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18 **UNITED STATES DISTRICT COURT**
19 **EASTERN DISTRICT OF CALIFORNIA**

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

22 Plaintiffs,

23 vs.

24 CATHERINE E. WITHERSPOON, in her
25 official capacity as Executive Director of the
26 California Air Resources Board,

27 Defendant,

28 ASSOCIATION OF INTERNATIONAL
AUTOMOBILE MANUFACTURERS,

Plaintiff-Intervenor,

SIERRA CLUB, *et al.*,

Defendant-Intervenors.

Case No. CIV-F-04-6663 AWI LJO

**PLAINTIFFS' RESPONSE TO
DEFENDANT AND DEFENDANT-
INTERVENORS' SUPPLEMENTAL
BRIEF REGARDING
MASSACHUSETTS V. EPA**

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

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1 Plaintiffs Central Valley Chrysler-Jeep, Inc., *et al.* (“the Central Valley plaintiffs”),
2 respectfully submit their memorandum responding to the “Opening Supplemental Brief Regarding
3 *Massachusetts v. EPA*” filed by defendant and defendant-intervenors (“defendants”) (Doc. # 620).
4 As the Central Valley plaintiffs explain below, defendants’ motions for summary judgment should
5 be denied, and the case should be restored to the Court’s trial calendar.¹

6 **Preliminary Statement**

7 Defendants contend that the Supreme Court’s decision in *Massachusetts v. EPA*, 127 S. Ct.
8 1423 (2007), leaves “no triable issues for this Court,” “resolves all of Plaintiffs’ remaining claims in
9 their favor,” and entitles them to summary judgment. (Doc. # 620 at 1:11-12.) Defendants ignore
10 the fact that the *Massachusetts* decision nowhere discusses federal preemption of the regulation
11 challenged in this action, or any other type of state regulation. (*See infra* at pp. 4-5.) Putting that
12 critical flaw to the side, defendants’ argument rests on the following syllogism:

- 13
- 14 • First Premise: In the *Massachusetts* case, U.S. EPA made an argument regarding the
equivalence between regulation of carbon dioxide and regulation of fuel economy, which
the Supreme Court rejected. (*See* Doc. # 620 at 3.)
 - 15 • Second Premise: Plaintiffs’ argument is the same as EPA’s. *Id.* (“EPA explained its
16 argument in terms virtually identical to the arguments of the Plaintiffs in this case.”)
 - 17 • Conclusion: Therefore, the Supreme Court’s decision in *Massachusetts* requires this
18 Court to reject plaintiffs’ argument.

19 The syllogism fails because, among other things, the second premise is incorrect. The
20 positions taken by EPA and by industry in *Massachusetts* are neither “virtually identical to,” much
21 less the same as, the claims that the Central Valley plaintiffs are presenting in this case.
22 *Massachusetts* addressed the question whether a hypothetical, future EPA program regulating carbon
23 dioxide might in theory be permitted to overlap with NHTSA’s fuel economy program. The Court
24 assumed that in such a situation, the federal agencies would be able to align their two programs. By
25 contrast, this case challenges a specific set of emission standards that actually interfere with

26 ¹ Prior to *Massachusetts v. EPA*, the parties including the Central Valley plaintiffs had already filed
27 extensive briefs on defendants’ motions for summary judgment. *See* Doc. # 427, 513, 546 and notes
28 4-7 below.

1 NHTSA's fuel economy program in a number of demonstrable ways. Whatever the abstract power
2 of EPA, California or another state to adopt *some type* of carbon dioxide regulation, the Central
3 Valley plaintiffs are prepared to prove that *this particular* carbon dioxide regulation (the one adopted
4 by CARB in 2004) conflicts in concrete and specific ways with the goals and purposes of EPCA, and
5 is thus subject to implied conflict preemption analysis.² The conflict preemption claim presents
6 triable issues of fact, and it was on that basis that this Court correctly denied defendants' motion for
7 judgment on the pleadings in 2006.³

8 The Supreme Court's decision in *Massachusetts* hardly lessens plaintiffs' entitlement to a
9 trial on the conflict preemption claim. To the contrary, the Supreme Court's decision puts to rest
10 defendants' theory that the Clean Air Act necessarily "trumps" any Congressional objective in
11 EPCA. The Supreme Court admonished EPA and NHTSA to "avoid inconsistency" in administering
12 their respective mandates under the Clean Air Act and EPCA. *Massachusetts*, 127 S. Ct. at 1467.
13 This Court is now the key forum in which to decide whether CARB's regulations are inconsistent
14 with EPCA. There is no other forum, and in particular no process at EPA, that can decide that
15 question. (*See infra* pp. 14-16 and Doc. # 348-2.)

16 The dealer and manufacturer plaintiffs are prepared to prove at trial that the implementation
17 of CARB's regulation will (i) leave manufacturers with no choice but to withdraw numerous motor
18 vehicle models from the California market (and in other states where the California regulations have
19 been adopted) due to the prohibitive cost of equipping those models with the technology necessary

20 ² To the extent that one is looking for a resemblance between the position taken by the U.S. EPA and
21 industry parties in *Massachusetts v. EPA* and any positions asserted in this case, one might see some
22 parallels in some of the preemption arguments advanced by the plaintiff-intervenor, the Association
23 of International Automobile Manufacturers ("AIAM"). However, as AIAM demonstrates in its
24 separate brief, defendants oversimplify and mischaracterize AIAM's position. Putting any dispute
25 between defendants and AIAM to the side, however, this Court can otherwise dispose of defendants'
26 motions for summary judgment, because the conflict preemption claims presented here were
27 certainly not presented to, nor addressed by, the Supreme Court.

28 ³ *See Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1167 (E.D. Cal. 2006)
("Because Plaintiffs have stated a claim for preemption of the regulations based on their actual
conflict with the EPCA, the court declines to decide at this stage whether the other theories of
preemption have merit.").

1 to meet the standards;⁴ (ii) undercut the wide range of choice in vehicles currently enjoyed by
2 California consumers;⁵ (iii) force production cutbacks and plant closures in the automotive industry,
3 causing job losses in the tens if not hundreds of thousands;⁶ and (iv) cause significant increases in
4 the incidence of traffic fatalities and severe injuries on California highways.⁷

5 Of course, none of that evidence was either considered or addressed by the Supreme Court in
6 *Massachusetts*, just as the Supreme Court did not discuss preemption of state regulation nor the
7 decision of this Court on last year's motion for judgment on the pleadings. In ruling on defendants'
8 motions for summary judgment, a court must both credit plaintiffs' evidence and draw "all
9 justifiable inferences" in plaintiffs' favor.⁸ Neither in the earlier cycle of briefs nor in the new brief
10 have defendants even attempted to claim that plaintiffs lacked factual support for their claims of
11 conflict preemption.

12 The question before this Court can thus be refined as follows: does the *Massachusetts*
13 decision completely immunize a California regulation that would cause the type of severe impacts
14 that plaintiffs are prepared to prove from a conflict preemption analysis under EPCA? The answer is

16 ⁴ Nov. 22, 2006 Decl. of Alan R. Weverstad (Doc. # 502) (confidential version filed under seal) at
17 ¶¶ 7-8; Nov. 22, 2006 Decl. of Reginald R. Modlin (Doc. # 501) (confidential version filed under
18 seal) at ¶¶ 12-13 (hereafter "Modlin Decl."); Nov. 22, 2006 Decl. of Thomas C. Austin (Doc. # 504)
19 at ¶¶ 10-13 (hereafter "Austin Decl."). Because the Alliance of Automobile Manufacturers does not
20 take positions on the impact of the California regulation on any specific manufacturer, the evidence
21 to be offered by Mr. Weverstad and Mr. Modlin is offered on behalf of plaintiffs other than the
22 Alliance. In addition, those portions of the analysis of Mr. Austin that pertain to manufacturer-
23 specific impacts, as well as the analysis of Mr. Ronald R. Harbour, *see infra*, are also offered on
24 behalf of plaintiffs other than the Alliance.

