

1 EDMUND G. BROWN JR.
 Attorney General of the State of California
 2 MARY E. HACKENBRACHT
 Senior Assistant Attorney General
 3 ELLEN M. PETER, State Bar No. 72234
 Supervising Deputy Attorney General
 4 KATHLEEN A. KENEALY, State Bar No. 212289
 JAN ZABRISKIE, State Bar No. 117049
 5 Deputy Attorneys General
 1300 "I" Street, Suite 125
 6 P.O. Box 944255
 Sacramento, CA 94244-2550
 7 JOSEPH BARBIERI, State Bar No. 83210
 GAVIN G. McCABE, State Bar No. 130864
 8 MARC N. MELNICK, State Bar No. 168187
 MARK W. POOLE, State Bar No. 194520
 9 Deputy Attorneys General
 1515 Clay Street, 20th Floor
 10 P.O. Box 70550
 Oakland, CA 94612-0550
 11 Telephone: (510) 622-2133
 Fax: (510) 622-2270

12 Attorneys for Defendant

13 *Additional Counsel on Next Page*

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
 Resources Board,
 22 Defendant,

23 ASSOCIATION OF INTERNATIONAL
 24 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'
 OPENING SUPPLEMENTAL
 BRIEF REGARDING
 MASSACHUSETTS v. EPA**

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

1 DAVID D. DONIGER, State Bar No. 76262
NATURAL RESOURCES DEFENSE COUNCIL
2 1200 New York Ave., NW
Washington, DC 20005
3 Tel: (202) 289-2403
Fax: (202) 789-0859
4

MATTHEW F. PAWA (*pro hac vice*)
5 BENJAMIN KRASS (*pro hac vice*)
LAW OFFICES OF MATTHEW F. PAWA, P.C.
6 1280 Centre Street, Suite 230
Newton Centre, MA 02459
7 Tel: (617) 641-9550
Fax: (617) 641-9551
8

DAVID BOOKBINDER (*pro hac vice*)
9 SIERRA CLUB
408 C Street, NE
10 Washington, DC 20002
Tel: (202) 548-4598
11 Fax: (202) 547-6009

12 JAMES T.B. TRIPP (*pro hac vice*)
ENVIRONMENTAL DEFENSE
13 257 Park Avenue South
New York, NY 10010
14 Tel: (212) 616-1247
Fax: (212) 505-2375
15

Attorneys for Defendant-Intervenors Sierra Club, Natural
16 Resources Defense Council, and Environmental Defense

17 DANIELLE R. FUGERE, State Bar No. 160873
BLUEWATER NETWORK
18 311 California Street, Suite 510
San Francisco, CA 94104
19 Tel: (415) 544-0790 x15
Fax: (415) 544-0796
20

Attorneys for Defendant-Intervenors Bluewater Network,
21 Global Exchange, and Rainforest Action Network

22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
1 INTRODUCTION	1
2 BACKGROUND	1
3 ARGUMENT	3
4 I. THE SUPREME COURT REJECTED THE CLAIM THAT CARBON DIOXIDE	
5 REGULATION UNDER THE CLEAN AIR ACT IS PRECLUDED BY EPCA OR	
6 CONFLICTS WITH EPCA.	3
7	
8 A. The Supreme Court Held That EPA’s Regulation of Carbon Dioxide Does	
9 Not Conflict with the Language or Purposes of EPCA, Even Though That	
10 Regulation Would Have the Effect of Requiring Higher Fuel Economy.	3
11	
12 B. Applying <i>Massachusetts v. EPA</i> to this Case Demonstrates That	
13 California’s EPA-approved Clean Air Act Emission Standards Do Not	
14 Conflict with EPCA.	5
15	
16 II. THE SUPREME COURT’S DECISION DEFEATS PLAINTIFFS’ FOREIGN	
17 POLICY ARGUMENT BECAUSE IT REJECTS THEIR BARGAINING CHIP	
18 THEORY AS A BASIS FOR NON-IMPLEMENTATION OF DOMESTIC	
19 LAW.	11
20	
21 CONCLUSION	12
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES

	<u>Pages</u>
CASES	
1 <i>Chamber of Commerce v. Lockyer</i> , 422 F.3d 973, 993 (9th Cir. 2005), <i>rev'd</i>	
2 <i>on other grounds</i> , 463 F.3d 1076 (9th Cir. 2006)	10
3 <i>DBSI/TRI IV Ltd. P'ship v. United States</i> , 465 F.3d 1031 (9th Cir. 2006).	2
4 <i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 147 (1963)	10
5 <i>Ford Motor Co. v. Env'tl. Prot. Agency</i> , 606 F.2d 1293, 1297 (D.C. Cir. 1979)	6
6 <i>Massachusetts v. Environmental Protection Agency</i> , 549 U.S. _____,	
7 127 S.Ct. 1438 (2007)	<i>passim</i>
8 <i>Motor & Equip. Mfrs. Ass'n v. Env'tl. Prot. Agency</i> , 627 F.2d 1095 (D.C. Cir. 1979)	6
9 <i>Motor & Equip. Mfrs. Ass'n v. Nichols</i> , 142 F.3d 449 (D.C. Cir. 1998)	6
10 <i>New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.</i>	
11 <i>Co.</i> , 514 U.S. 645 (1995)	10
12 <i>U.S. v. Salerno</i> , 481 U.S. 739 (1987)	10
13	
14	
FEDERAL STATUTES	
15 United States Code, title 42	
16 § 7521	<i>passim</i>
17 § 7521(a)(1)	3, 4
18 § 7543	<i>passim</i>
19 § 7543(a)	10
20 § 7543(b)	9, 10
21 § 7543(b)(1)	6, 8
22 United States Code, title 49	
23 § 32902(f)	6, 9, 10
24 Act of July 5, 1994, Pub. L. No. 103-272, 1994 U.S.C.C.A.N. (108 Stat.) 745	7
25 Energy Policy and Conservation Act, Pub. L. No. 94-163, 1975 U.S.C.C.A.N.	
26 (89 Stat.) 871	7
27	
OTHER AUTHORITIES	
28 H.R. Rep. No. 90-728 (1967), <i>reprinted in</i> 1967 U.S.C.C.A.N. 1938	5
H.R. Rep. No. 95-294 (1977), <i>reprinted in</i> 1977 U.S.C.C.A.N. 1077	6
H.R. Rep. No. 103-180 (1994), <i>reprinted in</i> 1994 U.S.C.C.A.N. 818	7

TABLE OF AUTHORITIES (CON'T)

1		
2		<u>Pages</u>
3	OTHER AUTHORITIES (CON'T)	
4	Average Fuel Economy Standards for Light Trucks Model Years 2008-2011	
5	71 Fed. Reg. 17566 (April 6, 2006)	9
6	Average Fuel Economy Standards for Nonpassenger Automobiles,	
7	42 Fed. Reg. 13,807 (March 14, 1977)	9
8	California State Motor Vehicle Pollution Control Standards; Request for	
9	Waiver of Federal Preemption; Opportunity for Public Hearing	
10	72 Fed. Reg. 21260 (April 30, 2007)	2
11	California State Motor Vehicle Pollution Control Standards; Request for	
12	Waiver of Federal Preemption; Opportunity for Public Hearing	
13	72 Fed. Reg. 22626 (May 10, 2007)	2
14	Control of Emissions from New Motor Vehicles and Engines, 68 Fed. Reg.	
15	52922 (Sept. 8, 2003)	3, 4, 11
16	Passenger Automobile Average Fuel Economy Standards, 42 Fed. Reg.	
17	33,534 (June 30, 1977)	9
18	Preparation of Fourth U.S. Climate Action Report, 72 Fed. Reg. 25676 (May 4, 2007)	12
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **INTRODUCTION**

2 The Court has requested supplemental briefing on the impact on this case of the United
3 States Supreme Court’s decision in *Massachusetts v. Environmental Protection Agency (EPA)*,
4 549 U.S. ____, 127 S.Ct. 1438 (2007) (Docket No. 616). As this Court recognized when it
5 imposed a stay pending that decision, EPA’s arguments in the Supreme Court “exactly
6 mirror[ed] the structure and elements of the arguments” made by Plaintiffs here, and a Supreme
7 Court decision in California’s favor “will necessarily address and overcome Plaintiffs’ claims.”
8 In this case, there is no basis for distinguishing between greenhouse gas emission standards
9 adopted by EPA and those adopted by California and approved by EPA. Defendant and
10 Defendant-Intervenors (collectively, “Defendants”) submit that the Supreme Court’s decision
11 effectively resolves all of Plaintiffs’ remaining claims in Defendants’ favor, leaving no triable
12 issues for this Court.

13 **BACKGROUND**

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

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

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

19 \\\

20 \\\

21 \\\

22 \\\

23

24 2. See California State Motor Vehicle Pollution Control Standards; Request for
25 Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21,260 (April 30,
26 2007); California State Motor Vehicle Pollution Control Standards; Request for Waiver of
Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 22,626 (May 10, 2007).

