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14
 15 IN THE UNITED STATES DISTRICT COURT
 16 FOR THE EASTERN DISTRICT OF CALIFORNIA- FRESNO DIVISION
 17

18 CENTRAL VALLEY CHRYSLER-JEEP, INC.; et al.,
 19 Plaintiffs,
 20 v.

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

24 ASSOCIATION OF INTERNATIONAL
 AUTOMOBILE MANUFACTURERS,
 25 Plaintiff-Intervenor,

26 SIERRA CLUB, NATURAL RESOURCES DEFENSE
 COUNCIL, ENVIRONMENTAL DEFENSE,
 27 BLUEWATER NETWORK, GLOBAL EXCHANGE
 and RAINFOREST ACTION NETWORK,
 28 Defendant-Intervenors.

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

**DEFENDANT AND
 DEFENDANT-INTERVENORS'
 OPPOSITION TO BRIEF OF
 PLAINTIFF-INTERVENOR
 ASSOCIATION OF
 INTERNATIONAL
 AUTOMOBILE
 MANUFACTURERS
 CONCERNING IMPACT OF
 MASSACHUSETTS v. EPA**

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

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INTRODUCTION

1
2 Defendant and Defendant-Intervenors file this opposition to the brief of Plaintiff-
3 Intervenor Association of International Automobile Manufacturers (AIAM) regarding the impact
4 on this case of *Massachusetts v. Environmental Protection Agency (EPA)*, 127 S. Ct. 1438
5 (2007).^{1/} AIAM views the Supreme Court’s decision as having “no bearing on the questions
6 raised in this action.” (AIAM Br. at 1:9.) AIAM is wrong.

7 In holding that the Clean Air Act authorizes the regulation of greenhouse gas emissions
8 from new motor vehicles, the Supreme Court explicitly rejected AIAM’s theory that the
9 Department of Transportation’s (DOT’s)^{2/} regulation of fuel economy places *any* limits or
10 restrictions on this authority: “EPA has been charged with protecting the public’s ‘health’ and
11 ‘welfare,’ 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT’s mandate
12 to promote energy efficiency.” 127 S. Ct. at 1462.

13 AIAM tries to turn the Court’s decision upside down. Relying entirely on the Court’s
14 observation that EPA’s and NHTSA’s “obligations may overlap, but there is no reason to think
15 the two agencies cannot both administer their obligations and yet avoid inconsistency,” AIAM
16 incorrectly argues that the Court’s decision is predicated on a *requirement* that these two
17 agencies work together to “administer their obligations and avoid inconsistency.” (AIAM Br. at
18 5:19-6:2; 6:10-7:8.) AIAM then claims that the Clean Air Act is therefore subordinate to EPCA:
19 “the Supreme Court recognized that EPA may exercise its regulatory authority so long as it did
20 so in coordination with NHTSA to ensure that its actions did not conflict with EPCA’s goals.”
21 (*Id.* at 5:22-6:2.)

22 Remarkably, any such EPCA-imposed limit on Clean Air Act authority was precisely
23 what the Court rejected in *Massachusetts v. EPA*. The Court determined that the authority for
24

25 1. Brief of AIAM Concerning Impact of *Massachusetts v. EPA*, filed July 20, 2007
26 (AIAM Br.) (Docket No. 619).

27 2. DOT is the federal agency responsible for setting fuel economy standards under
28 the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §§ 6201 *et seq.* The National
Highway Traffic Safety Administration (NHTSA) is the organization within DOT that sets and
enforces fuel economy standards. 49 C.F.R. § 1.50(f).

1 regulating greenhouse gases under the Clean Air Act exists independently of EPCA. Moreover,
2 the Clean Air Act and EPCA explicitly spell out exactly how any such regulatory overlap should
3 be dealt with. Neither statute requires – or even suggests – any such coordination or a limitation
4 on Clean Air Act authority. As discussed previously, it is quite the opposite: emissions
5 regulations under the Clean Air Act trump EPCA.^{3/} As NHTSA has acknowledged for decades,
6 it must conform EPCA fuel economy regulations to either EPA’s or California’s EPA-approved
7 emission standards, and not the other way around.^{4/}

8 This Court previously noted that EPA’s argument in *Massachusetts* “exactly mirrors the
9 structure and elements of the arguments” made by Plaintiffs here, and that a decision in
10 California’s favor in that case “will necessarily address and overcome Plaintiffs’ claims.”^{5/} The
11 Supreme Court having handed down such a decision, this Court should enter judgment in
12 Defendants’ favor.