25 ⁵ Austin Decl. at ¶ 12.

26 ⁶ Nov. 22, 2006 Decl. of Ronald R. Harbour (Doc. # 505) at ¶¶ 6-10.

27 ⁷ Nov. 22, 2006 Decl. of M. Laurentius Marais (Doc. # 506) ¶ 4.

28 ⁸ *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (in summary judgment posture, "the nonmoving
party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor"
(internal citations omitted)); *Welles v. Turner Entm't Co.*, 488 F.3d 1178, 1183 (9th Cir. 2007)
(reversing grant of summary judgment due to presence of genuine issues of material fact and noting
that on summary judgment the Court must "view the evidence in the light most favorable to the non-
moving party and draw all justifiable inferences in favor of that party").

1 no, for the reasons explained below, and as another court held.⁹ The regulation challenged in this
2 action could take full effect within a matter of months, with no consideration at all of the issue of
3 EPCA preemption by U.S. EPA.¹⁰ All parties in this Court should agree that if EPA waives Clean
4 Air Act preemption, some dealers and manufacturers will face a Hobson's choice between
5 compliance with the regulation and exclusion from the California new vehicle market. As the
6 Central Valley plaintiffs have consistently maintained, injunctive relief based on the EPCA
7 preemption claim affords plaintiffs their best chance for permanent relief from the dilemma this
8 Court has recognized that the challenged regulation presents.¹¹

9 **Massachusetts v. EPA -- The Decision and Its Requirements for U.S. EPA**

10 The *Massachusetts* decision turned on the construction of section 202(a)(1) of the Clean Air
11 Act. That section of the Clean Air Act directs the Administrator of U.S. EPA to establish standards
12 applicable to "the emission of any air pollutant ... which in his judgment cause, or contribute to, air
13 pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C.

14
15 ⁹ As Chief Judge Sessions stated in ruling that the trial in Vermont should go forward even after the
16 Supreme Court had issued its *Massachusetts* decision, the "significant factual dispute" presented by
17 plaintiffs' conflict preemption claim was in no way resolved by the Supreme Court's *Massachusetts*
18 decision:

19 *But as to that ultimate legal question first, as to whether or not this regulation in
20 California is preempted by EPCA, that has not been resolved. But more importantly,
21 ... that second claim, and that is the implied preemption claim -- conflict preemption,
22 I mean, that's a matter of significant factual dispute.*

23 *Green Mountain Chrysler-Plymouth-Dodge, et al. v. Crombie*, No. 05-cv-302 (D. Vt.), Tr. of April
24 4, 2007 "Hearing to Discuss U.S. Supreme Court Decision in *Massachusetts v. EPA* & Testimony of
25 Mr. Duleep," at 113 (emphasis added) (attached as Exh. A). Because Chief Judge Sessions found
26 that there was nothing in the *Massachusetts* decision that was "so clear and dispositive on the issue
27 as to give us any greater guidance than we had before," *see id.* at 115, he proceeded with trial.

28 ¹⁰ U.S. EPA has announced that it intends to act on CARB's waiver request by the end of 2007. If
EPA grants the waiver of Clean Air Act preemption at the end of 2007, CARB may try to enforce its
regulation starting with the 2009 model year, which can begin as early as January 2, 2008. The
premise for litigation of the EPCA claims in this Court has been and remains that EPA will not
decide the EPCA preemption issues when it acts on the waiver request. *See infra* pp. 14-16.

¹¹ *See* Memorandum Opinion & Order on Defendants' Motion for Summary Judgment on the Issue
of Ripeness and/or Mootness & Order for Stay of Further Proceedings (Doc. # 606), at 13-14
(confirming the ripeness of claims presented under EPCA).

1 § 7521(a)(1). The Clean Air Act thus establishes an analytical process in which EPA first must
2 determine if an airborne substance is an “air pollutant.” For such substances, EPA is then usually
3 required to consider whether they may reasonably be anticipated to endanger health or welfare. If
4 EPA makes such an “endangerment finding,” the next step in the regulatory process (conducted
5 under section 202(a)(2) of the statute) is for the EPA to adopt standards that apply the “requisite
6 technology” to control the relevant air pollutant, giving appropriate consideration to the time needed
7 to deploy the necessary controls. *Id.* § 7521(a)(2).

8 In the *Massachusetts* decision, the Supreme Court settled the question whether carbon
9 dioxide (“CO₂”) is an “air pollutant,” by dismissing EPA’s prior determination, in response to a
10 petition for rulemaking filed in 2001, that CO₂ was not an air pollutant. *See Massachusetts*, 127 S.
11 Ct. at 1462. Accordingly, the Court remanded the case so that EPA could conduct the second and, if
12 necessary, third analytical steps, expressing no opinion on “whether ... EPA must make an
13 endangerment finding,” or whether the EPA can employ what the Court called “policy
14 considerations” in deciding, pursuant to section 202(a)(2), exactly what technologies to require and
15 when to require them. *Id.* at 1462-63. The practical significance of the decision thus depends on
16 several questions the Supreme Court did not address, including the state of current science relating to
17 climate change, the definition of “requisite technology” under the Clean Air Act, and the possibility
18 that practical or policy considerations might warrant EPA’s abstention from proceeding with the
19 regulatory process.

20 The Supreme Court also did not address California’s request for a waiver of Clean Air Act
21 preemption for the California CO₂ standards under section 209(b) of the Clean Air Act. The
22 *Massachusetts* decision cleared the way for the waiver proceeding at EPA to get under way, and
23 EPA has now held two hearings and received thousands of pages of comments from interested
24 parties.¹² EPA will have to decide if the California regulation does not comply with any of the
25 criteria for approval of such regulations under section 209(b). EPA will not have to decide,

26 _____
27 ¹² *See California State Motor Vehicle Pollution Control Standards*, 72 Fed. Reg. 21,260 (Apr. 30,
28 2007); 72 Fed. Reg. 26,626 (May 10, 2007).

1 however, whether the California CO₂ standards conflict with the goals and purposes of EPCA,¹³ and
2 California would undoubtedly challenge any attempt by EPA to do so.¹⁴ The upshot is that this
3 Court remains the only forum that can resolve, in a timely and definitive manner, whether the
4 specific CO₂ standards adopted by California are subject to EPCA preemption.

5 **ARGUMENT**

6 **I. The Supreme Court’s Decision in *Massachusetts v. EPA* Underscores Plaintiffs’
7 Right to Try Their Claims of Conflict Preemption Under EPCA.**

8 **A. The *Massachusetts* Decision Does Not Revive Defendants’ Legal Theory
9 for Dismissal of the Conflict Preemption Claims.**

10 Now, as before the *Massachusetts* decision, defendants have only one argument for defeating
11 plaintiffs’ EPCA conflict preemption claim as a matter of law, so as to leave “no triable issues.”
12 That argument reasons that when EPA grants a waiver of Clean Air Act preemption for a California
13 regulation, that regulation becomes incorporated in EPCA and is thus rendered immune from
14 conflict preemption by virtue of EPCA’s directive that in the course of setting fuel economy
15 standards NHTSA must “consider” “the effect of other motor vehicle standards of the Government
16 on fuel economy.” *See* Doc. # 620 at 6-7 & n.4 (citing 49 U.S.C. § 32902(f) for the proposition that
17 “[a]s standards with federal status under EPCA, California standards approved by EPA under the
18 Clean Air Act are not within the set of state standards subject to either express or implied
19 preemption under EPCA”).¹⁵

20 ¹³ *See Motor & Equip. Mfrs. Ass’n, Inc. v. EPA*, 627 F.2d 1095, 1119 (D.C. Cir. 1979) and Doc. #
21 310 at 29.

