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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendant,

ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,

Plaintiff-Intervenor,

SIERRA CLUB, *et al.*,

Defendant-Intervenors.

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Date:	**September 15, 2006**
Time:	**9:00 a.m.**
Courtroom:	**Two**
Judge:	**Hon. Anthony W. Ishii**
Trial Date:	**January 30, 2007**

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Preliminary Statement

This case presents what all parties agree are important questions under federal law. The plaintiffs are a group of new-vehicle dealers in the southern San Joaquin Valley, two vehicle manufacturers who supply those dealers, an automotive trade association, and the Tulare County Farm Bureau. The defendant is the Executive Officer of the California Air Resources Board ("CARB"), who has been sued in her official capacity in this Court under the rule in *Ex Parte Young*, 209 U.S. 123 (1908). Plaintiffs claim that a regulation approved by CARB in 2004 is preempted by several Acts of Congress and by the U.S. Constitution.

The matter is before the Court on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), filed by the CARB Executive Officer and defendant-intervenors (collectively "defendants"). According to defendants and their *amici*, California's power to regulate automotive air pollutants is at risk in this case, along with the health of the residents of this State and people living in the States that *amici* claim to represent.

The principal refrain in defendants' motion rests on a straw-man legal argument. California has long exercised the power to regulate smog-forming and other vehicular emissions that are harmful to breathe. That authority is unquestioned and unaffected by this litigation. This case arises from CARB's decision in 2004 to step beyond that authority, into a regulatory domain that Congress has long reserved to the national government. Plaintiffs seek the opportunity to prove in this Court that the regulation approved by CARB in 2004 [1] is expressly preempted by an Act of Congress, and [2] interferes acutely with federal programs established by Congress, and therefore also is subject to implied preemption.

The issue of implied preemption depends on the practical effects of CARB's 2004 regulation on consumers, on the new-vehicle market, and on the dealers and manufacturers who compete in that market. Defendants and their *amici* largely ignore implied preemption in their opening papers. They cannot and do not offer a sound theory for disposition of this type of implied preemption case on a Rule 12(c) motion.

In addition, there is ***no evidence***, either offered in the pleadings or contained in the first two waves of defendants' numerous expert reports, to support the alarming claim that the outcome of this

case will have any impact on the global climate or the climate of California. Along with the evidence supporting their preemption claims, plaintiffs are prepared to prove at trial that the regulation challenged here will have no perceptible impact on temperature. And, as they have alleged in their Complaint, plaintiffs are also prepared to prove that defendants' regulation will have the unintended effect of hurting the Central Valley's effort to fight smog and reduce other tailpipe emissions that are harmful to breathe.

The actual scientific evidence on the issue of climate change shows that global temperatures depend on the energy-usage activities of all people on Earth. In order to address the problem, the world must reduce its use of carbon-based fuels, which likely entails a shift away from gasoline-powered vehicles to vehicles that do not need carbon-based fuels, among other measures. This will be a global effort over a long period, and it demands huge resources from all sectors of the economy, including the automobile industry. The shift cannot be accomplished through regulations like that involved here. Instead of helping to address the problem, CARB's rule will serve mainly to divert billions of dollars away from efforts within the industry to produce climate-friendly vehicles, as well as disrupt the national government's efforts to address the issue of climate change at the appropriate level, which is international. Plaintiffs are also prepared to prove those facts at trial.

First, however, comes the present motion under Rule 12. A motion for judgment on the pleadings requires the parties to operate within the pleadings. It is therefore important to be clear at the outset on the main contents of the Complaint.

A. The California Regulation

At a hearing in September 2004, CARB approved a regulation designed to limit the release of greenhouse gases from new motor vehicles sold in California. (First Amended Complaint ("FAC") ¶¶ 6-8.) Carbon dioxide, or "CO_2," is the primary greenhouse gas released by motor vehicles. Unlike other gases coming from the tailpipes of some automobiles, or other types of power plant or factory emissions, carbon dioxide is not harmful to breathe. Humans and other animals exhale carbon dioxide, which is then used by plants to produce oxygen; CO_2 is thus a critical part of the life cycle of Earth. (*Id.* ¶ 2.)

Carbon dioxide has become a focus of public attention because it accumulates in the upper atmosphere and contributes to the greenhouse effect. Although the rule approved by CARB in 2004

nominally includes other greenhouse gases in addition to carbon dioxide, gasoline-powered vehicles can meet the new CARB standards only by controlling carbon dioxide. The CARB rule is designed to require stringent controls on carbon dioxide, but the vehicle technologies would still largely depend on the use of gasoline. This means the CARB rule will have only symbolic effects on the issue of global warming. Indeed, there was no evidence at the September 2004 hearing that the specific regulation approved by CARB would have any measurable impact on global or California temperatures, nor is there any such evidence today. (FAC ¶¶ 8, 11, 111.)

B. Environmental Impact

For many years federal and state agencies have regulated tailpipe emissions that, unlike CO2, are harmful to breathe. Those harmful pollutants include, for example, the gases that form smog -- which is one of the main air quality problems in various regions of the State and nation, including the Central Valley. Smog-forming and other harmful emissions from motor vehicles are controlled with devices like catalytic converters. (FAC ¶¶ 37.) Some cars rolling off the assembly lines today can control smog-forming and other harmful emissions to near-zero levels, and the levels of control for pollutants today are roughly the same nationwide. (*Id.* ¶ 50.)

There is, however, no device like a catalytic converter than can be used to reduce carbon dioxide. Indeed, CO2 is one of the main (and nontoxic) outputs of a modern automotive catalytic converter. The only way to control carbon dioxide from a gasoline vehicle is to reduce the amount of fuel that it burns; the amount of CO2 that comes from such a vehicle is directly related to the amount of fuel it consumes. (FAC ¶¶ 4, 37, 45.) As a practical matter, this means that in order for a vehicle to reduce its CO2 emissions, it must reduce its fuel consumption. In the case of gasoline-powered vehicles, higher fuel economy means lower CO2 emissions. (*Id.* ¶ 4.)

Higher fuel economy does not, however, equate to lower pollution. Carbon dioxide does not create smog, and reducing gasoline consumption does not cut a vehicle's emissions of the pollutants that are harmful to breathe. (FAC ¶¶ 50, 108.) Advanced catalytic converters enable some vehicles with higher fuel consumption to emit fewer pollutants than vehicles that consume less gasoline. (*Id.* ¶ 108.)

It is also true that higher fuel economy vehicles are already in production and widely available today -- although the free-market demand for such vehicles is not as high as defendants

would prefer. This is because higher fuel economy vehicles tend to involve trade-offs such as smaller size, less utility, and/or a higher initial price. Substantial boosts in fuel economy can require lighter-weight materials, advanced engines, and more complex transmissions. Those technologies add to the cost of a new vehicle. In the case of the new CARB regulation, some experts estimate a thousand dollars added to the initial purchase price of some vehicles, and others estimate higher increases. (*Id.* ¶ 13.)