13 ARGUMENT

14 **I. MASSACHUSETTS DOES NOT RESTRICT THE CLEAN AIR ACT’S** 15 **GRANT OF REGULATORY AUTHORITY OVER MOTOR VEHICLE** 16 **EMISSIONS.**

17 Confronted by the Court’s recognition that the Clean Air Act’s emissions regulatory
18 authority is independent of fuel economy regulation under EPCA, AIAM boldly tries to flip this
19 decision on its head. AIAM repeatedly claims that the Court held that EPCA places limits on the
20 Clean Air Act: “[T]he Supreme Court recognized that EPA may exercise its regulatory
21 authority so long as it did so in coordination with NHTSA to ensure that its actions did not
22 conflict with EPCA’s goals.” (AIAM Br. at 5:22-6:2.) *Massachusetts* “did nothing more than

23 3. See, e.g., Defendant and Defendant-Intervenors’ Memorandum of Points and
24 Authorities in Opposition to Motion for Summary Judgment of Association of International
25 Automobile Manufacturers, filed November 22, 2006 (Defs’ Opp. to AIAM MSJ) (Docket No.
494) at 12-13, 24-25.

26 4. See Defendant and Defendant-Intervenors’ Opening Supplemental Brief
Regarding *Massachusetts v. EPA*, filed July 20, 2007 (Defendants’ Opening Brief) (Docket No.
620) at 9:12-23.

27 5. Memorandum Opinion and Order on Defendants’ Motion for Summary Judgment
28 on the Issue of Ripeness and/or Mootness and Order for Stay of Further Proceedings, signed
January 12, 2007 (Stay Order) (Docket No. 606) at 19 and 21.

1 pave the way for a coordinated inter-agency approach at the federal level to regulating
2 greenhouse gas emissions that takes into account the goals and purposes of a number of federal
3 statutes as well as the various pertinent national and international initiatives.” (AIAM Br. at
4 2:26-3:1.) EPA could adopt greenhouse gas regulations “in a manner other than setting tailpipe
5 limits if it determines that doing so would conflict with NHTSA’s administration of EPCA.”
6 (AIAM Br. at 5 n.1.) In other words, AIAM erroneously argues that EPA’s Clean Air Act
7 authority is limited by EPCA because it is contingent upon EPA “coordination” with NHTSA.

8 AIAM also claims that Clean Air Act authority is limited by EPCA: EPA may exercise
9 this authority *only* if it did not “conflict with EPCA’s goals.” (AIAM Br. at 8:17-19.) AIAM
10 further argues that, because California “neither consulted nor coordinated with NHTSA or any
11 other federal agency in crafting its AB 1493 regulations,” and those AB 1493 regulations
12 conflict with EPCA, California’s regulations are preempted. (AIAM Br. at 8:23-24.) But again,
13 AIAM is wrong. The Supreme Court imposed no such condition on Clean Air Act authority.
14 Instead, it left EPA and California free to establish whatever emission standards they see fit so
15 long as they comply with the Clean Air Act:

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

23 *Massachusetts v. EPA*, 127 S. Ct. at 1462.

24 Ignoring all else, AIAM focuses solely on rewriting this final sentence. From the Court’s
25 rather obvious statement that, if necessary, the two agencies could “both administer their
26 obligations and yet avoid inconsistency,” AIAM reads in both a requirement that the agencies
27 consult each other, and a requirement that EPA “ensure that its actions did not conflict with
28 EPCA’s goals.” (AIAM Br. at 6:1-2.) In other words, Clean Air Act authority extends only as

1 far as EPCA allows it, according to AIAM.