22 ¹⁴ *See infra* at pp. 14-16.

23 ¹⁵ To be sure, defendants have also filed a discrete motion for *partial* summary adjudication of
24 plaintiffs’ EPCA conflict preemption claims that rests on theories distinct from the legal argument
25 referenced in text. But those theories on their face are limited only to portions of plaintiffs’ conflict
26 preemption claims (pertaining to light trucks after model year 2011 and to passenger cars). *See*
27 Defts’ Motion for Summary Adjudication of Plaintiffs’ EPCA Claim, at 1 (Doc. # 427-1). They are
28 also meritless for the reasons plaintiffs explained in their briefs submitted last fall. *See* Pltfs’
Memorandum of Points & Authorities in Opposition to Defts’ Motion for Summary Adjudication of
EPCA Conflict Preemption Claim (Doc. # 498-1). Indeed, in their reply brief defendants all but
abandoned their motion for summary adjudication as it relates to passenger cars, recharacterizing it
as seeking only clarification that “the preemption analysis is different for the statutory mileage
standard for passenger cars than [for] the NHTSA standard for light trucks.” Defts’ Reply
(Continued...)

1 In its thorough opinion denying defendants' motion for judgment on the pleadings in
2 September 2006, this Court rejected defendants' legal argument and the extreme consequences it
3 would entail:

4 Nothing in the statutory language or the legislative history of the Clean Air Act, the
5 EPCA, or any other statute before the court indicates Congress's intent that an EPA
6 waiver would allow a California regulation to disrupt the CAFE program.... The
7 requirement that the Secretary 'shall consider' the effect of the California regulations
8 does not indicate congressional intent to permit regulations that are obstacles to the
9 EPCA's goals, such as ensuring vehicle safety, the economic health of the industry,
10 and consumer choice. *See* 49 U.S.C. § 32902(f).

11 *Central Valley*, 456 F. Supp. 2d at 1172-73. This Court thus acknowledged the reasonableness of
12 NHTSA's position that section 32902(f), the provision in EPCA on which defendants' argument
13 relies, "is neither a saving clause nor a waiver provision" and "only ... direct[s] NHTSA to
14 consider those State standards that can otherwise be validly adopted and enforced under State and
15 Federal law." *Id.* at 1174 (quoting *Average Fuel Economy Standards for Light Trucks Model Years*
16 *2008-2011*, 71 Fed. Reg. 17,566, 17,669 (April 6, 2006) (hereafter "2008-2011 Light Truck
17 Standards").)

18 Contrary to defendants' suggestion, the *Massachusetts* decision did not revive the legal
19 argument this Court correctly declined to accept. The *Massachusetts* decision does not even cite 49
20 U.S.C. § 32902(f). The decision neither acknowledges nor addresses NHTSA's reasonable
21 interpretation that section 32902(f) does not require it to "consider" California regulations that are
22 invalid to begin with under principles of EPCA conflict preemption. And the decision contains no
23 language that would undermine this Court's lucid conclusion that "[e]ven if one objective of EPCA
24 is to set fuel economy standards in a manner that takes into account the effects of California
25 standards receiving a waiver, this does not evince Congress's intent that such a standard is permitted
26 to impair the achievement of the EPCA's other objectives." 456 F. Supp. 2d at 1174.¹⁶

27 _____
28 Memorandum of Points & Authorities in Support of Motion for Summary Adjudication of EPCA
Preemption Claim, at 10 (Doc. # 543). And more to the point for present purposes, defendants have
made no argument that the *Massachusetts* decision has any effect on the theories they raised in their
motion for partial summary judgment.

¹⁶ In a "counter-motion" seeking summary judgment late in 2006, defendants sought to revive their
legal argument by making an admittedly belated request for this Court to reconsider the conclusions
(Continued...)

1 Nor did the Supreme Court say anything in *Massachusetts* that would convert all California
2 regulations for which EPA grants waivers into “federal laws” for purposes of EPCA. Nowhere in
3 the *Massachusetts* decision did the Court refer to or discuss the effect of a Clean Air Act waiver.
4 And contrary to defendants’ argument, *see* Doc. # 620 at 6-7 & n.4, the inclusion of California
5 standards for which EPA grants a waiver within the term “other motor vehicle standards of the
6 Government,” 49 U.S.C. § 32902(f), does not amount to a directive that such California standards
7 should be treated as federal law for all purposes under EPCA. Instead, it is nothing more than a
8 convenient shorthand for referring to an array of different regulations, including NHTSA-
9 promulgated safety standards and even motor vehicle noise control standards, that can have
10 incidental effects on motor vehicle fuel economy.¹⁷ Congress did not intend by this oblique

11 _____
12 it reached in denying defendants’ motion for judgment on the pleadings. Both defendants’ counter-
13 motion and the request for reconsideration contained within it were untimely. *See* Pltfs’
14 Memorandum of Points & Authorities in Support of Motion to Strike Defts’ Counter Motion for
15 Summary Adjudication & Request for Reconsideration (Doc. # 529-2); *United States ex rel. Int’l*
16 *Bus. Machs. Corp. v. Hartford Fire Ins. Co.*, 112 F. Supp. 2d 1023, 1028 n.6 (D. Haw. 2000)
17 (holding that a counter motion is only proper if the party filing it past the deadline for motions “has
no basis for knowledge of an argument made in the original motion”). Defendants’ request for
reconsideration, which did not even acknowledge the requirements for seeking reconsideration set
forth in the relevant Local Rule, did not meet those requirements. *See* Pltfs’ Memorandum in
Opposition to Defts’ Counter Motion for Summary Judgment & Request for Reconsideration at 28-
29 (Doc. # 546).

18 In any event, as plaintiffs explained last fall, defendants’ substantive arguments for seeking
19 reconsideration are incorrect. *Id.* at 29-32. NHTSA is perfectly capable of complying with any
20 requirement under section 32902(f) to “consider” the effect on fuel economy of the challenged
21 California carbon dioxide regulation by recognizing that it is void on grounds of express and implied
22 preemption and will thus have no effect on fuel economy. EPCA does not require that any particular
23 result follow from the mere act of considering a state motor vehicle emissions regulation within the
24 broader task of setting federal CAFE standards. It is not uncommon for agencies to be mandated to
25 consider various factors by statute, but then have discretion in balancing them and determining the
ultimate standard. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 172 (1997) (explaining that the
Secretary’s ultimate decision is review for an abuse of discretion but he must “consider” various
factors in coming to that discretionary final conclusion); *Visiting Nurse Ass’n Gregoria Auffant, Inc.*
v. Thompson, 447 F.3d 68, 77 (1st Cir. 2006) (Secretary has “broad discretion” to determine
“reasonable costs” under the Medicare Act although the Secretary is required to “consider” various
statutory criteria).