Higher prices reduce new vehicle sales. This is particularly true for farmers, small businesses and consumers in this area. (FAC ¶¶ 11-12.) Faced with higher prices caused by the CARB regulation, some consumers will decide to keep their current vehicles longer or buy a used car or truck. (*Id.* ¶ 11, 13.) This means that the CARB regulation have an unintended result. Older vehicles, with less effective catalytic converters and higher smog-forming emissions, will stay on the road longer. Whatever the symbolic value of the 2004 CARB rule, the end result will be higher air pollution levels than if CARB had not tried to regulate greenhouse gases in the first place.[1]

C. The Federal Fuel Economy Law

With the foregoing background, it is time to turn to the legal issues. Even higher fuel economy does not translate into lower pollution levels, and despite the indirect impact of fuel economy rules on pollution levels, reducing fuel consumption is an important national goal. Since the mid-1970s, the federal government has regulated motor vehicle fuel economy. The governing statute is the Energy Policy and Conservation Act of 1975 ("EPCA" or "the 1975 Act"). (*See* FAC ¶¶ 4, 41-46).

When it passed the 1975 Act, Congress understood that if the federal government set fuel economy standards too high, it would add large costs to some vehicles, and could put them out of the reach of many consumers. That would reduce consumer choice and jeopardize employment at the automobile plants producing those vehicles. Accordingly, Congress directed the federal agency in charge of the fuel economy program to balance the nation's need for higher fuel economy with other

[1] FAC ¶¶ 108-110; *see International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 634 (D.C. Cir. 1973) (higher prices from regulation "would … increase[e] actual total emissions of cars in use"). More stringent fuel economy standards can also adversely affect traffic safety by keeping older cars in use for longer periods. *See Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 324-25 (D.C. Cir. 1992).

factors such as "economic practicability." *See* 49 U.S.C. § 32902(f). The 1975 Act thus required a middle course, between [1] standards that would maximize fuel economy but unduly affect the market, and [2] no standards at all or standards that, in the judgment of the federal agency assigned to implement EPCA, would require too little from the industry. (*See* FAC ¶ 41-46 *and* pp. 17-19 below.)

The federal agency that was ultimately assigned responsibility to establish and revise the fuel economy standards is the National Highway Traffic Safety Administration ("NHTSA"). To avoid any interference with NHTSA's balancing of the competing goals of EPCA, Congress decided to preempt any state regulation "related to [the] fuel economy standards" set by NHTSA. (FAC ¶¶ 35, 41-46; *see* pp 24-27 below.) The preemption provision in the 1975 Act states:

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

49 U.S.C. § 32919(a).

The above-quoted text is central to plaintiffs' main claims in this case. As stated in the Complaint, the fuel economy standards adopted and enforced by the federal government under EPCA rely primarily on measurements of carbon dioxide. (FAC ¶ 45.) The CARB regulations adopted in 2004 are similarly expressed as "carbon dioxide equivalent" (or "CO2e") standards, and rely on the some federal test measures of CO2 used to measure fuel economy. (*Id.* ¶ 72.) For gasoline-powered vehicles, the difference between measuring fuel economy and CO2 is like the difference between measuring temperature in degrees Fahrenheit or Centigrade.

The first claim that plaintiffs advance under EPCA is thus that the CARB regulation is a *de facto* fuel economy standard. A *de facto* fuel economy standard certainly is "related to fuel economy standards" for purposes of the above-quoted text, and thus should be found to be expressly preempted under the 1975 Act. (FAC ¶ 4, 41-46, 113.)

Plaintiffs also allege and are prepared to prove that in addition to being expressly preempted, the CARB regulation is also subject to implied preemption. (FAC ¶¶ 41-46, 114-115.) The well-settled rules of implied preemption forbid the operation of a state law or regulation that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"

Hines v. Davidowitz, 312 U.S. 52, 47 (1941), or intrudes upon a field of regulation fully occupied by the federal government. *City of Burbank v. Lockheed Air Terminal Inc*., 411 U.S. 861, 873 (1973).

Federal courts consider issues of implied preemption in any case in which such preemption is properly alleged as an alternative to express preemption. *See Geier v. Am. Honda Co.*, 529 U.S. 861, 873 (2000) (finding implied conflict preemption in case where statutory text did not completely bar state action in the relevant field of regulation). To establish implied preemption it is sufficient to show either that a state law or regulation conflicts with a federal statute or regulatory program, or that the state has impermissibly intruded into a field reserved for national action. Both "conflict" and "field" preemption need not be shown in the same case in order to invalidate the States' action; either form of implied preemption is sufficient by itself. *See, e.g., English v. General Elec. Co*., 496 U.S. 72, 79-80 (1990).

The evidence at trial will show not only that CARB's regulation is expressly preempted, but also that the regulation acutely interferes with the federal fuel economy standards established under EPCA. As stated in the Complaint, the CARB rule will "restrict or eliminate the sale of some types of vehicles in California," force many types of full-size cars and trucks to "disappear from the new-vehicle market in California," produce "drastic changes" in some local automotive retail businesses, and strain the economic resources of the industry as a whole. (FAC ¶¶ 77, 84, 104.) Each of those impacts of the CARB regulation -- reduction of consumer choice, disruption of the retail market, and financial jeopardy for some of America's largest manufacturing employers -- are contrary to, and certainly conflict with, the goals and purposes of the 1975 Act. (*See* pp. 17-27 below.)

The EPCA claims in this case are contained in Count I of the First Amended Complaint. When the First Amended Complaint was filed, NHTSA was already on record expressing doubts about the legality of state regulations relating to fuel economy standards. (FAC ¶ 37.) More recently NHTSA has spoken without equivocation on the issue. In an April 2006 rulemaking notice, NHTSA declared that any state regulation of the type involved in this action "is expressly preempted [by EPCA,]" "would frustrate the objectives of Congress," and "conflict[s] with the efforts of NHTSA" to administer the national fuel economy program. *Average Fuel Economy Standards for Light Trucks -- Model Years 2008-2011: Final Rule*, 71 Fed. Reg. 17566, 17654, 17667 (Apr. 6, 2006); *see* pp. 30-32 below.

D. The Present Motion

It appears that the primary purpose of the motion now before the Court is to prevent a trial that would establish the conflict between CARB's regulation and federal law. The principal reasons why that motion should be denied with respect to Count I of the First Amended Complaint are outlined below. The main body of this Memorandum explains those reasons in full detail and also addresses defendants' theories with respect to the other claims presented in this action.

First, it should be clear that plaintiffs have no burden of proving the elements of any of their claims in response to a Rule 12(c) motion. If defendants believe they can show the evidence is too weak for trial, then they should have filed a motion for summary judgment. On a motion under Rule 12(c), the "evidentiary facts in support of a theory" for relief are not required, nor is there any mechanism on such a motion for the Court to consider them. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997). In addition, on a motion under Rule 12(c), "[a]s with Rule 12(b)(6) motions, it is immaterial whether the court believes plaintiff will succeed at trial." *See* Rutter, CAL. PRAC. GUIDE: FED. CIV. P. BEFORE TRIAL, Chap. 9-E (2006).