2 AIAM does not – and cannot – square its wistful reading of *Massachusetts* with what the
3 Court actually held: EPA’s obligation to protect the public health and welfare under the Clean
4 Air Act is “wholly independent” of NHTSA’s duty to “promote energy efficiency,” 127 S. Ct. at
5 1462, and that the EPA cannot “shirk” its duties under the Clean Air Act even though its
6 obligations may overlap with those under EPCA. *Id.*^{6/}

7 In fact, elsewhere in the decision the Supreme Court clearly precludes this inference,
8 ruling that EPA cannot use objectives under other statutes as a basis for avoiding its obligations
9 under the Clean Air Act. EPA’s “reasons for action or inaction must conform to the authorizing
10 statute. . . . To the extent that this constrains agency discretion to pursue other priorities of the
11 Administrator or the President, this is the congressional design.” 127 S. Ct. at 1462. Thus, when
12 EPA acts, it must be consistent with the Clean Air Act. The Supreme Court recognized this,
13 implicitly, since it spoke of “the two agencies . . . administer[ing] their obligations” – rather than
14 a single combined obligation. *Id.* Congress did not instruct the EPA to follow NHTSA’s lead,
15 but rather to carry out its own mandate under the Clean Air Act.

16 In its Supreme Court brief in the *Massachusetts v. EPA* case, the automobile industry
17 argued that EPCA’s fuel economy requirements completely displace EPA’s authority to regulate
18 carbon dioxide. (*See* Brief for Respondents Alliance of Auto. Mfrs. *et al.* at 36-41,
19 *Massachusetts v. EPA* (No. 05-1120) (Auto Brief) (filed as Attachment 3 to Letter from Marc N.
20 Melnick, Deputy Attorney General, to Harold Nazaroff, Courtroom Deputy, filed Dec. 21, 2006
21 (Docket No. 573)).) That brief cites to a NHTSA statement made in the 2006 light duty truck
22 fuel economy rulemaking, claiming that the Clean Air Act could have *no role* in the regulation of
23 carbon dioxide emissions.^{7/} Thus, the automobile industry flatly asserted that EPA could not

24
25 6. NHTSA does not have “concurrent” authority to regulate emissions, as AIAM
26 erroneously asserts. (AIAM Br. at 1:12, 5:11; 11:5.) NHTSA’s mandate, under EPCA, is to
27 promote energy efficiency through mileage standards. EPA’s mandate, under the Clean Air Act,
28 is to protect the public health and welfare through emissions regulations. *See* 127 S. Ct. at 1462.

7. “EPA regulation of carbon dioxide motor vehicle emissions is fundamentally at
odds with the EPCA program and would shatter that delicate political balance.” (Auto Brief at
37-38.)

1 ever issue a carbon dioxide regulation “more stringent than those promulgated under EPCA.” *Id.*
2 at 38. AIAM recycles this same argument in this case when it asserts that California’s
3 greenhouse gas emissions standards are preempted because they would conflict with NHTSA’s
4 balancing of factors (in setting federal fuel economy standards) (*See* AIAM Br. at 7:22-8:4.)
5 *Massachusetts v. EPA* renders this argument null and void. (*See* Defendants’ Opening Brief at
6 8:1-3 (noting that Supreme Court disregarded as irrelevant AIAM’s argument that fuel economy
7 and carbon dioxide emissions control are “directly related.”)) The Supreme Court, however,
8 rejected that argument and, in doing so, effectively rejected AIAM’s preemption claim when it
9 determined that the setting of mileage standards under EPCA does not allow EPA to “shirk” its
10 regulatory duties under the Clean Air Act. As the Court pointed out, the Clean Air Act serves a
11 “wholly independent” purpose. 127 S. Ct. at 1462. (*See also* Defs’ Opp. to AIAM MSJ at 25-36
12 (presenting additional reasons AIAM’s argument must be rejected).) The Court’s rejection of
13 AIAM’s argument is further evidenced by its flat dismissal of the extra-statutory excuses EPA
14 offered to defend its inaction on global warming. *See* 127 S. Ct. at 1463.