26 ¹⁷ *See, e.g., 2008-2011 Light Truck Standards*, 71 Fed. Reg. at 17,639-43 (considering effect on fuel
27 economy of various motor vehicle standards, including safety standards, whose “primary influence
28 ... is the addition of weight to the vehicle, with the commensurate reduction in fuel economy”); *cf.*
(Continued...)

1 shorthand reference to authorize a California regulation to disrupt the policy choices it and NHTSA
 2 have made within the CAFE program; Congress does not “hide elephants in mouseholes.” *Whitman*
 3 *v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

4 The *Massachusetts* decision at most removes one potential roadblock for California’s
 5 pending waiver application at EPA. But it did not consider or address the effect that such a waiver,
 6 if granted, would have on preemption under other statutes such as EPCA. Indeed, the only respect in
 7 which the *Massachusetts* decision addressed state action with respect to greenhouse gas regulation
 8 was to note that “[i]n some circumstances the exercise of [a State’s] police powers to reduce in-state
 9 motor-vehicle emissions might well be pre-empted.” *Massachusetts*, 127 S. Ct. at 1454. The federal
 10 courts have settled on a rule that an exemption or waiver of preemption under one federal statute
 11 does not create defenses to preemption under other federal statutes.¹⁸ Just as the Supreme Court did
 12 not take up the merits of this case or this Court’s prior ruling on the motion for judgment on the
 13 pleadings, *Massachusetts* did not discuss or revisit that rule. Defendants’ principal argument for
 14 overcoming plaintiffs’ conflict preemption claim has no more merit now than it did when the Court
 15 rejected it last fall.

16 **B. The *Massachusetts* Decision Did Not Change the Standard Plaintiffs Must
 17 Meet To Show Conflict Preemption Under EPCA.**

18 Defendants cannot overcome plaintiffs’ conflict preemption claims as a matter of law. There
 19 are longstanding preemption principles that should be applied to those claims, which *Massachusetts*

20 EPCA § 502(d)(3)(D), Pub. L. No. 94-163, 1975 U.S.C.C.A.N. (89 Stat.) 871, 905 (listing “Noise
 21 emission standards under section 6 of the Noise Control Act of 1972” within the category of
 22 standards whose effect NHTSA was instructed to consider in ruling on a manufacturer’s petition for
 23 a reduction in the applicable fuel economy standard).

24 ¹⁸ See, e.g., *United States v. Locke*, 529 U.S. 89, 106 (2000) (savings clause with limiting language
 25 “may preserve a State’s ability to enact laws of a scope similar to Title I but do[es] not extend to
 26 subjects addressed in the other titles of the Act or other acts”); *Int’l Paper Co. v. Ouellette*, 479 U.S.
 27 481, 493 (1987) (savings clause that states that “nothing in this section” preempts state law “does not
 28 purport to preclude pre-emption of state law by other provisions of the Act.”); *Bank of Am. v. City &
 County of San Francisco*, 309 F.3d 551, 565 (9th Cir. 2002) (savings clause reference to “this
 subchapter’ indicates that the EFTA’s anti-preemption provision does not apply to other statutes”);
Feikema v. Texaco, Inc., 16 F.3d 1408, 1414 (4th Cir. 1994) (“The natural reading of the phrase,
 ‘nothing in *this* section shall restrict, does not preclude preemption by *other* sections of the RCRA.”)
 (emphasis in original).

1 leaves unaltered.

2 Now, as before the *Massachusetts* decision, the standard for conflict preemption remains the
 3 one set forth in a long line of cases beginning with *Hines v. Davidowitz*, 312 U.S. 52 (1941) and
 4 extending through cases such as *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). In describing
 5 conflict preemption, the Supreme Court “has spoken of pre-empting state law that ‘under the
 6 circumstances of th[e] particular case stands as an obstacle to the accomplishment and execution of
 7 the full purposes and objectives of Congress’ -- whether that ‘obstacle’ goes by the name of
 8 ‘conflicting; contrary to; repugnance; difference; irreconcilability; inconsistency; violation;
 9 curtailment; interference,’ or the like.” *Geier*, 529 U.S. at 873.¹⁹

10 ¹⁹ Defendants now quote language from two cases out of context in an attempt to suggest a different
 11 and more difficult test: that “to prove even conflict preemption, Plaintiffs would have to show that
 12 Congress expressed an ‘unambiguous’ and ‘clear and manifest’ intent to preempt state laws.” Doc. #
 13 620 at 10 (quoting *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 146-47 (1963)); see
 14 also *id.* (implying that under *Chamber of Commerce v. Lockyer*, 422 F.3d 973 (9th Cir. 2005), *rev’d*
on other grounds, 463 F.3d 1076 (9th Cir. 2006), preemption can only be found to exist if there is
 “no set of circumstances ... under which the [statute] would be valid”).

15 As an initial matter, the language from *Florida Lime & Avocado Growers* could in no way
 16 supersede the principles set forth in *Geier*, which commanded a majority of the Court and postdated
 17 *Florida Lime & Avocado Growers* by nearly forty years. Moreover, Congress certainly did express
 18 an “unambiguous” and “clear and manifest” intent that EPCA preempt state laws -- through the
 19 express preemption provision codified at 49 U.S.C. § 32919(a). Likewise, the careful balance that is
 20 struck in the federal CAFE program between a host of competing objectives gives rise to a “clear
 21 and manifest” inference that state laws which disrupt that balance are preempted. Finally, unlike in
 22 *Florida Lime & Avocado Growers*, where the Court first held that maturity of avocados was not “a
 23 subject demanding exclusive federal regulation in order to achieve uniformity vital to national
 24 interests,” and that “supervision of the readying of foodstuffs for market has always been deemed a
 25 matter of peculiarly local concern,” before applying its heightened test of seeking “unambiguous”
 and “clear and manifest” intent to displace state regulation, 373 U.S. at 143-44, the economies of
 scale required for producing automobiles do indeed demand nationwide uniformity in an industry
 that can hardly be characterized as “of peculiarly local concern.” The goals of uniformity in
 regulating mobile sources of emissions were recognized again in this Court in *Pacific Merchant*
Shipping Ass’n v. Cackette, No. CIV. S-06-2791 WBS KJM, (E.D. Cal. Aug. 30, 2007), at 5, 6
 (attached as Exh. B) (noting that “the possibility of different state regulatory regimes created the
 ‘spectre of an anarchic patchwork of federal and state regulatory programs’”) (quoting *Motor &*
Equip. Mfrs. Ass’n, Inc. v. EPA, 627 F.2d 1095, 1109 (D.C. Cir. 1979)).

26 Defendants’ citation to *Chamber of Commerce v. Lockyer*, 422 F.3d 973 (9th Cir. 2005),
 27 *rev’d on other grounds*, 463 F.3d 1076 (9th Cir. 2006) is also off-base and potentially misleading.
 28 That case did not hold that conflict preemption in general could only be found if the court could see
 “no set of circumstances ... under which the [statute] would be valid,” but instead simply held that
 (Continued...)

1 This Court has already identified the relevant objectives of the CAFE program: “Based on
 2 the language of the EPCA and NHTSA’s statements, the court finds that among the objectives of the
 3 CAFE program are maximizing fuel economy, avoiding economic harm to the automobile industry,
 4 maintaining consumer choice, and ensuring vehicle safety.” 456 F. Supp. 2d at 1169. Accordingly,
 5 whether the challenged California regulation violates principles of conflict preemption under EPCA
 6 depends on whether it will “disturb and conflict with” the balance Congress and NHTSA have
 7 already struck in the federal CAFE program between the various “objectives of the CAFE
 8 program.”²⁰ These are important questions that require the Court to “determine for itself the
 9 practical impact of the [challenged state] law.” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *see*
 10 *also Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 107 (1992) (“[P]reemption analysis
 11 cannot ignore the effect of the challenged state action.... The key question is ... at what point the
 12 state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted
 13 under the Act.”). That is one reason why the Central Valley plaintiffs have been preparing for trial,
 14 and why this case should be restored to the trial calendar.

