of Defendants Motion to Dismiss in *Central Valley Chrysler-Jeep, Inc., et al v. Witherspoon*, No. 1:04-CIV-06663-AWI-GSA (Docket No. 90) at 26-27 n.17.

regulations were unlawfully adopted in violation of the CAA's express preemption provision.

"This court has held it to be 'a fundamental principle of statutory construction that the starting point must be the language of the statute itself.'" *Morenz v. Wilson-Coker*, 415 F.3d 230, 234 (2d Cir. 2005) (quoting *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 919 (2d Cir. 1987)). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id*. Here, the plain language of Section 209(a) bars California or any other state from adopting these mobile source emission regulations prior to obtaining a waiver.

Section 209(a) is a prohibition, providing that "***[n]o State*** . . . shall ***adopt or attempt to enforce*** any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . . ." 42 U.S.C. § 7543(a) (emphasis added). Section 209(b) provides for an exception to Section 209(a), and allows EPA to "waive application of this section," provided that the preconditions of Section 209(b) have been met. 42 U.S.C. § 7543(a). However, until a waiver has been granted, Section 209(a) remains in full effect, and all States, including California and Vermont, are preempted from either "adopt[ing] or attempt[ing] to enforce" an emissions regulation. That is, either action—adopting or enforcing—independently violates the statutory prohibition.

The key to Section 209(a) is the disjunctive "or" between the terms "adopt" and "attempt to enforce." As the Supreme Court has explained, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (construing the term "business or property" in Section 4 of the Clayton Act); *see also Spector v. Norwegian Cruise Line Ltd*., 545 U.S. 119, 120 (2005); *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002); *Miller v. Albright*, 523 U.S. 420, 432 (1998).

Precedent from this Circuit likewise establishes that "when . . . two words at issue are connected by 'or' rather than 'and,' and when no commas set off the second word to suggest that it stands in apposition to the first, we construe the disjunctive words to convey different meanings." *Collazos v. United States*, 368 F.3d 190, 199 (2d. Cir. 2004) (holding that the terms "enter or re-enter" in the Civil Asset Forfeiture Reform Act have different meanings and are independent bases for denying access to U.S. courts).[14]

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[14] *See also Roth v. Jennings*, 489 F.3d 499, 508 (2d Cir. 2007) ("Acquiring, holding, and disposing of are listed in the disjunctive. Hence, all that is required is that the members of the group have combined to further a common objective with regard to *one* of those activities."); *FTC v. Verity Intern., Ltd*., 443 F.3d 48, 65 (2d Cir. 2006) ("Because § 5(a)(1) is phrased in the disjunctive, prohibiting 'unfair *or* deceptive' acts or practices, 15 U.S.C. § 45(a)(1), the FTC need not prove its other claims to obtain relief

[Footnote continued on next page]

Accordingly, this Court should give effect to the disjunctive language in Section 209(a): no state may "adopt or attempt to enforce" a motor vehicle emissions regulation. 42 U.S.C. § 7543(a). And while Section 209(b) allows EPA to "waive application of this section" for a California regulation, *id.* § 7543(b), until the Agency does so, Section 209(a)'s plain meaning governs. Section 209(a) therefore preempted California's adoption of its emissions regulations on September 23, 2004, as well as Vermont's adoption of the GHG Regulations on November 7, 2005.[15]

[Footnote continued from previous page]

under the FTC Act. Liability is supported by the Count I claim alone."); *United States v. Rivera*, 415 F.3d 284, 287 (2d Cir. 2005) ("The statute was clearly written in the disjunctive. The government need only show that the weapons [sic] was either 'designed to' or 'may readily be converted.' It need not demonstrate both."); *United States v. Lucien*, 47 F.3d 45, 56 (2d Cir. 2003) ("The use of the disjunctive conjunction 'or' between 'conscious' and 'reckless' . . . suggests that a conscious risk of injury is something different from and an alternative to a reckless risk of injury.").

[15] Significantly, the disjunctive language of Section 209(a) is different from the conjunctive language of Section 177 that this Court considered in *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*, 17 F.3d 521 (2d Cir. 1994) ("MVMA"). That section allows other states to "adopt ***and*** enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines . . . if such standards are identical ***to California standards for which a waiver has been granted***.…" 42 U.S.C. § 7507 (emphasis added). The differences between the language of these two sections necessarily convey different meanings.

To read Section 209(a) to allow California and the Section 177 States to adopt an emissions regulation before EPA grants a waiver of CAA preemption would produce patently inequitable results, as the facts of this case convincingly demonstrate. Even the authors of California's regulations concede that compliance would require considerable lead time.[16] Given the aggressive timetables prescribed in the regulations, CARB effectively sought to force manufacturers to take significant steps toward compliance before a waiver determination could have been made. Indeed, although CARB approved their regulations for adoption on September 24, 2004 and Assembly Bill 1493 directed CARB to seek an EPA waiver, the Board waited for over a year before submitting a waiver request to EPA on December 21, 2005. JA at ___ [AIAM Request for Judicial Notice (Docket No. 189) Exh. B (CARB Request for a Clean Air Act Section 209(b) Waiver of Preemption, Support Document)].

CARB proceeded in this leisurely manner despite knowledge that its prior attempt to compel reductions in motor vehicle CO2 emissions had been enjoined under EPCA by a federal court, *Cent. Valley Chrysler-Plymouth v. Cal. Air Res.*

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16 As noted above, CARB's designated witness on lead time testified that it will take some manufacturers up to six years to bring their fleets into compliance with the 2011 MY standards and up to seven years to comply with the 2012 MY standard. JA at ___. [Albu Depo. at 258:20- 259:10; 272:15-273:19].