A Rule 12(c) motion may "only be granted when the pleadings show that it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Enron Oil Trading & Transp. Co.*, 132 F.3d at 529; *see also Living Designs, Inc. v. E.I. Dupont de Nemours*, 431 F.3d 353, 360 (9th Cir. 2005) (allegations of complaint must be "construed in the light most favorable" to plaintiffs). Accordingly, defendants must accept as true all facts alleged in the First Amended Complaint -- including the fact that the CARB rule will require significant increases in fuel economy over federal levels (FAC ¶ 77), and the evidence of impacts on consumers and the industry, (*id.* ¶¶ 77, 84, 104).

As defendants appear to admit, their motion cannot prevail unless they persuade the Court that "even if California's greenhouse gas standards have the effect on fuel economy that NHTSA and Plaintiffs say they do, ***it would not matter***."[2] Similarly, defendants would have to prove at this

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[2] *See* Defendant and Defendant-Intervenors' Memorandum of Points and Authorities in Support of Their Motion for Judgment on the Pleadings ("Deft. Memo.") at 24 ll. 16-17 (emphasis added).

It bears noting that, although seeking judgment on the pleadings, defendants advised Magistrate Judge O'Neill last year that they expect trial of this case will take 20 days, and have served massive (Continued…)

stage that even if the evidence showed that the CARB rule would have the effects on consumers, the market and the industry that plaintiffs are prepared to prove at trial, those effects would not matter. Stated another way, defendants are obliged to prove as a legal matter that (1) there is no express preemption under EPCA, and also (2) the impacts on consumers and the industry could not establish implied preemption under EPCA.

Given the current posture of the case, and the fact that defendants have chosen to proceed under Rule 12(c), the Court can make short work of their motion. Defendants insist on a "narrow" construction of "related to" preemption clauses. They claim that there is a general "presumption against preemption." (Deft. Memo. at 19 ll. 5-10, 25-28.) For present purposes, plaintiffs need not quarrel with defendants' views on those points. It is sufficient to note that even the decisions on which defendants rely recognize that when a state regulation "acute[ly] interfere[s]" with the objectives of Congress, that regulation is preempted. *See*, *e.g.*, *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). This is plainly a case of "acute interference." Plaintiffs are prepared to prove at trial that the CARB regulation will have a devastating impact on the goals and purposes of EPCA that defendants never discuss in their opening papers -- consumer choice, competition, market flexibility and the health of the automobile industry.

Defendants' theory for dismissal of the case on purely legal grounds relies on the federal Clean Air Act. Defendants and their *amici* point out that the Clean Air Act permits CARB to regulate automotive air pollutants. (Defs' Memo. at 9-12.) About three years ago, the federal agency that administers the Clean Air Act (the U.S. Environmental Protection Agency, or "EPA") decided that for its part, it did not believe that Congress intended for EPA to regulate carbon dioxide as a "pollutant" under the Clean Air Act. (FAC ¶ 48.) That decision by EPA is still in litigation and is now headed for the U.S. Supreme Court.[3] Defendants presumably hope that the Supreme Court

discovery requests and more than a dozen expert reports on plaintiffs. Plaintiffs have produced more than an estimated two million pages in response to those discovery requests, even though they believe that the factual issues here can be resolved mainly by the testimony of experts. Based on the expert reports exchanged by the parties, plaintiffs believe this case can be tried in far less time than estimated by defendants.

[3] *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted* 126 S. Ct. 2690 (2006).

will direct EPA to regulate CO2 as a pollutant, and assume that this will open the way to state regulation in the same arena.

Plaintiffs are prepared to assume for purposes of this motion that it is possible (if unlikely) that the Supreme Court in *Massachusetts v. EPA* will decide that the Clean Air Act permits EPA to promulgate ***some type*** of greenhouse gas or CO2 regulation. Under the implied preemption rubric, however, the question presented here in this Court is whether ***this specific*** greenhouse gas regulation violates federal law, by interfering with the goals and purposes of EPCA. The evidence of implied preemption based on the particular regulation challenged here will obviously not be in front of the Supreme Court. Whatever may happen in the Supreme Court, the specific preemption issues presented here will not be decided in Washington.

The question that defendants are really asking this Court to decide now -- and it is a question that will not be before the Supreme Court -- is whether ***any*** regulation that CARB might adopt must be considered immune from any scrutiny under EPCA, assuming the CARB rule regulates some type of emission under the Clean Air Act. Stated another way, defendants want this Court to hold as a matter of law that a waiver of Clean Air Act preemption by EPA always and irrevocably "trumps" any preemptive intent of Congress expressed in EPCA. If ***any*** regulation under the Clean Air Act is lawful, notwithstanding EPCA, then ***no*** regulation would be preempted by EPCA, provided it was adopted under color of the Clean Air Act. Defendants are thus seeking a declaration that the Clean Air Act impliedly repeals the preemption term in EPCA, because there is nothing in the Clean Air Act that does so explicitly.

The result that defendants seek is extraordinary. Federal courts "are not at liberty to pick and choose among congressional enactments." *Morton v Mancari*, 417 U.S. 535, 551 (1974). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* It would be fair to expect defendants to have offered a full analysis of the relevant text and structure of EPCA and its legislative history, as well as a complete treatment of the administrative and judicial implementation of the goals of the 1975 Act. Legislative intent is the "touchstone" of preemption. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963); *see also Air Conditioning & Refrigeration Inst. v. Energy Resources Cons. & Dev't Comm'n*, 410 F.3d 492, 498 (9th Cir. 2005) (interpreting an EPCA

1 preemption provision regarding the labeling of appliances in light of "'a fair understanding of
2 congressional purpose' as evidenced by the relevant legislative history").
3 Instead, defendants and their *amici* choose to operate in the type of "contextual vacuum"
4 disapproved by the Supreme Court. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The only
5 provision in the 1975 Act that receives their attention is a single provision that gives NHTSA the
6 ability to change fuel economy standards in response to other regulations -- which is a far cry from
7 giving a State the power to set its own *de facto* fuel economy standards, regardless of the effect on
8 the other factors that NHTSA is required to consider *in the same subsection of the statute*. (*See* p. 18
9 below.) If defendants are correct in their analysis of the one term in EPCA they choose to discuss,
10 any rule adopted by CARB would be exempt from preemption, even if it violated longstanding
11 views of "economic practicability" established under EPCA. The intent of Congress in requiring
12 "economic practicability," and the concrete steps taken to meet that requirement in the federal
13 program, find no place in defendants' analysis -- nor could they, because even a limited examination
14 of the nuanced goals of EPCA would scuttle their motion.
15 At the end of the day, there is simply nothing in EPCA or the Clean Air Act, much less a
16 "clearly expressed congressional intention," indicating that Congress wished to impliedly repeal the
17 preemption provision of EPCA for any regulation that any state (including California) might adopt
18 under color of the Clean Air Act. *Morton*, 417 U.S. at 551. Indeed, as the phrase itself suggests, a
19 ***clear*** expression establishing ***implied*** repeal is an oxymoron, something that Congress would not
20 likely do, and a step that Congress did not take in the statutes relevant here. California and other
21 States remain free to regulate a wide array of motor vehicle emissions under the Clean Air Act. But
22 the 1975 Act provides that a limited subset of such state regulations -- those that are "related to fuel
23 economy standards" -- are off limits, particularly when such rules have practical consequences for
24 the public and the regulated parties as severe as those which plaintiffs have alleged in their
25 complaint and are prepared to prove at trial.