15 **C. The *Massachusetts* Decision Leaves for This Court the Obligation To
 16 Resolve Factual Questions Regarding the Actual Conflict Between
 17 California’s Specific Regulation and the Federal CAFE Program.**

18 By quoting language from the *Massachusetts* decision out of context, defendants appear to
 19 suggest that the Supreme Court has considered and resolved the factual question whether the
 20 regulations challenged in this case conflict with EPCA. *See* Doc. # 620 at 10 (suggesting that

21 the “categorical nature” of preemption under the specific federal act before it -- the National Labor
 22 Relations Act -- relieved it from the burden of considering whether the state regulation at issue might
 23 survive preemption “in a particular factual situation.” 422 F.3d at 993.

24 ²⁰ *Cf. California v. FERC*, 495 U.S. 490, 506 (1990) (“Allowing California to impose significantly
 25 higher minimum stream flow requirements would disturb and conflict with the balance embodied in
 26 that considered federal agency determination.”); *Ouellette*, 479 U.S. at 495 (finding a state action
 27 preempted because it would “compel the source to adopt different control standards and a different
 28 compliance schedule from those approved by the [federal agency], even though the affected State
 had not engaged in the same weighing of the costs and benefits.”); *see also California Coastal
 Comm’n v. Granite Rock Co.*, 480 U.S. 572, 605 (1987) (Powell, J., concurring in part and
 dissenting in part) (“Allowing California to strike a different balance necessarily conflicts with the
 federal system.”).

1 demonstrating conflict preemption would entail meeting “an even higher burden than
2 ‘inconsistency,’ which EPA was unable to show in *Massachusetts*”). Defendants’ reading does not
3 bear close scrutiny.

4 The issue before the Supreme Court was the abstract question whether EPA might be able to
5 adopt some type of regulation of carbon dioxide as a greenhouse gas. The Supreme Court answered
6 this question in the affirmative based on what it found to be “unambiguous” statutory text under
7 which carbon dioxide qualified “without a doubt” as an “air pollutant.” *Massachusetts*, 127 S. Ct. at
8 1460. The Supreme Court did not consider whether EPA could or should adopt any specific
9 regulation of carbon dioxide, much less a regulation of the same structure and stringency as
10 California’s. Rather, the Supreme Court took pains to point out that it did not need to and would not
11 “reach the question whether on remand EPA must make an endangerment finding,” which would be
12 a necessary prerequisite to any regulation of carbon dioxide. *Id.* at 1463. And it likewise made clear
13 that “EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its
14 regulations with those of other agencies.” *Id.* at 1462.

15 That is the context in which one must consider the two sentences from the *Massachusetts*
16 opinion on which defendants focus their attention: (i) the Supreme Court’s statement that “EPA has
17 not identified any congressional action that conflicts in any way with the regulation of greenhouse
18 gases from new motor vehicles,” *id.* at 1461;²¹ and (ii) the Supreme Court’s statement that NHTSA’s
19 and EPA’s “obligations may overlap, but there is no reason to think the two agencies cannot both
20 administer their obligations and yet avoid inconsistency,” *id.* at 462. Both these sentences refer to
21 regulation of greenhouse gases by a federal agency (not a state) and in the abstract (not in the context
22 of a specific regulation).

23 Those points are crucial. First, as federal agencies, NHTSA and EPA have the ability and the

24 ²¹ This statement appears in the context of the Supreme Court’s discussion distinguishing *FDA v.*
25 *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Read in this context, it appears that all
26 the Supreme Court meant was that EPA had identified no legislative enactment -- similar to the
27 legislative enactments in *Brown & Williamson* that “made sense only if adopted ‘against the
28 backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA
to regulate tobacco,’” *Massachusetts*, 127 S. Ct. at 1461 -- that evinced a clear Congressional
understanding that EPA *lacked* the power to promulgate some form of greenhouse gas regulation.

1 duty to coordinate in order to “avoid inconsistency” or conflict. The Supreme Court’s decision
2 allows NHTSA and EPA to begin that process of coordination at the federal level with respect to the
3 overlap between regulation of greenhouse gases and regulation of fuel economy, and recognizes that
4 the mere *potential* of inconsistency or conflict is no reason to cut off the coordination process at the
5 very outset. Indeed, the President has now taken concrete steps to ensure that the necessary
6 coordination will occur. Exec. Order No. 13432, 72 Fed. Reg. 27,717 (May 14, 2007) (directing
7 EPA and NHTSA to coordinate “to protect the environment with respect to greenhouse gas
8 emissions from motor vehicles ... in a manner consistent with sound science, analysis of benefits and
9 costs, public safety, and economic growth”).

10 Second, if EPA does make an “endangerment” finding and does elect to adopt greenhouse
11 gas regulations, there are a number of options open to it that would not necessarily create conflict or
12 inconsistency with the federal CAFE program. EPA could choose to regulate only greenhouse gases
13 other than carbon dioxide, upon finding that the regulation of carbon dioxide embodied in the federal
14 CAFE program is sufficient. EPA could choose to regulate carbon dioxide solely by regulating the
15 carbon content of fuels rather than by establishing fleet-average tailpipe carbon dioxide emission
16 standards. EPA could establish maximum carbon dioxide emission limits for classes of vehicles
17 defined by size and weight, without imposing any sort of binding fleet-average requirement by
18 manufacturer. EPA and NHTSA could choose together to set joint carbon dioxide/fuel economy
19 standards, with EPA also establishing emissions limits for other greenhouse gases as well.²²

20 Third, in this case, CARB made no attempt to coordinate with NHTSA,²³ and instead
21 adopted a specific regulation that the Central Valley plaintiffs are prepared to prove will give rise to
22 concrete and quantifiable conflicts with the federal CAFE program. The Supreme Court did not
23 have the California regulation before it, and thus could not consider the evidence of the ways in

24 ²² The federal agencies have been directed by the President to make decisions on possible future
25 regulations by the end of calendar year 2008. While that is an ambitious target date for decision-
26 making, it will come far too late in order to illuminate any of the issues in this case, without an
unconscionable delay in the trial here.

27 ²³ Indeed, NHTSA has itself recognized the extensive conflict between the challenged regulation and
28 the federal CAFE program. *2008-2011 Light Truck Standards*, 71 Fed. Reg. at 17,667-68.

1 which that regulation will actually disrupt the goals and objectives of the federal CAFE program.
2 Accordingly, the only way of determining whether CARB has heeded the Supreme Court's implicit
3 directive to "avoid inconsistency" with the federal CAFE program is for this Court to allow
4 plaintiffs' conflict preemption claim to proceed to trial. *Massachusetts*, 127 S. Ct. at 1462.²⁴

5 **D. This Court Remains the Only Forum for Adjudication of Plaintiffs'
6 EPCA Preemption Claim.**

7 In a passage in their brief that makes no pretense of interpreting the *Massachusetts* decision,
8 defendants argue that "Congress has assigned to EPA, not to NHTSA or a district court, the authority
9 to pass on the consistency of California's standards with federal law." (Doc. # 620 at 9.)
10 Defendants accordingly suggest that plaintiffs "can present [their] factual concerns about
11 technological feasibility, cost, lead-time, and safety to EPA," or that in the alternative "the
12 automobile industry can ask NHTSA to address California emission standards and any alleged
13 inconsistencies ... in the course of NHTSA's proceedings to set federal fuel economy standards." *Id.*
14 at 8-9. As defendants well know, none of these proposed alternatives provides anything close to an
adequate substitute for federal court review of plaintiffs' EPCA conflict preemption claim.