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

1 ARGUMENT

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

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

9 In the administrative action under review in *Massachusetts v. EPA*, EPA asserted that it
10 lacked authority to regulate carbon dioxide under Section 202 of the Clean Air Act. One
11 argument the agency offered was that carbon dioxide regulation would conflict with the
12 authority of the Department of Transportation (DOT) and its subsidiary agency, the National
13 Highway Transportation Safety Administration (NHTSA), to set fuel economy standards under
14 EPCA. Control of Emissions from New Motor Vehicles and Engines, 68 Fed. Reg. 52,922,
15 52,928 (Sept. 8, 2003).

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

18 Even if [greenhouse gases] were air pollutants generally
19 subject to regulation under the [Clean Air Act], Congress has not
20 authorized the Agency to regulate CO₂ emissions from motor
21 vehicles to the extent such standards would effectively regulate the
22 fuel economy of passenger cars and light duty trucks. No
23 technology currently exists or is under development that can
24 capture and destroy or reduce emissions of CO₂, unlike other
25 emissions from motor vehicle tailpipes. At present, the only
26 practical way to reduce tailpipe emissions of CO₂ is to improve
27 fuel economy. Congress has already created a detailed set of
28 mandatory standards governing the fuel economy of cars and light
29 duty trucks, and has authorized DOT—not EPA—to implement
30 those standards. . . .

31 Given that the only practical way of reducing tailpipe CO₂
32 emissions is by improving fuel economy, any EPA effort to set
33 CO₂ tailpipe standards under the CAA would either abrogate
34 EPCA's regime (if the standards were effectively more stringent
35 than the applicable CAFE standard) or be meaningless (if they
36 were effectively less stringent).

37 *Id.* at 52,929.

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

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

3 [T]he first question is whether §202(a)(1) of the Clean Air Act
4 authorizes EPA to regulate greenhouse gas emissions from new
5 motor vehicles in the event that it forms a “judgment” that such
6 emissions contribute to climate change. We have little trouble
7 concluding that it does. . . .

8 The statutory text forecloses EPA’s reading. The Clean Air
9 Act’s sweeping definition of “air pollutant” includes “any air
10 pollution agent or combination of such agents, including any
11 physical, chemical . . . substance or matter which is emitted into or
12 otherwise enters the ambient air . . .” §7602(g) (emphasis added).
13 On its face, the definition embraces all airborne compounds of
14 whatever stripe, and underscores that intent through the repeated
15 use of the word “any.” Carbon dioxide, methane, nitrous oxide,
16 and hydrofluorocarbons are without a doubt “physical [and]
17 chemical . . . substance[s] which [are] emitted into . . . the ambient
18 air.” The statute is unambiguous.

19 127 S.Ct. at 1459-60 (footnotes omitted).

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

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

127 S. Ct. at 1461-62.

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

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

5 *Id.* at 1458 (footnote omitted).

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

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

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

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

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

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

4
 5 The history of congressional consideration of the California waiver
 6 provision, from its original enactment up through 1977, indicates
 7 that Congress intended the State to continue and expand its
 8 pioneering efforts at adopting and enforcing motor vehicle
 9 emission standards different from and in large measure more
 10 advanced than the corresponding federal program

11 *Motor & Equip. Mfrs. Ass’n v. Env’tl. Prot. Agency*, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979).
 12 *See also id.* at 1108 n.22, 1110 & n.31, 1128; *Ford Motor Co. v. Env’tl. Prot. Agency*, 606 F.2d
 13 1293, 1297 (D.C. Cir. 1979). After *Massachusetts v. EPA*, carbon dioxide and other greenhouse
 14 gases are pollutants to be regulated under the Clean Air Act, consistent with their impacts on
 15 public health and welfare.

16 Second, there is no room for arguing that California’s authority to regulate greenhouse
 17 gases under Section 209 poses any greater conflict with EPCA than EPA’s authority under
 18 Section 202. California’s standards require an EPA waiver under Section 209. Under Section
 19 209(b)(1)(A), EPA considers whether California’s standards are “not consistent with Section
 20 202.” Under this provision, EPA has historically considered whether waiver opponents have
 21 demonstrated that California has provided “inadequate lead time to permit the development of
 22 the technology necessary to implement the new procedures, giving appropriate consideration to
 23 the cost of compliance.” *See Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 463 & n.13
 24 (D.C. Cir. 1998) (quoting Federal Register notice in explaining waiver test). EPCA *itself*
 25 provides that once EPA grants a waiver for California standards, those standards stand in the
 26 same position with respect to EPCA as standards that EPA itself has promulgated under Section
 27 202. EPCA’s 49 U.S.C. section 32902(f) provides that *both* have equal *federal* status – they are
 28 both “motor vehicle standards of the Government.”^{4/} As standards with federal status under