Bd., No. 02-5017, 2002 U.S. Dist. LEXIS 20403, at *9 (E.D. Cal. June 11, 2002), and in the face of NHTSA's expert determination that CO2 emissions regulations are preempted under EPCA. In fact, now that EPA has denied the waiver, the Defendants would still require the manufacturers to gamble that the denial will be upheld in court or not be reconsidered by EPA at some future time.[17]

Congress carefully selected the disjunctive approach of Section 209(a) to guard against precisely this type of inequitable pressure to compel massive investment and restructuring by manufacturers before a waiver decision could be attained. Simply put and plainly stated in the text of Section 209, before California and Vermont may adopt an emissions regulation – and thereby start the lead time clock ticking – California must first apply for and be granted a waiver of preemption. Because the California and Vermont regulations were both adopted in violation of Section 209(a) without a waiver having first been granted, the GHG Regulations are irredeemably flawed, and their implementation should be permanently enjoined.

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[17] Thus, the factual circumstances of this challenge are markedly different from the facts presented in *MVMA*. *See MVMA, Id.* at 534 (finding that requiring manufacturers to comply with regulations before a waiver was reasonable given that "waiver applications are almost always approved").

C. If This Court Were to Decline to Reach the Issue of EPCA Preemption, Then It Should Vacate the District Court's Opinion on that Issue

Although this action may be disposed of entirely on the basis of preemption under Section 209(a) of the CAA, this Court also should address the separate and distinct question of whether the GHG Regulations are preempted under EPCA. Considering all of the questions before this Court will provide a more orderly review of the constitutionality of the GHG Regulations in the event that this Court's decision is considered by the U.S. Supreme Court.

AIAM understands that this Court may decline to reach the merits of EPCA preemption if it determines that the GHG Regulations should be permanently enjoined under Section 209(a) of the Clean Air Act. In the event the court follows this path, it should vacate the district court's order resolving the EPCA preemption claims. *See* 28 U.S.C. § 2106.

It is well established that when a party has been "prevented from obtaining the [appellate] review to which they are entitled[, such party] should not be treated as if there had been a review." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). Thus, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39; *see also E.I. Dupont De Nemours &*

Co. v. Invista B.V., 473 F.3d 44, 48 (2d Cir. 2006) (*vacatur* necessary to prevent the parties from being bound in future litigation by a district court's order that was not subject to appellate review).

Significantly, AIAM's EPCA preemption claim becomes moot – and thus requires *vacatur* – only if this Court were to order the issuance of a permanent injunction under Section 209(a) of the CAA on account of California's failure to obtain a waiver before it and Vermont adopted their respective regulations. If the Court were to decline to permanently enjoin the GHG Regulations then it will have to address the merits of EPCA preemption because a live controversy will still exist. As discussed above, if a waiver for these regulations were to be granted in the future, the state regulators will demand immediate compliance, which, given the necessary lead time, would effectively require manufacturers to act now. In light of this immediate harm, manufacturers are entitled to a determination that the GHG Regulations are preempted under EPCA.

II. The GHG Regulations Are Expressly Preempted Under EPCA

Congress crafted EPCA's express preemption provision using the broadest possible language. In whole, that section reads:

> (a) When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

> (b) When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.
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> (c) A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.

49 U.S.C. § 32919.[18]

This broad language coupled with the district court's own conclusions concerning the direct connection between CO2 emissions standards and fuel economy standards led the court to recognize that "the express language of EPCA's preemption provision appears literally to forbid the enactment or enforcement of Vermont's GHG regulation . . . ." 508 F.Supp.2d at 350. This initial observation was entirely correct and should have ended its preemption inquiry.

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[18] The breadth of EPCA's preemption provision is demonstrated by its legislative history, showing that Congress considered and rejected more limited forms of preemption. The original bill introduced into the Senate would have allowed states to regulate fuel economy so long as the state standards were consistent with federal fuel economy standards, labeling, or advertising. S. Rep. No. 94-179, at 25 (1975). The House bill would have allowed states to regulate so long as their standards are "identical to" a federal requirement. H.R. Rep. No. 94-340, at 274 (1975) (§ 507 as introduced, § 509 as reported).

A. The GHG Regulations Are Preempted Because They Fall Squarely Within the Language of EPCA's Broadly-Worded Express Preemption Provision

The broad "related to" preemption language used by EPCA is substantially identical to preemption language found in other statutes, most notably the Employee Retirement Income Security Act of 1974 ("ERISA"),[19] the Airline Deregulation Act of 1978,[20] and the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act").[21] In construing each of these statutes, the Supreme Court has held that the term "related to" evidences a broad preemptive intent. In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), for example, the Court described "related to" preemption in the following manner:

> We have said, for example, that the "breadth of ["related to"] pre-emptive reach is apparent from [its] language," that it has a "broad scope," and an "expansive sweep," and that it is "broadly worded," "deliberately expansive," and "conspicuous for its breadth."

Id at 383-84; *see also Vango Media v. City of New York*, 34 F.3d 68, 74 (2d Cir. 1994).

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19 ERISA pre-empts all state laws "insofar as they . . . relate to any employee benefit plan . . . " 29 U.S.C. § 1144(a).

20 The Airline Deregulation Act of 1978 preempted state law "having the force and effect of law relating to rates, routes, or services of any air carrier . . . ." 49 U.S.C. app. § 1305(a)(1))(current version at 49 U.S.C. § 41713(b)(1)).

21 The FAAA Act forbids States to "enact or enforce a law . . . related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1).