15 The first alternative -- that plaintiffs simply present their concerns to EPA -- has already been
16 the subject of considerable briefing and discussion in this Court. Indeed, as this Court noted in its
17 September 2006 decision denying defendants' motion for judgment on the pleadings, defendants in
18 that context

19 disclaim[ed] making any contention that the EPA would consider whether the EPCA
20 preempted the California regulations or consider whether the regulations affect the
21 'goals and purposes' of the EPCA. Defs' Objection to Pls' Surreply Brief 3:12-18.
Defendants concede that the EPA's review of the regulations is limited by the criteria
in section 209(b) [of the Clean Air Act].

22 456 F. Supp. 2d at 1171 n.10. This Court went on to hold that "the criteria considered by EPA in

23 ²⁴ Defendants seriously misread the *Massachusetts* decision when they claim that "[t]he obvious
24 implication of the Supreme Court's ruling is that it is acceptable for a carbon dioxide emission
25 standard to lead to higher fuel economy than what NHTSA would require." Doc. # 620 at 8. If
26 anything, the Supreme Court recognized that even at the federal level it would be important for
27 NHTSA and EPA to coordinate in order to "avoid inconsistency." This rationale would apply *a*
28 *fortiori* to state regulation of greenhouse gases, where formal mechanisms for coordination are less
likely to exist, and where the administrator of the state agency would be accountable to his Governor
rather than to the President.

1 granting a waiver [do not] ensure that such interference will not occur.” *Id.* at 1173.

2 Defendants can hardly dispute this holding. At a hearing on California’s application for an
3 EPA waiver in Sacramento on May 30, 2007, the Attorney General of California told the EPA
4 hearing panel that under governing law, “you are not allowed to consider issues like preemption
5 from another statute.”²⁵ Likewise, at the May 22 hearing on the waiver request, the Natural
6 Resources Defense Council (“NRDC”) took the same position on the ability of EPA to consider the
7 issue of EPCA preemption:

8 EPA also asked whether there was relevance to the waiver decision from the Energy
9 Policy and Conservation Act. And our response is, the EPCA provisions are not
relevant under this waiver decision. The waiver decision must be made solely on
criteria that are in Section 209(b).

10 Transcript of May 22, 2007, EPA Hearing on CARB Request for Waiver of Preemption, EPA
11 Docket No. EPA-HQ-AR2006-0173, at 190 (“May 22 EPA Tr.”) (maintained electronically at
12 www.regulations.gov). Notably, NRDC also urged EPA to grant the waiver request, dismissed
13 concerns about the feasibility and cost of compliance, and indicated that it planned to join California
14 in suing EPA if the waiver request was not approved soon.²⁶ In sum, the conclusions this Court has
15 already drawn regarding the differences between the EPA waiver process and the balancing of
16 policies embedded in the CAFE program are sufficient to dispose of defendants’ suggestion that the
17 EPA’s review process will prevent conflict with the objectives of EPCA; and defendants are in no
18 position to argue the contrary.

19 Defendants’ second alternative -- that NHTSA can redress any conflicts with EPCA -- is
20 equally illusory, and certainly is not supported by undisputed facts proffered by defendants. The
21 greenhouse gas standards adopted by CARB are so stringent that it would be impossible for NHTSA
22 simply to take the standards in that regulation as a given, for purposes of California and the other
23 states enforcing those standards, and make changes of its own to the federal standards in order to
24 offset the effects of the state standards on the federal program. NHTSA has no power to relieve
25 manufacturers of the duty to meet the fleet-average CO₂-equivalent standards in California and other

26 ²⁵ Transcript of May 30, 2007, EPA Hearing on CARB Request for Waiver of Preemption, EPA
Docket No. EPA-HQ-AR2006-0173 at 14 (maintained electronically at www.regulations.gov).

27 ²⁶ May 22 EPA Tr. at 190.

1 states with the same standards, and so vehicle models that do not meet those standards will start to
2 disappear from the showrooms and dealer lots. For consumers and the motoring public in California
3 and the other states enforcing the greenhouse gas standards, the choice among the full national range
4 of new vehicle models will still be lost, and the unintended safety consequences of the rebound
5 effect will still occur.

6 If unconstrained by statute, NHTSA could in theory relax the national fuel economy
7 standards so that manufacturers could sell their more fuel-intensive vehicles in states not enforcing
8 the California greenhouse gas standards, and thus try to avoid the losses of jobs at factories and in
9 the supply and distribution chains. But EPCA -- which is also intended to give consumers in all
10 states a wide choice of fuel-efficient vehicles -- does not permit NHTSA to write standards that
11 would set an effective mpg standard in the non-California states at a low level; it requires NHTSA to
12 set "maximum feasible" standards nationwide. 49 U.S.C. § 32902(a), (c). And even if NHTSA
13 could somehow relax its standards, there is no reason to believe that the market in those other states
14 would achieve a fleet mix that would keep production of the industry's less fuel-efficient vehicles at
15 the same level as would occur in the absence of the state regulation.

16 More to the point, however, the *Massachusetts* decision simply does not require plaintiffs to
17 settle for either of defendants' preferred alternatives to judicial review. To the contrary, the
18 Supreme Court explicitly recognized that "[i]n some circumstances the exercise of [a State's] police
19 powers to reduce in-state motor-vehicle emissions might well be pre-empted," and acknowledged
20 the importance of "avoid[ing] inconsistency" between regulation of greenhouse gases and the federal
21 CAFE program. *Massachusetts*, 127 S. Ct. at 1454, 1462. These unresolved questions of
preemption remain for this Court to decide.

22 **II. The *Massachusetts* Decision Supports a Holding That California's Regulation Is**
23 **"Related To" Fuel Economy Standards.**

24 While the majority of evidence at trial would pertain to the actual conflict California's
25 regulation will create with the federal CAFE program, plaintiffs are also prepared to offer evidence
26 that the only feasible way for manufacturers to comply with the regulation will be to increase
27 fleetwide fuel economy to levels far beyond the requirements of federal CAFE. *See, e.g.*, Modlin
28 Decl. at ¶ 5; Austin Decl. at ¶¶ 6-9. This evidence would demonstrate that in practice the regulation

1 will operate as a *de facto* fuel economy standard and is thus expressly preempted under EPCA as a
2 regulation “related to fuel economy standards.” 49 U.S.C. § 32919(a).

3 Because the Supreme Court in *Massachusetts* did not have California’s regulation before it, it
4 also did not decide the factual question whether in practice that regulation would operate as a *de*
5 *facto* fuel economy standard triggering EPCA’s express preemption provision. But in recognizing
6 that EPA’s regulation of carbon dioxide under the Clean Air Act and NHTSA’s regulation of fuel
7 economy under EPCA “may overlap,” the Supreme Court acknowledged that in some instances the
8 regulation of carbon dioxide might well amount to the setting of fuel economy standards.
9 *Massachusetts*, 127 S. Ct. at 1462. Far from undermining plaintiffs’ express preemption claim, the
10 Supreme Court’s opinion in fact lends credence to the underlying factual premise behind it.