* * * * *

26 The balance of this response to the lengthy papers filed by defendants and their *amici* is
27 divided into two parts. Part I presents the pertinent legislative analysis of the federal Clean Air Act
28 and EPCA. This is necessary in order to explain how Congress "intended the statute[s] and [their]

surrounding regulatory scheme[s] to affect business, consumers and the law." *Medtronic*, 518 U.S. at 486. Part II then applies the legislative analysis contained in Part I to the legal arguments in the papers from defendants and their *amici* with respect to each Count in the Complaint.

I. The Federal Statutory Framework And The California Regulation

Defendants and their *amici* correctly state that in preemption cases, the federal "courts must be guided by congressional purpose."[4] This makes it essential to examine the text, structure, evolution and prior interpretations of the relevant statutes by the courts and agencies. The analysis can start with the Clean Air Act, whose current provisions find their antecedents in a period before the enactment of the fuel economy law.

A. The Clean Air Act

Two important points emerge from a careful examination of the Clean Air Act, and Congress' treatment of carbon dioxide and global climate issues under the Clean Air Act. The first is that Congress intended for mobile source emissions regulations to be primarily focused on smog and other substances that are harmful to breathe. The second is that when the issue of climate change emerged as a public concern, well after the principal text of the Clean Air Act had been written, later Congresses appreciated the problem of climate change for what it was -- a global issue, requiring an international focus.

1. The Regulation of Mobile Sources under the Clean Air Act

The early history of the federal Clean Air Act relevant to this case is conveniently summarized in *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987). As Judge O'Scannlain there explained:

> Federal involvement in the regulation of air pollution began in 1955, with the passage of the Air Pollution Control Act. … The purpose of that legislation was to provide financial and technical assistance to the states in an effort to define and suggest solutions to the growing problem of air pollution. In 1963 Congress expanded its role with the enactment of the Clean Air Act ("CAA" or "Act")…. The 1963 legislation directed the then-designated Department of Health, Education & Welfare to prepare "criteria documents" on the effects of several air pollutants, and to distribute these

[4] *See* Memorandum of Points and Authorities of Behalf of *Amici* the States of New York, Connecticut, Maine, New Jersey, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts and the City of New York in Support of Defendants' Motion for Judgment on the Pleadings ("*Amici* Memo.") at 21 l.5.

> documents among the states. The states were slow to act, however, and the Clean Air Act Amendments of 1970 reflected congressional impatience by increasing the federal role in air quality management.

Id. at 1073 (citations omitted). The purpose of the Clean Air Act was thus to ensure that States would each individually address the air pollution problems that existed within their borders or regions, the premise being that the States were the proper political institutions to address such problems.

Congress directed the U.S. Environmental Protection Agency ("EPA") to establish "National Ambient Air Quality Standards" (or "NAAQS") that had to be met within each State and region of the country. *See* 42 U.S.C. § 7409. The standards would be used to define the geographical "problem areas" for air pollution, where residents were breathing unhealthful levels of smog, carbon monoxide, and other dangerous substances. *See* S. Rep. No. 90-403, at 3-4 (1967) (Exhibit A). With those "problem areas" identified, the States were expected to prepare and implement "State Implementation Plans" (or "SIPs") until Title I of the Clean Air Act that would bring themselves into compliance with the NAAQSs. *See Union Elec. Co. v. EPA*, 427 U.S. 246 (1976).

For the most part, the SIPs written by individual States focus on local sources of pollution, such as factories or power plants in a given State. Congress recognized that automobiles, which are typically assembled in one or two plants and then shipped nationwide, were also important sources of pollution. As one House Committee explained:

> Air sampling studies over the last several years leave no doubt that automotive smog is occurring with increasing severity in urban areas throughout the United States…. Every automobile gives off, in addition to carbon dioxide, numerous unburned hydrocarbons, oxides of nitrogen, and traces of other substances. As these byproducts of the operation of automobiles become concentrated in the atmosphere, they are acted upon by sunlight, leading to the formation of ozone (a highly poisonous variety of oxygen), and automotive smog, which has serious adverse effects upon the health of persons exposed to it.

See H.R. Rep. No. 89-899, at 4 (1965) (Exhibit B). Based on the industry's "willingness to accept legislation which would establish national standards," Congress therefore decided to require national control of motor vehicle emissions in order to assist the States in meeting the national air quality standards within their borders. *See* S. Rep. No. 89-192, at 8 (1965) (Exhibit C).

While the regulation of the automobile was national in scope, the principal problems it was intended to address were still local or regional -- and no more so than in California. A Senate Report

stated, with particular reference to southern California, "The acute smog problem in Metropolitan Los Angeles forced the control of exhaust carbon monoxide and hydrocarbons and crankcase emissions." S. Rep. No 89-192, at 5 (1965) (Exhibit C). By the time the federal government had begun regulation of automotive air pollution, the State of California (and even earlier, various governmental bodies in the greater Los Angeles area) had established limited controls on smog-forming emissions from motor vehicles.

Given the unique pollution issues presented in Los Angeles, Congress understood that there were grounds to allow California to have its own automotive air pollution regulations. As stated in one Senate Report:

> It is true that, in the 15 years that auto emissions have been debated and discussed, only the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need be more stringent than national standards.

S. Rep. 90-403, at 33 (1967) (Exhibit A). To the same effect, a House Report noted that a special provision was needed for California "in recognition of the unique problems faced by California as a result of its climate and topography." H.R. Rep. No. 90-728, at 22 (1967) (Exhibit D). As California Senator Murphy stated the problem colloquially:

> I pointed out in the hearings in Washington … that we in Los Angeles stopped all the backyard burning, we thought that would help a great deal, and the smog got worse. There isn't any question but what the main source is from the emission of pollutants from the exhausts of automobiles, of which we have a great number.