15 Finally, AIAM’s reliance on the instruction for agency collaboration under Executive
16 Order 13432 is similarly misplaced, since this directive for interagency collaboration is not part
17 of EPCA or the Clean Air Act.^{8/} Of course, EPA, NHTSA and California could and still can
18 communicate about any number of issues. NHTSA can provide information, including perceived
19 conflicts, to EPA during the course of EPA’s assessment of California’s waiver request. *See* 42
20 USC § 7543(b)(1) (providing for public notice and opportunity to be heard by interested parties
21 in EPA waiver proceedings). Similarly, both NHTSA and EPA could have provided comments,
22 including perceived conflicts, to the California Air Resources Board during the extended
23 development of the AB 1493 regulation, although neither agency did so. *See* Cal. Gov. Code §§
24 11346 *et seq.* (providing for public notice and opportunity to be heard).

25
26
27 8. Moreover, this Executive Order reveals nothing about congressional intent and,
28 by its own terms, it “is not intended to, and does not, create any right, benefit or privilege,
substantive or procedural, enforceable at law or in equity.” *See* Executive Order 13432, 72 Fed.
Reg. 27,717, 27,719 (May 16, 2007).

1 In the end, as discussed below, the only relevant limit in EPCA requires NHTSA to
2 conform its regulations to either California or EPA emission standards, and not the other way
3 around.

4 **II. MASSACHUSETTS v. EPA GOVERNS THIS CASE BECAUSE**
5 **CALIFORNIA AND EPA EMISSION STANDARDS ARE TREATED**
6 **IDENTICALLY UNDER EPCA.**

7 AIAM insists that *Massachusetts v. EPA* “has no bearing on the questions raised in this
8 action,” because that case was not a preemption case. (*See, e.g.*, AIAM Br. at 1:6-10.)
9 Defendants addressed this issue in their opening brief. (*See* Defendants’ Opening Brief at 9-11.)
10 AIAM ignores, however, that a court’s “sole task” in a preemption case “is to ascertain the intent
11 of Congress.” *See Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987). Plaintiffs’
12 and AIAM’s preemption claims have always rested on the fundamental premise that the
13 regulation of carbon dioxide emissions from automobiles is tantamount to the regulation of fuel
14 efficiency – and that only NHTSA has the power to regulate fuel efficiency. (*See, e.g.*,
15 Complaint in Intervention of Intervenor AIAM for Injunctive and Declaratory Relief, lodged
16 Feb. 3, 2005 (Docket No. 14) ¶ 7.) *Massachusetts v. EPA* considered this identical argument and
17 rejected it, finding it irrelevant. *See* 127 S. Ct. at 1426 (the two agencies’ statutory obligations
18 are “wholly independent”).

19 Furthermore, as described previously, EPCA’s legislative history and NHTSA’s
20 regulatory practice confirm that EPCA section 32902(f), requiring NHTSA to take into account
21 “other standards of the Government” was meant, from the beginning, to include both EPA-
22 adopted standards and EPA-approved California standards under the Clean Air Act.
23 (Defendants’ Opening Brief at 6-8 & nn.4-5; 9 & n.7.) This has always been the automobile
24 industry’s understanding as well. *See, e.g.*, Light Truck Average Fuel Economy Standards;
25 Model Year 1993-1994, 56 Fed. Reg. 13,773, 13,779 (April 4, 1991). Section 32902(f) makes
26 no distinction between emission standards adopted by EPA and those approved by EPA, and it
27 makes no distinction between emission standards for carbon dioxide and those for other
28 pollutants. Moreover, the purposes that give rise to Plaintiffs’ conflict preemption claim spring
from NHTSA’s balancing of factors in 49 U.S.C. section 32902(f) – which include consideration

1 of Clean Air Act emission standards.

2 Initially, this Court questioned whether the word “consider” in Section 32902(f) left open
3 the possibility of preemption of Clean Air Act emission standards. (Memorandum Opinion and
4 Order (1) Granting in Part and Denying in Part Defendant and Defendant-Intervenors’ Motion
5 for Judgment on the Pleadings and (2) Limiting Discovery of Global Warming Science
6 Documents, filed Sept. 25, 2006 (Docket No. 363) at 17-19.) However, as explained in the
7 summary judgment briefing and argument that led to this Court’s Stay Order, Congress’
8 requirement in EPCA that NHTSA “consider” certain emission standards is simply incompatible
9 with a rule that preempts, and therefore prevents, such consideration from ever taking place.
10 (*See* Defs’ Opp. to AIAM MSJ at 36-43.)