11 In this regard, it is critical to recognize that the consequences of regulatory “overlap” are
12 very different for EPA than they are for California. For EPA, regulatory overlap means that it must
13 coordinate with NHTSA to “avoid inconsistency.” *Id.*²⁷ For California, however, regulatory overlap
14 requires the application of the express preemption provision that Congress adopted with the specific
15 intent of precluding states from establishing their own fuel economy standards, no matter what label
16 or ostensible purpose the states might attach to them. As an early Senate report explained with
17 respect to EPCA’s preemption provision: “State or local fuel economy standards would be
18 preempted, regardless of whether they were in terms of miles per gallon or some other parameter
19 such as horsepower or weight.” S. Rep. No. 93-526, at 66 (1974).

20 No matter how many times defendants repeat their primary theme that “there is no room for
21 arguing that the Clean Air Act gives California any less authority to regulate greenhouse gases than
22 EPA,” Doc. # 620 at 5, the bottom line is that unlike EPA’s regulations, California’s regulations are
23 subject to preemption principles that originate in the Supremacy Clause of the United States
24 Constitution. U.S. Const., art. VI. It is true that the *Massachusetts* decision may help California
25 receive a waiver of preemption under the Clean Air Act. But the Clean Air Act itself specifically

26 ²⁷ Even if the Clean Air Act and EPCA grant EPA and NHTSA overlapping regulatory authority,
27 “[o]verlapping statutes do not repeal one another by implication; as long as people can comply with
28 both, then courts can enforce both.” *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004).

1 states that a waiver only operates to remove the preemption that would otherwise apply under that
 2 Act, *see* 42 U.S.C. § 7543(b) (permitting EPA, upon making the requisite findings, to waive
 3 “application of *this section*”) (emphasis added); and nothing in EPCA can reasonably be read to do
 4 more than the Clean Air Act would accomplish by its own terms. If plaintiffs meet their burden to
 5 prove that the regulation will in practice function as a *de facto* fuel economy standard, EPCA’s
 6 preemption provision will require that it be invalidated whether or not California succeeds in its
 7 application for an EPA waiver.

8 Finally, defendants argue that the express preemption provision does not apply to a state
 9 standard once a waiver has been granted because, in the defendants’ view, it effectively becomes a
 10 federal law. This is not only incorrect, but also irrelevant. Section 32919(a) precludes states from
 11 enforcing “*a* law or regulation” that is related to fuel economy standards. There is no limitation
 12 based on the source of that “law or regulation.” Looking at the original enactment (as the defendants
 13 often suggest) confirms the lack of any limitation as it states: “no State or political subdivision of a
 14 State shall have authority to adopt or enforce *any* law or regulation relating to fuel economy
 15 standards.” Pub. L. 94-163, § 509 (emphasis added). This language defeats any argument that the
 16 character of the law in question has any effect on a State’s ability to enforce it; rather, a State is no
 17 more permitted to enforce a federal law as a state one.²⁸ Indeed, this principle was invoked by the
 18 Supreme Court in *Massachusetts* where it explained that the use of such terms “embraces airborne
 19 compounds of whatever stripe.” 127 S. Ct. at 1459. The scope of EPCA prohibition on state
 20 enforcement of any law or regulation of “whatever stripe” is confirmed by a reference later in that
 21 section to “federal standard[s].”²⁹ Defendants’ argument about the supposed “federal statutes” of its
 22 regulation is irrelevant; EPCA precludes California’s enforcement of a regulation that is “related to”

23 ²⁸ *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) (holding that the phrase “any term of
 24 imprisonment” encompasses both federal and state terms of imprisonment); *United States v. Alvarez-
 25 Sanchez*, 511 U.S. 350, 358 (1994) (noting that statute referring to “any law enforcement officer”
 26 includes “federal, state, or local” officers); *Collector v. Hubbard*, 12 Wall. 1, 15 (1871) (stating “it
 27 is quite clear” that a statute prohibiting the filing of suit “in any court” “includes the State courts as
 28 well as the Federal courts,” because “there is not a word in the [statute] tending to show that the
 words ‘in any court’ are not used in their ordinary sense”).

²⁹ *Gonzales*, 520 U.S. at 5 (confirming scope of term “any” by looking at restriction that appeared in
 a different portion of the statute).

1 fuel economy standards regardless of whether the regulation at issue is local, state or federal in
2 nature.

3 **III. The *Massachusetts* Decision Does Not Affect Plaintiffs' Foreign Policy Claim.**

4 Defendants' argument regarding the effect of the *Massachusetts* decision on plaintiffs'
5 foreign policy preemption claim fares no better than their contentions regarding EPCA preemption.
6 The argument tries to sail past the obvious point that the *Massachusetts* Court was not faced with
7 any claims that a state regulation was subject to foreign policy preemption scrutiny, and did not
8 decide any such questions. Indeed, the Court's sole statement on preemption actually reinforced the
9 viability of such a claim as a separate and unresolved issue: "When a State enters the Union, it
10 surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force
11 reductions in greenhouse gas emissions, *it cannot negotiate an emissions treaty with China or India,*
12 and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle
13 emissions might well be pre-empted." *Massachusetts*, 127 S. Ct. at 1454 (emphasis added) (contrast
14 California's international agreement to pursue greenhouse gas policy in coordination with Great
15 Britain).

16 In denying the rulemaking petition at issue in *Massachusetts*, EPA had supported its
17 reluctance to regulate greenhouse gases in part with the argument that "[u]nilateral EPA regulation
18 of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing
19 countries to reduce the GHG intensity of their economies." EPA, *Control of Emissions from New*
20 *Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003). The Supreme Court
21 held that EPA improperly invoked such foreign policy-related concerns to justify its "refusal to
22 decide whether greenhouse gases cause or contribute to climate change." *Massachusetts*, 127 S. Ct.
23 at 1463. The Court did not hold that EPA had incorrectly stated United States foreign policy on
24 climate change. Disapproval of a federal agency's reliance on foreign policy concerns when
25 construing its own powers obviously says nothing about whether foreign policy with a particular
26 content preempt conflicting state laws. Indeed, as to the substance of EPA's reasoning, the Supreme
27 Court was careful to note that it had "neither the expertise nor the authority to evaluate [EPA's]
28 policy judgments." *Id.*

1 Defendants therefore blatantly misread the *Massachusetts* decision when they claim that it
2 rejected the policy premise underlying EPA’s foreign-policy based reasoning. *See* Doc. # 620 at 11.
3 If anything, the Supreme Court’s opinion bore out the foresight of this Court’s observation, in
4 denying defendants’ motion for judgment on the pleadings, that “[r]egardless of the Supreme Court’s
5 ultimate holding on th[e] issue [whether EPA could properly consider foreign affairs questions], the
6 [EPA] statement remains an expression by an executive agency of the President’s foreign policy
7 strategy.” *Central Valley*, 456 F. Supp. 2d at 1177 n.15.

8 To be sure, in the wake of *Massachusetts*, EPA appears to possess the authority under the
9 Clean Air Act to adopt some type of regulation of carbon dioxide. And the President may well
10 choose to employ this very authority as a bargaining chip in ongoing negotiations with other nations.
11 As plaintiffs have demonstrated and as this Court recognized in holding that plaintiffs had stated a
12 claim of foreign policy preemption, however, the promulgation of unilateral state regulations such as
13 California’s will weaken the President’s bargaining position vis-à-vis other countries and thus impair
14 his ability to use that newly affirmed Clean Air Act authority in negotiations designed to achieve
15 multilateral agreements. *See* 456 F.Supp. 2d at 1183 (holding that “Plaintiffs have stated a claim for
16 preemption of the regulations based on foreign policy” in light of their allegation “that the California
17 regulations, by unilaterally reducing [greenhouse gas] emissions, potentially undercut the
18 Executive’s ability to pursue [greenhouse gas emissions reduction] agreements”).