Problems and Progress Associated with Control of Automobile Exhaust Emissions: Hearing Before the Subcomm. on Air and Water Pollution of the S. Comm. on Public Works, 90th Cong. 4 (1967) ("1967 Hearings") (Exhibit E) (Statement of Sen. Murphy, Member, Sen. Comm. on Public Works). Unlike those "pollutants from the exhausts of automobiles," automotive carbon dioxide was treated as a "harmless byproduct" of the combustion process, in which an engine's harmful exhaust would be reduced by a catalytic converter to CO2 and water.[5]

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[5] *See Chrysler Corp. v. EPA*, 631 F.2d 865, 869 (D.C. Cir. 1980) ("A catalytic converter can reduce carbon monoxide emissions by 60-80 percent by promoting a chemical reaction among the carbon monoxide, hydrocarbons, and oxygen. This reaction produces two harmless byproducts, [CO2] and water.")

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Congress also recognized that it would be inefficient to require consumers nationwide to purchase cars equipped with the smog-fighting hardware needed in California. A House Report warned that if the industry simply built a 50-State vehicle that would meet the most stringent standards anywhere, "this would lead to increased costs to consumers nationwide, with benefit only to those in one section of the country." H.R. Rep. No. 90-728, at 22 (1967) (Exhibit D). The solution to the problem of how to address the unique air pollution problems of this State was the "California waiver" provision, added to Title II of the Clean Air Act in 1967.

Prior to the addition of the "California waiver" provision, questions had arisen about the authority of California to continue separate regulation once federal controls were in effect. The Senate Committee in charge of the matter explained the solution in this manner:

> On the question of preemption, representatives of the State of California were clearly opposed to displacing that State's right to set more stringent standards to meet peculiar conditions. The auto industry conversely was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry. …The committee has taken cognizance of both these points of view. Senator Murphy convinced the committee that California's unique problems and pioneering efforts justified a waiver of the preemption section to the State of California.

S. Rep. 90-403, at 33 (1967) (Exhibit A). The result was contained in what is now section 209 of the Clean Air Act. Section 209(a) generally preempts state regulation of motor vehicle emissions. *See* 42 U.S.C. § 7543(a). Section 209(b) permits EPA to waive the preemption that would otherwise occur "under this section" for rules adopted by the State of California that met specified criteria for approval, including a demonstration of "compelling and extraordinary" need for regulation in California separate from the nation as a whole. *Id.* § 7543(b).[6]

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[6] The Senate Committee responsible for the California waiver provision also noted that while only California had demonstrated the need for its own vehicle control rules, "This situation may change. Other regions of the Nation may develop air pollution situations related to automotive emissions which will require standards different from those applicable nationally." *See* S. Rep. No. 90-403, at 33 (1967) (Exhibit A). The Committee's Report identified four types of emissions of concern: "(a) Hydrocarbons and carbon monoxide in exhaust from all new vehicles; (b) Nitrogen oxides emissions in exhausts from all new vehicles; (c) Odors from new diesel-powered vehicles; [and] (d) Particulates from all new vehicles including smoke and the residues of additives such as lead, barium, and nickel." *Id.* at 32. Notably, the Senate Committee's list of pollutants of concern included substances emitted from vehicles that were poisonous, formed urban or regional ozone, or that were offensive in localized areas, such as diesel odors -- in New York, for example, the concern was carbon monoxide, just as in California, it was smog. 1967 Hearings, at 107 (Statement of Dean (Continued…)

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2. Congressional Treatment of Carbon Dioxide and Global Climate Issues

The problem presented by carbon dioxide emissions from motor vehicles and other sources is not their impact on local or regional air quality -- which is the purview of the Clean Air Act -- but their impact on the greenhouse effect. Congress has recognized that unlike smog and other similar air pollutants, the issue of greenhouse gases cannot be addressed solely at a state or even a national level. When it last amended the Clean Air Act in 1990, for example, Congress considered and rejected amendments to Title II that would have directed EPA to institute CO2 standards for vehicles sold in the United States starting in model year 1996. S. Rep. No. 101-228, at 98 (1989) (Exhibit F).

Taking a broader approach, in the Global Climate Protection Act of 1987 Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change. *See* 22 U.S.C. § 2651 note. Pursuant to that law, EPA and the State Department sent a report to Congress in the early 1990's, stressing the global nature of the climate change problem and calling for "international consensus" and a "comprehensive" approach to "addressing potential climate change." H.R. Rep. No. 107-57, 2001 WL 470730, at *133 (2001).

President George H. W. Bush took the first step towards developing that international consensus by signing the United Nations Framework Convention on Climate Change (the "UNFCCC"), which was ratified by the Senate in 1992. Sen. Exec. Doc. No. 102-55, at 9 (1992). The UNFCCC recognized that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." The treaty established a framework for international cooperation in an effort to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." UNFCCC, art 2. Through the UNFCCC, the parties undertook to review their own national policies on greenhouse gases and to work together to negotiate future, binding commitments by which the nations of the world would agree to reduce greenhouse gas emissions. See UNFCC, art. 4.1, 4.1(b), (f), 4.2, 31 I.L.M. 849, 855-56 (May 9, 1992).

Cotson, Deputy Undersecretary Of Health, Education, and Welfare) (Exhibit E). The problems were regional or local contaminants.

The United States and other members of the UNFCCC worked to develop this multilateral framework through the Kyoto Protocols to the UNFCCC. While the Kyoto Protocol was being negotiated in 1997, the Senate adopted by a 95-0 vote the Byrd-Hagel Resolution, which stated that the United States should not sign any protocol that would mandate new commitments to reduce U.S. greenhouse gas emissions unless the Protocol also mandated new commitments from developing countries as well. *See* S. Res. 98, S. Rep. No. 105-54 (1997) (Exhibit G). Because the final draft of the Protocols provided only for reductions in emissions from developed countries, President Clinton did not submit the Kyoto treaty to the Senate for ratification. *See* 144 Cong. Rec. S3240-04, 1998 WL 183270 (Apr. 20, 1998) (statement of Sen. Hagel) (quoting Undersecretary of State Stuart Eizenstat: "We have no intention through the back door or anything else, without Senate confirmation, of trying to impose or take any steps to impose what would be binding restrictions on our companies, on our industry, on our business, on our agriculture, on our commerce, or on our country until and unless the Senate of the United States says so.").

In subsequent statutes, Congress continued to express its opposition to any measure that would require the United States to reduce greenhouse gases, absent an international agreement involving both developed and developing countries. On several occasions, Congress attached riders to federal appropriation bills to prohibit the Executive Branch from using funds "to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol" without the ratification of that treaty by the Senate. *See, e.g.*, Pub. L. 105-276, 232 (1998).