Just this term, the Supreme Court addressed this language in the FAAA Act's preemption provision and reaffirmed its view that use of the phrase "related to" in a preemption clause expresses a broad preemptive purpose. *Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989 (2008). That case pertained to a Maine law requiring state-licensed shippers of tobacco products to utilize a delivery company that provides a recipient-verification service confirming that the buyer is of legal age. *Id.* at 993-94. In holding that the Maine statute was preempted, the Court relied on its prior holding in *Morales*, and articulated the following summary of what "related to" preemption means:

> In *Morales*, the Court determined: (1) that "[s]tate enforcement actions having a connection with, or reference to" carrier "'rates, routes, or services' are pre-empted,"; (2) that such preemption may occur even if a state law's effect on rates, routes or services "is only indirect,"; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.
>
> Finally, *Morales* said that federal law might not preempt state laws that affect fares in only a "tenuous, remote, or peripheral . . . manner," such as state laws forbidding gambling.

Id. at 995 (citations omitted).

Following this rule, the *Rowe* Court held that the Maine Tobacco Delivery Law was preempted because the law "directly regulates a significant aspect of the motor carrier's package pick-up and delivery service" and therefore "creates the

kind of state-mandated regulation that the federal Act pre-empts." *Id.* at 996; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (finding state law preempted where it "implicates an area of core ERISA concern"). The Court further noted that

> the state law is not general, it does not affect truckers solely in their capacity as members of the general public, the impact is significant, and the connection with trucking is not tenuous, remote, or peripheral.

128 S. Ct. at 997-98. Accordingly, the Court found *Rowe* "no more 'borderline' than was *Morales.*" *Id.* at 998.

Here, the GHG Regulation are preempted for the same reasons the Maine Tobacco Delivery law was found to be preempted in *Rowe.* The regulations "directly regulate[]" motor vehicle fuel economy, they do "not affect [automobile manufacturers] solely in their capacity as members of the general public," and "the connection with [fuel economy standards] is not tenuous, remote, or peripheral." *Id.* at 997-98.

The district court's factual findings compel this conclusion. Specifically, the court found that "there is a near-perfect correlation between fuel consumed and carbon dioxide released," 508 F.Supp.2d at 352, and that "it is possible to express these emissions standards as fuel economy standards in miles traveled per gallon of

gasoline consumed," *id.* at 342 n.49;[22] *see also* Light Truck Standards, 71 Fed. Reg. at 17,657 ("[A] State GHG standard is [a] fuel economy standard in almost all but name and stated purpose. It would have virtually the same effects as a fuel economy standard.").

The failure of the district court to properly apply the law to the facts of this case lies in its misreading of the actual language of EPCA's preemption provision. The court acted as if EPCA bars state regulations "related to fuel economy" – as opposed to "fuel economy *standards*" – and thereby created a false tension between EPCA's language on the one hand, and the statute's legislative history and agency practice on the other.

The lower court noted that EPCA was enacted "against the backdrop of other regulations that affected motor vehicles and could have *an effect on fuel economy*, such as emissions standards under Section 202 of the CAA [and] emissions standards under Section 209(b) of the CAA . . . ." *Id*. at 354 (emphasis added). From this, the court made an unwarranted leap: "Unless this Court is to ignore decades of EPA-issued and approved regulations that also can be said to

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[22] One of the Defendants' experts candidly admitted that "[the GHG standard] would call for a fuel economy level for light vehicles on the order of 40 miles per gallon or so." JA at ___ [TR Vol. 15, 22:22-24 (Testimony of David Greene)]. This trial testimony is entirely consistent with and supports the evidence that was before the court on AIAM's Motion for Summary Judgment.

'relate to' *fuel economy*, this regulation does not 'relate to' *fuel economy* within the meaning intended by Congress." *Id.* (emphasis added).

Clearly, the court's reasoning reads the word "standards" out of the phrase "related to fuel economy standards." The other emissions regulations cited by the court are not related to fuel economy "standards" because they merely have some incidental impact on a vehicle's fuel economy performance.[23] In contrast, GHG emissions standards impose minimum levels of fuel economy that must be met.

This distinction was explained in detail by NHTSA – and ignored by the district court:

> NHTSA does not interpret EPCA's express preemption provision as preempting State emissions standards that only incidentally or tangentially affect fuel economy. These standards include, for example, given current and foreseeable technology, the existing emissions standards for CO, HC, NOX, and particulates. They also include the limits on sulfur emissions that become effective in 2007. NHTSA considers such standards under the decisionmaking factors provision of EPCA since, under applicable law, they can be adopted and enforced and therefore can have an effect on fuel economy.
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> * * *
>
> NHTSA's judgment is that the agency should distinguish between motor vehicle emission standards for emissions other than CO2 (e.g., HC, CO, NOX and PM) and motor vehicle emission standards for CO2. Those other emissions are not directly and inextricably linked

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[23] Indeed, the court itself found that, in contrast to CO2 emissions, "there is no such perfect correlation between fuel consumed and emissions of [historically regulated auto emissions, such as] hydrocarbons or carbon monoxide." 508 F.Supp.2d at 352; *see also* JA at ___ [Haskew Aff. ¶ 16].

> to fuel economy. NHTSA's current view is that standards for emissions other than CO2 merely affect the level of CAFE that is achievable and thus only incidentally affect fuel economy standards.

Light Truck Standards, 71 Fed. Reg. at 17,669.

After repeatedly concluding that the regulation of CO2 emissions is the functional equivalent of a fuel economy standard merely expressed in different terms,[24] the trial court then erroneously applied the wrong statutory standard to uphold the regulation. The undisputed facts established in connection with AIAM's Motion for Summary Judgment and the facts adduced at trial demonstrate that the GHG Regulations "create[] the kind of state-mandated regulation that [EPCA] pre-empts." *Rowe*, 128 S. Ct. at 996.