19 In their supplemental brief, defendants continue to resist this logic by denying the very
20 existence of any federal foreign policy of forgoing unilateral action in order to achieve multilateral
21 concessions. The latest document defendants point to as evidence of a different foreign policy is a
22 draft of the *Fourth U.S. Climate Report* (described as an “initial draft”) which lists California’s
23 greenhouse gas standards among nonfederal policies and measures that have been adopted in the
24 United States. *See* Doc. # 620 at 12 & n.9 (citing Att. 11 to Defts’ Appendix of Other Authorities in
25 Support of Supplemental Brief re *Massachusetts v. EPA*.) But the climate report that defendants cite
26 is required by the United Nations Framework Convention on Climate Change (“U.N.F.C.C.C.”) to
27 set forth “detailed information on [the] policies and measures” that a signatory has adopted to reduce
28 greenhouse gas emissions. U.N.F.C.C.C., Art. 4.2(b) (relevant excerpt attached as Exh. C). And the
United States can hardly hide from other countries the fact that California and other states have

1 adopted greenhouse gas regulations, especially given the many meetings Governor Schwarzenegger
2 has held with foreign heads of state to urge them to adopt similar regulations.³⁰ Viewed in this
3 context, the decision of a state department official to report the existence of those state regulations in
4 the *Fourth U.S. Climate Report* and to portray them as part of a host of nonfederal initiatives “vital
5 for the success of emission reduction policies” cannot be taken as evidence of Executive Branch
6 approval that would immunize those regulations from foreign policy preemption; rather, it is likely
7 the best that the United States can do to fulfill its reporting obligations under the U.N.F.C.C.C. while
8 avoiding the embarrassment that would result either from ignoring the existence of those regulations
9 or admitting to the international community their inconsistency with Executive Branch policy.

10 Meanwhile, both the Solicitor General’s brief in *Massachusetts* and recent statements from
11 the President demonstrate that this Court was correct to conclude that “current Executive branch
12 policy is to negotiate with other nations to reach agreements regarding greenhouse gas emissions
13 reductions” and that unilateral state actions might well conflict with this policy. *Central Valley*
14 *Chrysler-Jeep*, 456 F. Supp. 2d at 1183. As plaintiffs indicated in their opposition to defendants’
15 motion for summary judgment on the foreign policy claim last fall, the Solicitor General reaffirmed -
16 - in well-considered and authoritative statements on behalf of the government of the United States --
17 that in the Executive’s view “unilateral regulation could ‘weaken U.S. efforts to persuade developing
18 countries to reduce the [greenhouse gas] intensity of their economies,’ and that ‘[a]ny potential
19 benefit of EPA regulation could be lost to the extent other nations decided to let their emissions
20 significantly increase in view of U.S. emissions reductions.’” Brief of the United States in
21 *Massachusetts v. EPA*, No. 05-1120, at 48-49 (filed Oct. 24, 2006) (attached as Exh. F); *see also*
22 *Pltfs’ Memorandum of Points & Authorities in Opposition to Defts’ Motion for Summary Judgment*

23 ³⁰ *See, e.g.*, Gar Alperowitz, *California Split*, NEW YORK TIMES, at A15 (Feb. 10, 2007) (“Governor
24 Schwarzenegger may not have thought through the implications of continuing to assert forcefully his
25 ‘nation-state’ ambitions. But he appears to have an expansive sense of the possibilities: this is the
26 governor, after all, who brought Prime Minister Tony Blair of Britain to the Port of Long Beach last
27 year to sign an accord between California and Britain on global warming.”) (attached as Exh. D);
28 Editorial, *California’s Foreign Policy*, LONG BEACH PRESS-TELEGRAM, at A2 (Aug. 2, 2006)
 (“Whenever British Prime Minister Tony Blair can’t reach agreement on environmental policies with
 the president of the United States, he can always pop over to the nation-state of California, as he did
 Monday, with notable success.”) (attached as Exh. E).

1 on the Foreign Affairs Claim at 6-9 (Doc. # 513). This rationale applies *a fortiori* to unilateral state
2 regulation that is beyond the President's control.

3 Two recent events make clear that the Executive's foreign policy has not changed since the
4 Solicitor General filed his brief in *Massachusetts*. First, on May 31, 2007, President Bush
5 announced a framework for American foreign policy on climate change after the expiration of the
6 Kyoto Protocol in 2012.³¹ In laying out this foreign policy initiative, the President reiterated that the
7 inclusion of the major developing economies in any international agreement on climate change is
8 vital: "Th[is] plan recognizes that it is essential that a new framework include both major developed
9 and developing economies that generate the majority of greenhouse gas emissions and consume the
10 most energy, and that climate change must be addressed in a way that enhances energy security and
11 promotes economic growth."³² The President has made clear that he intends any agreement
12 concluded under this framework to include major developing-country emitters.³³

13 Most recently, on June 7, 2007, the United States committed itself to a G-8 Summit
14 Declaration entitled "Growth and Responsibility in the World Economy," available at [http://www.g-8.de/nn_220074/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-](http://www.g-8.de/nn_220074/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng.html)
15 [eng.html](http://www.g-8.de/nn_220074/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng.html) ("G-8 Summit Declaration"). In a section entitled "Climate Change," the eight
16 industrialized nations acknowledged that "[a]s climate change is a global problem, the response to it
17 needs to be international." *Id.* at ¶ 50. The parties agreed to commit to the goals of halving global
18 emissions by 2050 and "achieving a comprehensive post 2012-agreement ... that should include *all*
19 *major emitters.*" *Id.* at ¶¶ 49, 52 (emphasis added).

20 If California and other states are free to enforce regulations such as the ones challenged here,
21 however, they are free to eliminate any realistic prospect of the United States obtaining such
22

23 ³¹ This policy is summarized in a document entitled, "Fact Sheet: A New International Climate
24 Change Framework," available at <http://www.whitehouse.gov/news/releases/2007/05/print/20070531-13.html>.

25 ³² Fact Sheet: A New International Climate Change Framework, available at
26 <http://www.whitehouse.gov/news/releases/2007/05/print/20070531-13.html>.

27 ³³ See Transcript, President Bush Discusses United States International Development Agenda (May
28 31, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/print/20070531-9.html>.

1 emissions reduction commitments from foreign governments. “‘Quite simply, if the [California] law
2 is enforceable the President has less to offer and less economic and diplomatic leverage as a
3 consequence.’ The law thus ‘compromise[s] the very capacity of the President to speak for the
4 Nation with one voice in dealing with other governments’” *American Insurance Ass’n v.*
5 *Garamendi*, 539 U.S. 396, 424 (2003) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S.
6 363, 377, 381 (2000) (citation omitted) (second alteration in original).) Nothing in *Massachusetts* is
7 to the contrary.

8 **Conclusion**

9 For the foregoing reasons and those contained in Doc. # 427, 513, 546 filed in the primary
10 briefing cycle, defendants’ pending motions for summary judgment should be denied.

11
12
13 Dated: September 7, 2007

Respectfully submitted,

14 SAGASER, JONES & HELSLEY

15 /s/ Timothy Jones

16 Timothy Jones

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