11 AIAM argues that this Court’s September 2006 decision dictates the same outcome on
12 their pending motions for summary judgment. The earlier decision, however, rested, at least in
13 part, on NHTSA’s identical assertion that the AB 1493 regulations are preempted. (AIAM Br. at
14 8:24-28.) The assertion by a separate federal agency should not be entitled to any deference, or
15 persuasive effect, for reasons already explained. (*See, e.g.*, Defs’ Opp. to AIAM MSJ at 39-42 &
16 n.16.) More importantly, however, NHTSA’s rationale was based on the explicit assumption
17 that EPA could not adopt carbon dioxide emission standards. (AIAM Br. at 10:26-27.) *See also*,
18 Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg.
19 17,566, 17,658-59, 17,669 (April 6, 2006). NHTSA itself, noted that if EPA were to regulate
20 greenhouse gases, “issuance of standards for those emissions would ‘abrogate EPCA’s regime,’
21 rendering NHTSA’s careful balancing of considerations a nullity. This is equally true for State
22 standards for those emissions.” 71 Fed. Reg. at 17,668.

23 As the Supreme Court confirmed, however, EPCA presents no bar to or limit on Clean
24 Air Act authority to regulate greenhouse gasses, authority that the Act explicitly extends to
25 California. (*See* Defendants’ Opening Brief at 7:6-8:13.) AIAM’s interpretation of EPCA
26 would effectively take away with one hand what Congress granted with the other – broad
27 authority under the Clean Air Act for California to develop its own emissions regulation
28 program. This authority is an essential part of the Clean Air Act’s two-car system for regulation

1 of new motor vehicle emissions. In fact, the legislative history of both the Clean Air Act and
2 EPCA demonstrates that Congress recognized and understood that emissions regulation would
3 have an impact on fuel economy. Indeed, Congress encouraged the development of technologies
4 that would have such effects. (*See id.* at 8:1-10.)

5 The Clean Air Act's two-car system has been in effect since 1967 – well before EPCA's
6 enactment. (*See* Defendants' Opening Brief at 5-6.) Congress strengthened that two-car system
7 in 1977 – after EPCA's enactment – and also allowed other States to adopt California's
8 standards at that time. (*See id.*) *See also* 42 U.S.C. § 7507. Thus, Congress envisioned a dual,
9 rather than a single, approach for the control of the nation's air pollutants. The Supreme Court's
10 decision in *Massachusetts v. EPA* confirms these pollutants include greenhouse gases.

11 The United States Court of Appeals for the District of Columbia Circuit described the
12 importance of the two-car system in the federal statutory scheme in *Motor and Equipment*
13 *Manufacturers Association, Inc. v. EPA*:

14
15 Since the inception of the federal government's emissions
16 control program it has drawn heavily on the California experience
17 to fashion and *to improve the national efforts at emissions control*.
18 The history of congressional consideration of the California waiver
19 provision, from its original enactment up through 1977, indicates
20 that *Congress intended* the State to continue and expand its
21 pioneering efforts at adopting and enforcing motor vehicle
22 emission standards different from and in large measure more
23 advanced than the corresponding federal program; *in short, to act*
24 *as a kind of laboratory for innovation*.

25 627 F.2d 1095, 1110-11 (D.C. Cir. 1979) (emphasis added) (citation omitted). Thus, Congress'
26 intent, together with *Massachusetts v. EPA*'s affirmation of the Clean Air Act's authority to
27 address the "serious and well recognized" harm posed by global warming, 127 S. Ct. at 1455,
28 provide compelling support for California to set its own emission standards to address
greenhouse gases. Plaintiffs' preemption theory, on the other hand, would nullify the Clean Air
Act's two-car system. This is not what Congress intended.

26 \\\

27 \\\

28 \\\

CONCLUSION

This Court noted that a Supreme Court decision in California’s favor in *Massachusetts* would “necessarily address and overcome Plaintiffs’ claims.” (Stay Order at 19 and 21.) The Supreme Court having issued such a decision, all grounds for Plaintiffs’ preemption claim have been removed, and Defendants respectfully request that the Court enter a judgment in their favor.

Dated: September 7, 2007

Respectfully submitted,

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