B. The GHG Regulations Are Expressly Preempted Because They Impact Congress's Preemption-Related Objective of Nationwide Fuel Economy Standards

Wherever the outer bounds of EPCA's preemption provision may lie, "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' . . . pre-emption-related objectives." *Rowe*, 128 S. Ct. at 995. In applying this standard the *Rowe* Court explained that

> to interpret the federal law to permit these, and similar, state requirements ***could easily lead to a patchwork of state service-determining laws, rules, and regulations***. That state regulatory

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[24] As another Defendants' experts testified, "the greenhouse gas standard includes fuel economy standard[s]." JA at ___ [TR Vol. 12-A, 77:21-22 (Testimony of Daniel Sperling)].

> patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

Id. at 996 (emphasis added). Similarly, in *Egelhoff*, the Supreme Court found that a state regulation concerning insurance beneficiaries had "a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration," and was therefore expressly preempted under ERISA. *Egelhoff*, 532 U.S. at 148. The Court determined that national uniformity was a fundamental goal of ERISA and that "[u]niformity is impossible . . . if plans are subject to different legal obligations in different States." *Id.*

The creation of uniform nationwide fuel economy standards set by the federal government was likewise a central purpose of EPCA. *See Green Mountain*, 508 F.Supp.2d at 354 ("Congress's undoubted intent was to make the setting of fuel economy standards exclusively a federal concern . . . "). These standards are expressed on a nationwide, fleet-average basis. Under EPCA, an automobile manufacturer can sell any combination of vehicles it chooses without penalty, so long as the average fuel economy of its nationwide fleets meets the applicable CAFE standard. This nationwide fleet average approach was adopted to "ensure wide consumer choice" by leaving "maximum flexibility to the manufacturer" to produce a "diverse product mix" while meeting the applicable nationwide CAFE standards. S. Rep. No. 94-179, at 6 (1975).

Nationwide fleet averaging is the cornerstone of the CAFE program, providing manufacturers the flexibility to tailor their vehicle offerings to the specific demands of the local consumers. To the extent that customers living in rural Idaho wish to purchase larger, more fuel intensive vehicles, a manufacturer may make such vehicles available for sale in those areas and balance such transactions with the sales of smaller and more fuel economical vehicles in urban areas such as New York City and Los Angeles. In contrast, the GHG Regulations establish *state-by-state* standards, requiring manufacturers to balance their fleets separately in each state that has adopted them.[25] Under the new rules, a

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[25] Defendant-Appellees have mistakenly asserted that state regulation of GHGs does not create a patchwork of state standards, claiming there are only two standards: California and federal. Defendants ignore the fact that states like Vermont adopting the regulations under CAA Section 177 require vehicles delivered for sale within the state to satisfy an *ex post facto* fleet averaging requirement. For example, the Vermont regulations incorporate the California regulations by reference and provide that:

> Fleet Average Emission means a vehicle manufacturer's average vehicle emissions of all greenhouse and non-methane organic gases ***from all new vehicles delivered for sale or lease <u>in Vermont</u>*** in any model-year.

12-031-001 Vt. Code R. 5-1101(f). (emphasis added). By using in-state sales to define the fleet, these regulations force manufacturers to balance fleet averages in multiple separate jurisdictions.

manufacturer cannot balance its sale of more fuel intensive vehicles in upstate Vermont with the sale of more fuel efficient vehicles in New York City.[26]

Massachusetts v EPA and the Executive Branch's recent actions on GHG emissions and fuel economy confirm the need for a uniform set of nationwide fuel economy standards. The Supreme Court in *Massachusetts v. EPA* endorsed the need for a coordinated approach at the federal level to address fuel economy and GHG emissions. Recognizing that EPA's regulation of GHG emissions would "overlap" with NHTSA's administration of the CAFE program, the court observed that because NHTSA and EPA are sister agencies within the same Executive Branch, "both [Agencies can] administer their obligations and yet avoid inconsistency." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007). Thus, if and when EPA ultimately promulgates federal GHG regulations, the Court observed that the Agency "no doubt has significant latitude as to the manner, timing,

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[26] For the reasons set forth herein, the GHG Regulations also are preempted under principles of conflict preemption. Conflict preemption operates to "pre-empt[ ] state law that 'under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' -- whether that 'obstacle' goes by the name of 'conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference,' or the like." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In this case, the GHG Regulations balkanize manufacturers' fleets and frustrate the congressional objective of uniform, national fuel economy expressed in EPCA.

content, and coordination of its regulations with those of other agencies." *Id.* at 1462.

The Supreme Court's view is buttressed by a recent Executive Order providing for "the coordinated and effective exercise of the authorities of the President and the heads of the Department of Transportation, the Department of Energy, and the Environmental Protection Agency to protect the environment with respect to greenhouse gas emissions from motor vehicles . . . ." Exec. Order No. 13432, 72 Fed. Reg. 27,717 (May 14, 2007). Significantly, all of these agencies answer to the same executive, which therefore ensures coordination among them as an institutional matter. California, in contrast, does not fall within the executive branch of the federal government, and its adoption of fuel economy standards is antithetical to a single national program.

Taken together, EPCA's express preemption provision, the Supreme Court's holding in *Massachusetts v. EPA*, and the recent Executive Order seek to ensure that automobile manufacturers are not subject "to a patchwork of state . . . laws, rules, and regulations" related to fuel economy standards. *Rowe*, 128 S. Ct. at 996. Because the GHG Regulations "interfere[] with nationally uniform" fuel economy standards, they have "a prohibited connection with" EPCA and are preempted. *Egelhoff*, 532 U.S. at 148.