3. Progress under the Clean Air Act

The automobile industry, the regulatory agencies and the other industries regulated by title II of the Clean Air Act (the oil companies, and the manufacturers of heavy-duty engines) have made enormous progress in the control of smog-forming emissions and other air pollutants since the creation of federal and state mobile-source standards. The federal Clean Air Act regulations and CARB's air pollution standards for cars, trucks and heavy-duty engines are based on the principle of "technology forcing." *See Natural Resources Defense Council v. EPA*, 655 F.2d 318, 329 (D.C. Cir. 1988). The industry has invested hundreds of millions of dollars on compliance with those standards. In the case of passenger cars and the trucks manufactured by plaintiffs and other

members of the plaintiff Alliance of Automobile Manufacturers, and plaintiff-intervenor Association of International Automobile Manufacturers, smog-forming and other pollutants in automobile exhaust have been reduced to near-zero levels.[7]

Likewise, it is important to note that progress in reducing smog-forming emissions and other pollutants that are harmful to breathe will continue regardless of the outcome of this litigation. CARB included in the regulation challenged here a "severability" provision, which provides that all California standards other than the greenhouse gas standards would be enforceable even if the greenhouse gas standards are not.[8] Similar provisions exist in the regulations adopted in the States whom *amici* claim to represent.[9]

B. The Energy Policy and Conservation Act of 1975

In contrast to its regulation of air pollutants under the Clean Air Act, Congress took a very different approach to the regulation of automotive fuel economy. Rather than assigning the task to EPA and fully endorsing the concept of "technology forcing," Congress assigned fuel economy regulation to a different agency, the Department of Transportation, and directed it to take a more measured approach. In addition, and unlike the approach taken with the "California waiver" provisions of the Clean Air Act, Congress decided to allow no opportunity for States to regulate fuel economy with separate programs.

1. Basic Provisions of the 1975 Act

Title III of EPCA directed the Secretary of Transportation to enforce nationwide fuel economy standards for automobiles beginning with the 1978 model year. The statute provided for fleet-wide average fuel economy standards that would apply to all cars or trucks sold by a manufacturer in a given year, called the "corporate average fuel economy," or "CAFE," standards.

[7] *See*, *e.g.*, Cal. Air Resources Bd., LEV II Fact Sheet, *available at* http://www.arb.ca.gov/msprog/levprog/levii/factsht.htm (explaining that a 1965 automobile produced approximately 2000 lbs. of smog forming emissions per 100,000 miles while 2010 automobiles will produce approximately 10 lbs.); EPA, Solutions that Reduce Pollution, *available at* http://www.epa.gov/otaq/invntory/overview/solutions/vech_engines.htm (noting that new automobiles produce 75-90% less pollution than 1970 models).

[8] 13 Cal. Code Regs § 1961.1(f).

[9] *See*, *e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 218-9; 310 Mass. Code Regs. 7.40(16).

Pub. L. No. 94-163, § 301, 89 Stat. 871, 902 (1975).[10]

Under the federal law, a manufacturer can produce and sell any combination of vehicles it chooses, provided its fleet-wide average fuel economy meets the applicable CAFE standard. The current CAFE standards are 27.5 miles per gallon ("mpg") for passenger automobiles and 20.7 mpg for trucks. Manufacturers that fail to comply with the CAFE standards must pay civil penalties. Since 1978, NHTSA has collected more than $500 million for violations of the CAFE standards (far more than for Safety Act violations). (*See* FAC ¶ 43.)

The corporate averaging approach was critical to the goals of EPCA. Congress sought significant fuel economy increases through "a series of graduated mileage requirements" that would "ensure wide consumer choice by leaving maximum flexibility to the manufacturer" in deciding how to meet the specified CAFE levels.[11] The authors of the 1975 Act emphasized that CAFE standards had to "be carefully drafted" in order to improve fuel economy without "unduly limiting consumer choice." H.R. Rep. No. 94-340, at 87 (1975) (Exhibit H).

When setting or revising CAFE standards, NHTSA must specify "maximum feasible average" standards, and in doing so "consider[s] technological feasibility, economic practicability, the effect of other standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). From the beginning of the work on EPCA, Congress was concerned about the impact of fuel economy regulation on the resources of the automobile industry. In the debate on the 1975 Act, Rep. Phil Sharp, one of the sponsors of the House fuel economy provisions, made clear that preserving the health of the industry was one of "several goals" of the CAFE legislation:

> It is a problem all of us have struggled with ... as to how far we can go without damaging the industry, because we have several goals we are trying to achieve. The first goal is energy savings. At the same time, we recognize that we have serious unemployment in the American auto industry and we want to preserve this important segment of the economy.

121 Cong. Rec. 18675 (June 12, 1975).

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[10] The Secretary delegated his EPCA functions to NHTSA. 49 C.F.R. § 1.50(f).

[11] *Center for Auto Safety v. NHTSA*, 847 F.2d 843, 863-64 (D.C. Cir.) (separate opinion of Buckley, J.), *vacated on unrelated grounds*, 856 F.2d 1557 (1988) (quoting S. Rep. No. 179, 94th Cong., 1st Sess. (1975)) (internal quotation marks omitted).

In its report on the fuel economy provisions in 1975, the House Commerce Committee also emphasized the competing goals of the legislation. On the one hand, the Committee deemed it necessary to mandate fuel economy improvements instead of accepting voluntary standards, which was the approach supported by then-President Ford and the automobile industry. "At the same time, the Committee recognizes that the automobile industry has a central role in our national economy and that any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to capacity and performance of motor vehicles." H.R. Rep. No. 94-340, at 87 (1975) (Exhibit H).

The Senate Conference report on EPCA also emphasized the balancing character of the judgment to be made in determining the "maximum feasible" level for standards. Although the determination "should not be keyed to the single manufacturer which might have the most difficulty achieving a given level of average fuel economy," such difficulties "should be given appropriate weight in setting the standard in light of the small number of domestic automobile manufacturers that currently exist, and the possible implication for the national economy and the reduced competition associat[ed] with a severe strain on any manufacturer." S. Rep. No. 94-516, at 155 (1975) (Conf. Rep.) (Exhibit J). The Conference Report directed "the Secretary [to] weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers." *Id.*[12]

2. NHTSA's Implementation of the Congressional Balance Required by EPCA

NHTSA has heeded the instructions of Congress, and has acted numerous times since the adoption of the 1975 Act to moderate the federal fuel economy standards. Like the text and

[12] Other features of the fuel economy statute reflect a similarly cautious approach. For example, the CAFE standard applicable to cars produced in MY 1985 and later years cannot be increased above 27.5 mpg, even if NHTSA determines the "maximum feasible" level is higher, unless it is first submitted to Congress for review and possible disapproval. 49 U.S.C. § 32902(c)(2). The statute also provides for judicial review thereafter. *Id.* § 32909(a). Amendments relaxing the standard, by contrast, do not require Congressional review unless they lower the standard by more than 1.5 mpg. *Id.* § 32902(c)(2). Similarly, amendments that make a CAFE standard *more stringent* must be adopted at least 18 months before the beginning of the model year to which the standard applies, while amendments making a standard *less stringent* are not subject to any statutory lead-time requirement. *See* 49 U.S.C. § 32902(g)(2).

legislative history of EPCA, the steps taken by NHTSA to implement the statute and the subsequent review of these measures in the federal courts are relevant in establishing the parameters for the preemption analysis needed in this case. *See United States v. Locke*, 529 U.S. 89, 110 (2000); *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005); *Lopez v. Washington Mut. Bank, FA*, 302 F.3d 900, 906 (9th Cir. 2002).