27 4. 49 U.S.C. section 32902(f) provides: “In determining the maximum feasible
 28 level, the Secretary shall consider “technological feasibility, economic practicability, the effect
 of other motor vehicle standards of the Government on fuel economy, and the need of the United

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

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

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

12 For purposes of this section, in determining maximum feasible
 average fuel economy, the Secretary shall consider—

13 (1) technological feasibility;

14 (2) economic practicability;

15 (3) *the effect of other Federal motor vehicle standards on fuel
 economy*; and

16 (4) the need of the Nation to conserve energy.

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

18 Each of the following is a category of Federal standards;

19 (i) Emissions standards under section 202 of the Clean Air Act,

20 and *emissions standards applicable by reason of section 209(b) of
 such Act*.

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

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

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

14 Plaintiffs may argue that a trial is still needed to consider factual evidence that
15 supposedly will demonstrate “inconsistency” between California’s standards and EPCA.^{6/} But
16 the two statutes prescribe the federal agency forum and the criteria for reviewing California’s
17 standards.

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

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

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

1 feasibility, cost, lead-time, and safety to EPA. If EPA determines, after evaluating those
 2 concerns under its statute, that the waiver should be issued, California's standards will have
 3 federal status as "other motor vehicle standards of the Government" under EPCA section
 4 32902(f). In addition, the automobile industry can ask NHTSA to address California emission
 5 standards and any alleged inconsistencies (pursuant to 49 U.S.C. section 32902(f)) in the course
 6 of NHTSA's proceedings to set federal fuel economy standards.

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

12 It has also been NHTSA's consistent understanding. From the first CAFE rulemaking in
 13 1977 through the light truck rulemaking in 2006, NHTSA's unbroken practice in administering
 14 EPCA has been to interpret the phrases "Federal standards" and "other motor vehicle standards
 15 of the Government" synonymously and to include Section 209(b) California emission
 16 standards.⁷ In all 20 of the rulemakings spanning this period, NHTSA has viewed its obligation
 17 the same way:

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

22 Passenger Automobile Average Fuel Economy Standards, 42 Fed. Reg. 33,534, 33,537 (June 30,
 23 1977) (emphasis added).

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

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

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

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

25
26 5. Plaintiffs will also point to the Supreme Court’s reference that “in some
27 circumstances the exercise of [Massachusetts’s] police powers to reduce in-state motor-vehicle
28 emissions might well be preempted.” *See Massachusetts*, 127 S.Ct. at 1454. But that is just a
reference to the fact that the Clean Air Act generally preempts state motor vehicle emission
standards – subject, of course, to the California waiver provision. *See* 42 U.S.C. § 7543(a), (b).

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

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

6 The Supreme Court’s decision is also fatal to Plaintiffs’ foreign policy claim. In
7 *Massachusetts v. EPA*, EPA argued that “regulating greenhouse gases might impair the
8 President’s ability to negotiate with ‘key developing nations’ to reduce emissions.” 127 S.Ct. at
9 1463 (quoting Control of Emissions from New Motor Vehicles and Engines, 68 Fed. Reg. at
10 52,931). The Supreme Court flatly rejected this contention, finding: “In particular, while the
11 President has broad authority in foreign affairs, that authority does not extend to the refusal to
12 execute domestic laws.” *Id.* The Court explained:

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

20 *Id.* at 1462 (citation omitted).

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

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

2 Dated: July 20, 2007

3 Respectfully submitted,

4 EDMUND G. BROWN JR.
Attorney General of the State of California
5 MARY E. HACKENBRACHT
Senior Assistant Attorney General
6 ELLEN M. PETER
Supervising Deputy Attorney General

7
8 /s/ Marc N. Melnick
9 MARC N. MELNICK
Deputy Attorney General
10 Attorneys for Defendant

11 SIERRA CLUB

12
13 /s/ David Bookbinder (as authorized on July 20, 2007)
14 DAVID BOOKBINDER
Attorneys for Defendant-Intervenors Sierra Club, Natural
Resources Defense Council, and Environmental Defense

15 BLUEWATER NETWORK

16
17 /s/ Danielle R. Fugere (as authorized on July 20, 2007)
18 DANIELLE R. FUGERE
Attorneys for Defendant-Intervenors Bluewater
19 Network, Global Exchange, and Rainforest Action
20 Network

21
22
23
24
25
26
27
28