C. EPCA's Express Preemption Provision Has No Exception for State GHG Regulations

In light of EPCA's broad preemption language and the district court's findings establishing that the GHG Regulations fall within its scope, the court's holding that the regulations are nevertheless not preempted can only be seen as creating an exception to EPCA's preemption provision. However, Congress expressly set forth the types of state regulations related to fuel economy standards that would be excepted from EPCA preemption, and emissions regulations is not one. First, states "may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs," but only if those requirements are "identical" to the federal requirements. 49 U.S.C. § 39219(b). Second, EPCA allows a state to "prescribe requirements for fuel economy for automobiles obtained for its own use." *Id.* § 39219(c).

As the district court correctly observed, "[w]hen Congress enacted EPCA, it was well aware of [the] long-standing practice of permitting California to apply for waivers from EPA for its emissions standards pursuant to the CAA." 508 F.Supp.2d at 355. Congress, therefore, *could have* written a third exception to EPCA's express preemption provision stating "Nothing in this Section shall preempt an emissions standard that obtains a waiver of Clean Air Act preemption under Section 209(b) of that Act."

EPCA, however, contains no such exception. Rather, the exceptions to preemption that are set forth in subsections (b) and (c) constitute the only classes of state regulations related to fuel economy standards preserved by Congress. *See Rowe*, 128 S. Ct. at 997 ("The [FAAA Act] says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health."). The district court impermissibly crafted a third, unwritten, exception to EPCA's express preemption provision for a GHG emissions regulation.

D. The GHG Regulations Are "Related To Fuel Economy Standards" Even Though They Address Emissions Other than CO2 and Provide Allowances for Alternative Fuels

The district court's opinion suggests that the GHG Regulations are not preempted by EPCA because it found that they do not amount to *de facto* fuel economy standards. 508 F.Supp.2d at 351-53. The court reached this determination based on the regulatory provisions addressing methane, nitrous oxide, air conditioning credits, and alternative fuels. In essence, the court found that even though "carbon dioxide represents the bulk of GHG emissions" covered by the regulations and that CO2 correlates directly with fuel economy, 508 F.Supp.2d at 351, these other relatively insignificant aspects of the regulations "encompasses emissions which do not correlate with fuel economy," *id*. at 352.

Thus, the court concluded that "the Vermont and California regulations are not the equivalent of fuel economy standards because multiple approaches, with various levels of fuel economy, allow compliance with the standard." *Id*. at 353.

It is unclear from the opinion if the district court relied on this finding to support its conclusion that the GHG Regulations are not "related to fuel economy standards."[27] If it did, then the court erred.

First, express preemption does not require exact equivalence between the GHG Regulations and fuel economy standards. *Morales,* 504 U.S. at 385, speaks directly to this issue. In addressing whether the challenged regulations were "relating to rates, routes, or services of any air carrier" under the Airline Deregulation Act's express preemption provision, the Court found it irrelevant that those regulations were not *de facto* regulations of rates, routes, or services of any air carrier:

> Petitioner contends that § 1305(a)(1) only pre-empts the States from actually prescribing rates, routes, or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "regulate rates, routes, and services."

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[27] The discussion of these non-fuel economy aspects of the GHG Regulations is in a different section of the opinion from the one in which the court addressed whether the regulations are "related to" fuel economy standards, and the court did not specifically cite to these provisions to support its conclusion that the regulations are not "related to fuel economy standards." *See* 508 F.Supp.2d at 353-55.

Id. at 385. Similarly, EPCA was not drafted narrowly to merely forbid states from "regulating fuel economy." Rather, EPCA broadly preempts regulations that are "related to" fuel economy standards.

Second, the district court's holding creates an exception to express preemption big enough to swallow the rule. If the mere existence of "multiple approaches, with various levels of fuel economy, [that would] allow compliance with" a state standard were enough to defeat express preemption under EPCA, then any state would be free to regulate fuel economy directly, despite Congress' clear intent to the contrary. *See Egelhoff*, 532 U.S. at 150 ("The statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it.").

The error of the district court's reasoning can be demonstrated by the following hypothetical. The current CAFE standard for passenger cars is 27.5 mpg. 49 U.S.C. § 32902(b); 49 C.F.R. § 531.5. Now consider a state regulation that expressly requires manufacturers to achieve a minimum fleet-average fuel economy of 43 mpg for passenger cars, but in calculating the fleet average, gives a 2 mpg credit for vehicles with zero methane and nitrous oxide emissions, another 2 mpg credit for vehicles with reduced air conditioning emissions, and another 2 mpg credit for vehicles actually driven on E85. It is clear that a manufacturer could not go from 27.5 mpg to 43 mpg solely by relying on these various credits;

however, the credits would impact the minimum fuel economy required. For example, if a manufacturer improved its air conditioning systems in its entire fleet but did nothing else, then its fleet would need to achieve 41 mpg to comply with the standard (because of the 2 mpg credit); if the manufacturer instead eliminated methane and nitrous oxide emissions *and* improved air conditioning systems in its entire fleet, then it could get by with 39 mpg (because it would get 4 mpg credit). The fact that this hypothetical regulation provides "multiple approaches, with various levels of fuel economy, [that would] allow compliance" cannot mean that it is not related to fuel economy standards under EPCA's express preemption provision. Such a conclusion would frustrate Congress's clearly expressed objective for a single set of nationwide fuel economy standards set at the federal level.

III. California Emissions Regulations Are Not "Federalized" by Virtue of the CAA Waiver Provision or EPCA's Requirement that NHTSA "Consider" Such Regulations

Despite the direct connection between state CO2 emissions regulations and fuel economy standards, the district court held that such regulations are not preempted under EPCA because (a) it determined that principles of express and implied preemption do not apply to emissions regulations which are federalized by virtue of a waiver under CAA Section 209(b); and (b) even if preemption did apply, the court did not believe that Congress intended for EPCA's express

preemption provision to apply to emissions standards with an EPA waiver. In other words, the court did not determine that *these* particular emissions standards are not "related to fuel economy standards," but rather that *no* emissions standards waived under Section 209(b) of the Clean Air Act *could ever be*. This finding, which was not supported by any legal precedent whatsoever, improperly elevates a California regulation to the status of a federal law and writes EPCA's preemption provision right out of the statute.