At the beginning of the 1980s, gasoline prices in the U.S. started to fall. This caused a major shift in consumer demand for different types of vehicles, and increased demand for larger, more powerful vehicles. One result was that several large manufacturers were unable to meet the CAFE standards. Accordingly, in November 1983, Ford Motor Company ("Ford") petitioned NHTSA to reduce the light truck CAFE standards for MY 1984-85. Ford explained that it had applied all the fuel economy technologies contemplated by NHTSA in setting these standards, but still could not meet the levels previously projected by NHTSA. NHTSA granted Ford's petition and relaxed the CAFE standard for some model year ("MY") 1985 vehicles. *Light Truck Average Fuel Economy Standards*, 49 Fed. Reg. 41250 (Oct. 22, 1984).

NHTSA's action on the Ford petition was challenged in the U.S. Court of Appeals for the District of Columbia Circuit, and affirmed. *See Center for Auto Safety v. NHTSA*, 793 F.2d 1322 (D.C. Cir. 1986). The petitioners' main argument was that the statute did not allow NHTSA to take consumer demand into account in setting CAFE standards. The Court concluded that neither the statute nor the legislative history clearly addressed the issue. As a result, the Court had to determine "whether the agency's interpretation represents a reasonable accommodation of the policies embodied in the statute." *Id.* at 1340. The Court thought "it would clearly be impermissible to rely on consumer demand to such an extent that it ignored the overarching goal of fuel conservation." *Id.* On the other hand, the Court recognized, "a standard with harsh economic consequences for the auto industry also would represent an unreasonable balancing of EPCA's policies." *Id.* Ultimately, the Court found that NHTSA "ha[d] reasonably balanced the competing policies of the statute in the rulemakings at issue." *Id.*

In March 1985, while the D.C. Circuit litigation concerning the 1983 Ford petition was still pending, General Motors Corporation ("GM") and Ford filed additional petitions asking NHTSA to

lower the passenger car CAFE standards for 1986 and later years. After an initial round of public comment, NHTSA proposed to lower the MY 1986 car standard to 26.0 mpg and sought further comment. *Passenger Automobile Average Fuel Economy Standards,* 50 Fed. Reg. 29912 (July 22, 1985). In October 1985, NHTSA published its final decision relaxing the MY 1986 car CAFE standard to 26.0 mpg. *Passenger Automobile Average Fuel Economy Standards*, 50 Fed. Reg. 40528 (Oct. 4, 1985). NHTSA concluded that GM and Ford had "sufficient plans to meet the 27.5 mpg standard and made significant progress toward doing so, [but] were prevented from fully implementing those plans by unforeseen events." *Id.* at 40533.

In June 1988, the court of appeals affirmed NHTSA's decision to relax the MY 1986 car CAFE standard. *See Public Citizen v. NHTSA*, 848 F.2d 256 (D.C. Cir. 1988). Then-Circuit Judge Ruth Bader Ginsburg found that NHTSA's "consideration of the likelihood of economic hardship within its assessment of 'economic practicability,' must be given due weight." *Id.* at 264-65. NHTSA had concluded that the industry-wide economic effects of the standard, if not relaxed, "would be severe." *Id.* at 265. Given that Congress had "'specifically delegated the process of setting ... fuel economy standards with broad guidelines concerning the factors that the agency must consider," the Court of Appeals found NHTSA's decision to be a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* (internal quotations and citations omitted).

As demand for larger vehicles continued to increase in the mid-1980s, NHTSA took a further look at the standards, and decided to lower the MY 1987 and 1988 passenger car CAFE standards. The agency concluded that GM and Ford had sufficient plans to meet the standards but their plans were overtaken by unforeseen changes in consumer demand. As a result, NHTSA concluded, the only actions then available to GM and Ford to raise their MY 1987-88 fuel economy levels significantly would involve "product restrictions [which] would result in sales losses well into the hundreds of thousands of units and job losses into the tens of thousands." *Passenger Automobile Average Fuel Economy Standards*, 51 Fed. Reg. 35594, 35615 (Oct. 6, 1986). That decision was also contested in the D.C. Circuit, and the decision of the agency to moderate the standards was

affirmed. *See City of Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990).[13]

More recently, NHTSA has made significant changes in the CAFE standards applicable to trucks, in order to increase the stringency of the regulations while remaining true to the other goals that Congress established in EPCA. In each of the last seven years, NHTSA has raised the truck CAFE standards, applicable for model years 2005 to 2011, at an estimated cost of about $8 billion. *See Light Truck Average Fuel Economy Standards Model Years 2005-2007*, 68 Fed. Reg. 16868, 16885 (Apr. 7, 2003); *Average Fuel Economy Standards for Light Trucks -- Model Years 2008-2011: Final Rule*, 71 Fed. Reg. 17566, 17622 (Apr. 6, 2006). In the last incremental increase, adopted in April 2006 and applicable through model year 2011, NHTSA determined that it needed to account of the strained financial condition of some vehicle manufacturers by giving them greater compliance flexibility. *See* 71 Fed. Reg. At 17574.

To understand this latest change, and its significance for this litigation, some technical background is necessary. The fuel economy of a motor vehicle is strongly related to its mass. Compared to lighter-weight vehicles, heavier vehicles need more horsepower, and more energy, to travel any given distance. National Academy of Sciences, EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS 24 (2002). Prior to NHTSA's recent amendment of the CAFE standards for trucks, the agency's truck fuel economy standards had specified the same fuel economy levels for trucks regardless of their weight or size. This meant that manufacturers who produced heavier, larger trucks had to meet the same fuel economy targets as manufacturers with smaller, lighter-weight truck fleets. A study by the National Academy of

[13] These are only a few of the many cases in the D.C. Circuit that have tested NHTSA's implementation of the nuanced goals of EPCA. *See*, *e.g.*, *Competitive Enterprise Institute v. NHTSA*, 45 F.3d 481 (D.C. Cir. 1995); *Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992); *Mercedes-Benz of North America, Inc. v. NHTSA*, 938 F.2d 294 (D.C. Cir. 1991); *City of Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990); *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990); *General Motors Corp. v. NHTSA*, 898 F.2d 165 (D.C. Cir. 1990); *Center for Auto Safety v. Thomas*, 806 F.2d 1071 (D.C. Cir.), *aff'd by an equally divided en banc court*, 847 F.2d 843 (D.C. Cir.) (*en banc*), *vacated*, 856 F.2d 1557 (D.C. Cir. 1988) (*en banc*); *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985); *Center for Auto Safety v. NHTSA*, 710 F.2d 842 (D.C. Cir. 1983); *Center for Auto Safety v. Claybrook*, 627 F.2d 346 (D.C. Cir. 1980). Each time NHTSA decided to relax the CAFE standards to account for "economic practicability," the agency was affirmed.