A. This Action Presents a Conflict Between a State Regulation and Federal Law

Relying on the Supreme Court's decision in *Massachusetts v. EPA*, which found "overlap but no conflict between" EPA's regulation of CO2 emissions and NHTSA's regulation of fuel economy, the district court recast the issue in this case as "whether EPA's authority to issue a waiver under the CAA's Section 209(b) for a California GHG emissions standard presents the same situation: overlap without conflict." 508 F.Supp.2d at 344. In drawing this parallel, the court failed to appreciate the difference between the expansion of one federal agency's authority to "overlap" with that of another federal agency and the expansion of a state's authority such that it encroaches upon an area expressly reserved for federal regulation.

The significant aspect of *Massachusetts v EPA* is the recognition by the Supreme Court that expanding EPA's authority to regulate greenhouse gas

emissions implicates NHTSA's authority over fuel economy on account of the direct relationship between CO2 emissions and fuel economy. The Supreme Court nevertheless held that EPA's regulation of CO2 emissions under 42 U.S.C. § 7521(a)(1) is not inherently inconsistent with the Department of Transportation's control of fuel economy under 49 U.S.C. § 32902, and that both agencies should be free to regulate within their designated spheres "and yet avoid inconsistency." 127 S. Ct. 1438, 1462 (2007).

Unlike the situation presented in *Massachusetts v. EPA*, this case involves the expansion of state authority at the expense of a federal regulatory regime, running head-on into EPCA's express preemption provision. The district court, therefore, reached its novel holding by erroneously finding that 49 U.S.C. § 32919(a) does not apply because the Vermont regulations will have the effect of federal law if a waiver is granted and therefore be immune from preemption.

On this issue, the Supreme Court's recent decision in *Rowe* is again instructive and demonstrates the error of the district court's holding. There, the Court held that Maine's Tobacco Delivery Law was preempted by the broad "related to" language in the FAAA Act, despite the fact that Congress has explicitly encouraged state laws to restrict tobacco sales to minors – even to the point of conditioning federal substance abuse grants upon a state's enactment of such laws. 42 U.S.C. § 300x-26(a)(1). Nevertheless, the fact that Congress is in

effect paying states to enact laws to prevent tobacco sales to minors does not render such state laws immune from preemption under other federal statutes. *See Rowe*, 128 S. Ct. at 998-99 (Ginsburg, J., concurring).

Similarly, the fact that Congress has encouraged the State of California to enact motor vehicle emission regulations through the waiver provision of Section 209(b) does not mean that such regulations are immune from preemption under EPCA. The district court's contrary holding finds no support in the plain language of the CAA or EPCA.

B. The Plain Language of Section 209(b) of the CAA Demonstrates that the Waiver Only Applies to Preemption under that Statute

The plain language of Section 209(b) belies the lower court's conclusion that the regulations have the force of federal law. Rather, that section is simply an exception to the otherwise sweeping express preemption provision found in Section 209(a). As discussed above, Section 209(a) provides that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . . " 42 U.S.C. § 7543(a). Section 209(b) is an exception to Section 209(a), providing that "[t]he Administrator shall . . . waive application of this section" if the conditions in the statute are met. *Id.* § 7543(b).

By expressly limiting the waiver to the "application of this section," Congress intended that a waiver have no broader applicability outside the CAA. The district incorrectly read these critical four words out of the statute. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) ("Section 505(e) [of the Clean Water Act] merely says that '[nothing] *in this section*,' i. e., the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.").

Furthermore, the text of CAA Section 209(b) also consistently maintains a distinction between "State standards" and "Federal standards" – drawing this distinction no fewer than seven times.[28] This repeated and careful distinction is senseless if a waiver itself transformed the state standard into a federal standard.

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[28] Section 209(b) provides that:

> (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that--
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part [42 USCS § 7521(a)].

[Footnote continued on next page]

Finally, Subsection 209(b)(3) provides that "compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this title [42 U.S.C. §§ 7521 et seq.]." *Id.* § 7543(b)(3). Two aspects of this subsection are significant. First, if a waived California standard became a federal standard – as the district court's holding requires – then it would not have been necessary for Congress to specify that compliance with the standards "shall be treated as" compliance with federal standards. The language Congress drafted shows that a waived California standard remains a state standard, but is treated ***as if it were*** a federal standard only for CAA compliance purposes. *See United States v. Chrysler Corp.*, 591 F.2d 958, 961 (D.C. Cir. 1979) (explaining that a waiver under Section 209(b) "simply allows both federal and state authorities to regulate emission controls."). Second, compliance with a waived emissions standard is only treated as compliance with a federal standard "for purposes of this title" – i.e.,

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[Footnote continued from previous page]

> (2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).
>
> (3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this title [42 USCS §§ 7521 et seq.].

42 U.S.C. § 7543(b).

Title II of the CAA. By its very terms, it does not provide that compliance with a waived standard is tantamount to compliance with federal law in all respects and does not override EPCA's express preemption provision.

C. 42 U.S.C. § 32902(f) Likewise Does Not Federalize a California Regulation or Otherwise Restrict EPCA's Express Preemption Provision

Another purported basis for the district court's exception to EPCA preemption lies in EPCA's requirement that NHTSA "consider" emissions regulations under 49 U.S.C. § 32902(f). 508 F.Supp.2d at 354. The court, however, cites to no authority for its inferential leap that a requirement that a federal agency "consider" a state regulatory standard means that the state standard becomes a federal standard immune from preemption.

In determining the "maximum feasible average fuel economy level," EPCA requires NHTSA to "consider" a number of competing factors, specifically "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). As the district court points out, NHTSA historically has treated waived state emissions standards as "other motor vehicle standards of the Government" which it must "consider" in setting fuel economy standards. 508 F.Supp.2d at 354. This requirement was central to the court's flawed view that the GHG Regulations are the equivalent of a federal law and thus

escape preemption. *See id*. at 347 (Congress "could not have intended that an EPA-approved emissions reduction regulation did not have the force of a federal regulation.").

The legislative history of this section demonstrates the error of the district court's holding. As originally enacted, Section 502(d) of EPCA allowed a manufacturer to seek a relaxation of the statutorily-mandated fuel economy standards if the manufacturer could show that "Federal standards" resulted in a "fuel economy reduction" (and if certain other conditions were met). Pub. L. No. 94-163 § 502(d). As a definitional matter, the statute provided that "***[f]or the purposes of this subsection"*** – i.e., subsection (d) to Section 502 – the term "Federal standards" includes "emissions standards applicable by reason of Section 209(b) of [the Clean Air] Act." Pub. L. No. 94-163 § 502(d)(3)(D)(i) (emphasis added). The limitation of the definition of "Federal standards" only "[f]or the purposes of this subsection" necessarily means that it has no impact on the preemption provision which was set forth in a different subsection of EPCA. Pub. L. No. 94-163 § 509(a); 49 U.S.C. 32919(a).

As the district court recognized, various provisions of EPCA were recodified in 1994. 508 F.Supp.2d at 354. With the recodification, the language "other Federal motor vehicle standards" was changed to "other motor vehicle standards of the Government" that is currently found in 49 U.S.C. § 32902(f). The 1994

recodification was intended to "revise[], codif[y], and enact[]" the law "without substantive change." Pub. L. No. 103-272, 108 Stat. 745, 745 (1994); *see also* H. R. Rep. No. 103-180, at 1 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 818; S. Rep. No. 103-265, at 1 (1994). Thus, it follows that the former statute's limitation of this definition "[f]or the purposes of this subsection" applies to the current Section 32902(f). In other words, while waived state emissions standards may be "other motor vehicle standards of the Government" for the purposes of what NHTSA must "consider" under Section 32902(f), they are expressly not "federal" standards for the purposes of Section 32919(a)'s express preemption provision.

Similarly, the fact that NHTSA must "consider" waived state regulations in determining the proper stringency of federal fuel economy regulations does not mean that such state standards become federal standards and are thus immunized from preemption. Congress regularly provides that an agency or a court must consider certain factors in undertaking some action. But no court has ever held that the mere consideration by a federal agency converts the factor into federal law or renders it beyond federal preemption. Rather, such a requirement does nothing more than explicitly set forth what factors a court or an agency must take into account in its deliberative process. *Conservation Law Found. v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000); *United States v. Kingdom (U.S.A.), Inc.*, 157 F.3d 133, 136

(2d Cir. 1998); *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986).[29]

* * *

In light of the obvious congressional intent expressed in the CAA and EPCA, the trial court's decision is particularly difficult to comprehend. In both of these laws, Congress went to great lengths to preserve a uniform national marketplace for automobiles and to guard against the fragmentation of that market by a multiplicity of state laws. This desire can be seen in the strong express preemption provisions of EPCA and the CAA. In the CAA, Congress did initially allow a single state which already had pre-existing mobile source emission regulations – California – to be exempted from the Act's sweeping preemption clause. California was permitted this special status in recognition of the obvious intense local air pollution problems that confront certain urban areas in that state, and EPA was instructed to waive federal preemption after considering criteria focused on those unique conditions. When Congress subsequently permitted other states to adopt the California auto emissions program, it very carefully required that such states take the **entire** program or stick with the federal program.

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[29] In reaching its conclusion concerning the sweeping impact of 49 U.S.C. § 32902(f) on preemption, the district court neglected to mention contrary views of NHTSA. *See infra* Section IV.

The lower court has turned this thoughtful congressional construct on its head. California's peculiar power to deal with a compelling local problem is transformed into an authority to make policy statements on a global environmental issue; a CAA waiver provision expressly limited by its own terms to waiving preemption "under this section" becomes a savings clause against the operation of other federal laws; a requirement that NHTSA "consider" certain factors is re-written into a provision empowering a state to make federal law. The purpose of the strong "related to" preemption provision of EPCA is entirely frustrated by these machinations.

The end result of this creative statutory interpretation is to do exactly what Congress sought to avoid – to balkanize the national auto market. Now, each of the thirteen states which have adopted California's emissions program will have its own individual "fleet average" for fuel economy. Each covered manufacturer must balance it fleet annually in each and every adopting state or face stiff penalties. This regime could not have been what Congress intended given both laws' obvious desire to facilitate a broad national market. If this patchwork was Congress's intent, surely it would have been expressed more plainly than the "consider [these] factors" language of EPCA Section 32902(f) and the specifically limited waiver language found in the CAA.

IV. The District Court Erred by Failing to Give Any Deference to NHTSA's Findings

The lower court ignored the most telling evidence with respect to the preemption claim: NHTSA has considered this issue and, after notice and public comment, concluded that the GHG Regulations are preempted. Light Truck Standards, 71 Fed. Reg. at 17,654. This comprehensive discussion covers sixteen pages in the Federal Register and addresses (a) the technical reasons why a CO2 emissions standard is related to a fuel economy standard; (b) NHTSA's interpretation of its statutory obligation to "consider" "other motor vehicle standards of the Government" in setting fuel economy standards and how that requirement impacts preemption; (c) NHTSA's construction of EPCA's express preemption provision; and (d) the agency's assessment of the extent to which the enforcement of the GHG Regulations would interfere with its administration of the CAFE program.

Despite NHTSA's clear and persuasive discussion of the topic, the district court did not devote a single word to the agency's considered view, let alone grant NHTSA's findings the deference due. The court's failure to do so constitutes reversible error. *United States v. Mead Corp.*, 533 U.S. 218, 226, 234 (2001) (reversing the Court of Appeals because it gave "no deference at all" to an

agency's determination); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).[30]

A. NHTSA's Factual Findings with Respect to the Relationship Between Greenhouse Gas Emissions Regulations and Fuel Economy Standards Are Entitled to Deference

Much of NHTSA's discussion in the Federal Register preamble is devoted to a technical analysis of the relationship between carbon dioxide emissions and fuel economy standards. *See, e.g.*, Light Truck Standards, 71 Fed. Reg. at 17,659-61. From this analysis, NHTSA determined that "[f]uel consumption and CO2 emissions from a vehicle are two 'indissociable' parameters" such that "fuel economy is directly related to emissions of greenhouse gases such as CO2," *id.* at

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[30] Apparently the district court was of the opinion that it did not have to defer to NHTSA's determinations on these issues because the agency was not participating in this action. JA at _____ [March 2 Hearing Transcript at 67:1-69:2] ("I just wanted to make sure that the government has been notified of this and they have made a deliberate decision not to be involved, because of course they are at risk of having a court make a determination as to, you know, the impact of these regulations which may be not consistent with their own view.").

Of course, deference to an agency's position does not require that the agency actively participate in the litigation in which the agency's determination is being considered. *Freeman v. Burlington Broad., Inc.*, 204 F.3d 311, 322 (2d Cir. 2000) (deferring to FCC determination that was expressed in a prior adjudicatory decision by the FCC in a separate action). Indeed, agencies may make their views known "through a variety of means, including regulations, preambles, interpretive statements, and responses to comments." *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 718 (1985).

17,659, and that the GHG standards are the "functional equivalents" of fuel economy standards. *Id* at 17,670.

"When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Applying this principle, similar agency determinations based on complex scientific data have received considerably deference from this Court. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 126-27 (2d Cir. 2007) ("Judicial review is considerably deferential when 'the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise'") (quoting *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).

B. NHTSA's Interpretation of EPCA's "Consider" Requirement Is Entitled To Deference

A significant basis for the district court's opinion that preemption does not apply here was its construction of the requirement in 49 U.S.C. § 32902(f) that NHTSA "consider" such emissions regulations in setting fuel economy standards. *See* 508 F.Supp.2d at 354. NHTSA, however, reached the opposite conclusion, determining that Section 32902(f) did not command the agency to accommodate a state CO2 regulation that would effectively set fuel economy standards and did not act as an exception to preemption:

> some commenters opposing preemption suggested that Section 32902(f), which lists the factors that NHTSA must consider in determining the level at which to set fuel economy standards, prevents preemption by 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 17,669.

The lower court should have afforded deference to NHTSA's interpretation of "consider" since it is the agency responsible for administrating EPCA. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). A court may not substitute its own construction of a statutory provision, as did the lower court, for a reasonable interpretation made by the federal agency. *Id.*; *see also Chauffeur's Training Sch., Inc. v. Spellings*, 478 F.3d 117, 125 (2d Cir. 2007) ("Courts defer to statutory interpretations of agencies when (1) the agency is charged with implementing the statutory scheme, and (2) its interpretation is reasonable."); *Envtl. Def. v. EPA*, 369 F.3d 193, 201 (2d Cir. 2004) ("EPA's authority to interpret ambiguities in the Act manifestly follows from its role in implementing the statute.").

C. NHTSA's Conclusions on Express and Conflict Preemption Are Entitled To Deference

Construing EPCA's express preemption provision, NHTSA concluded that state GHG regulations are preempted because "Congress has expressly preempted any state laws or regulations relating to fuel economy standards [and a] State requirement limiting CO2 emissions is such a law or regulation because it has the direct effect of regulating fuel consumption." Light Truck Standards, 71 Fed. Reg. at 17,654. NHTSA also found that "the State GHG standard, to the extent that it regulates tailpipe CO2 emissions, would frustrate the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA." *Id.* at 17,667.

As this Circuit and the Supreme Court have made clear, agency determinations concerning the preemptive effect of its regulations are entitled to deference. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-321 (2d Cir. 2005). In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883-84 (2000), for example, the Supreme Court "plac[ed] some weight upon" the Department of Transportation's determination that the airbag lawsuit before it was preempted by federal motor vehicle safety standard. NHTSA's conclusions on conflict preemption also are entitled to deference because the agency has a "special understanding of the likely impact of both state and federal requirements, as well

as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506 (1996) (Breyer, J., concurring in part and concurring in the judgment).

Accordingly, this Court should find, as did NHTSA, that "[s]tate regulation of motor vehicle tailpipe emissions of CO2 is both expressly and impliedly preempted by" EPCA because "it has the direct effect of regulating fuel consumption," and because such a state standard "would frustrate the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA." Light Truck Standards, 71 Fed. Reg. at 17,654, 17,667.

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant, the Association of International Automobile Manufacturers, respectfully requests that this Court reverse the judgment of the court below and hold that the GHG Regulations are preempted under the CAA and under the EPCA.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, counsel for Plaintiff-Appellant, the Association of International Automobile Manufacturers, certifies that the foregoing brief is set in proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point type and contains 16,251 words as determined by the word count function of Microsoft Word 2003 (excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32).

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