Sciences ("NAS") in 2002 had studied the "differential or disparate impacts .. inherent in a regulatory standard that sets the same performance measure for manufacturers regardless of the different types of vehicles they produce." *Id.* at 20. The NAS panel recommended that NHTSA consider reforms, in order to account for differences in various types of vehicles. *Id.* at 114

In its April 2006 rulemaking, NHTSA reexamined its instructions from Congress to maintain flexibility and protect the automobile industry from undue strain, in light of the NAS report. NHTSA identified the limits of what the domestic industry could be expected to accomplish in trying to meet more stringent CAFE standards under the old, unitary standards for trucks:

> Two of the larger, full-line light-truck manufacturers, General Motors and Ford, have reported serious financial difficulties. The investment community has downgraded the bonds of both companies. Further, both companies have announced significant layoffs and other actions to improve their financial condition. While these financial problems did not give rise to the Administration's CAFE reform initiative, the financial risks now faced by these companies, including their workers and suppliers, underscore the importance to full-line vehicle manufacturers of establishing an equitable CAFE regulatory framework.

71 Fed. Reg. at 17574. NHTSA proposed to adopt new standards for trucks that would be based on the size (and, by extension, the weight) of the vehicles. This meant that each manufacturer in the truck market would have to comply with standards based on its sales mix of trucks of various sizes and weights, rather than a single standard applicable to all manufacturers regardless of their sales mix. NHTSA explained the change as more equitable and market oriented:

> Instead of requiring a uniform level of CAFE -- which is inherently more challenging for manufacturers whose fleets have high percentages of larger vehicles to meet than for those whose product lines emphasize smaller models -- the [amended CAFE regulation] specifies fuel economy targets that vary according to vehicle [size]. [The amended regulation] is more market-oriented because it more fully respects economic conditions and consumer choice. [This] reduces the need that the agency might otherwise have to revisit previously established standards in light of changed market conditions, a difficult process that undermines regulatory certainty for the industry. In the mid-1980's, for example, the agency relaxed several [unitary] CAFE standards because fuel prices fell more than had been expected when those standards were established and, as a result, consumer demand for small vehicles with high fuel economy did not materialize as expected.

Id. at 17588, 17570. The approach taken in the April 2006 rule thus introduced a class-wide solution to what the drafters of EPCA had identified 30 years earlier as the "problem all of us have struggled

with," which was how to improve fuel economy "without damaging the industry."[14]

3. The Preemption Provisions in EPCA

Similar to their treatment of the important elements in the CAFE statute and its evolution at NHTSA and in the courts, defendants and their *amici* give short shrift to the central legal text in this proceeding, which is the preemption provision in section 32919 of EPCA, quoted on page 5 above. Indeed, they state that "EPCA's legislative history does not comment on" the preemption provision in the 1975 Act." Defs' Memo. at 18 n.7, l.28. As explained below, defendants and *amici* are hardly correct. The structure and evolution of the preemption provision in EPCA are illuminating.

Work on the fuel economy statute within Congress began shortly after the 1973 oil embargo by the Organization of Petroleum Exporting Countries, and was well under way in the First Session of the Ninety-Third Congress in 1974. It was settled early that, unlike the regulation of air pollutants under the Clean Air Act, fuel economy regulation would require a broad preemption of any state regulation, with no exceptions for any State. As one Senate Report in 1974 stated, "State or local fuel economy standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight." S. Rep. No. 93-526, at 66 (1974) (Exhibit K) (report on S. 2176).

As work on the federal fuel economy statute progressed, the specific legislative text for preemption evolved, and steadily reduced any role for the States. One bill in the Senate in 1974, S. 1883, had provided that "[a]fter the effective date of any rule that is promulgated under this title relating to minimum average fuel economy performance standards, or to fuel economy labeling or advertising, no State or political subdivision thereof may adopt or enforce any standards relating to such matters which are *inconsistent* therewith." S. Rep No. 90-179, at 45 (1975) (emphasis added);

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[14] Several States, including California, have filed a petition to review NHTSA's rule in the Ninth Circuit. Specifically, according to Attorney General Lockyer's press release on the petition, NHTSA's "rules fail to address the effects on the environment and global warming." Press Release, California Office of the Attorney General, Attorney General Lockyer Challenges Federal Fuel Standards for Failing to Increase Fuel Efficiency, Curb Global Warming Emissions (May 2, 2006), *available at* http://ag.ca.gov/newsalerts/release.php?id=1299. In light of the Attorney General's current suit against NHTSA's fuel economy standards based on global warming, it is hard to see how the defendant can assert that carbon dioxide emissions are not "related to" fuel economy standards.

see also id at 5. Preemption under a contemporaneous House bill was somewhat more strict:

> After the effective date of any standard under this part relating to average fuel economy for any automobile or any requirement under this part relating to fuel economy labeling or advertising of any new automobile, no State or political subdivision thereof may adopt or enforce any law or regulation which is applicable to such automobile and which relates to the subject matter of such Federal standard or requirement *unless such law or regulation is identical* to such Federal standard or requirement under this part.

H.R. Rep. No. 94-340, at 274 (1975) (Exhibit H) (emphasis added). Another early bill would have given the federal government the power to waive preemption under an approach that focused on negative effects on interstate commerce. Thus, the version of S. 633 introduced on February 7, 1975 provided for the adoption of more stringent rules by the States in these terms:

> (b) The Secretary may, by regulation … permit any such State or political subdivision thereof to establish standards which are more stringent than the ones under this title if the application of such State or local standards will not, through difficulties in marketing, distribution, or other factors, result in an unreasonable burden on commerce.

121 Cong. Rec. 2796-97 (Feb. 7, 1975).

Those approaches evidently left too much leeway to the States. As finally enacted, EPCA provided:

> Section 509. (a) Whenever an average fuel economy standard established under this part is in effect, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation relating to fuel economy standards or average fuel economy standards applicable to automobiles covered by such Federal standard.
>
> (b) Whenever any requirement under section 506 [i.e., the labeling provision] is in effect with respect to any automobile, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation with respect to the disclosure of fuel economy of such automobile, or of fuel cost associated with the operation of such automobile, if such law or regulation is not identical with such requirement.
>
> (c) Nothing in this section shall be construed to prevent any State or political subdivision thereof from establishing requirements with respect to fuel economy of automobiles procured for its own use.

89 Stat. at 914. Congress thus drew a clear line between rules that could affect the design or performance of new vehicles (*i.e.*, rules relating to the fuel economy standards that NHTSA was to establish) and rules concerning labels: the former were flatly impermissible under subsection (a) quoted above, and the latter would be allowed under subsection (b) so long as the State labeling rules were "identical" to the federal rules. States were given one, and only one, form of flexibility under the preemption intended by the statute -- the power to purchase more fuel-efficient vehicles as part

of fleets for their own use. The three preemption subsections in EPCA thus exemplify three different levels of preemption -- and the first subsection contains no allowances or provisos for rules related to fuel economy standards that would apply to vehicles sold to the general public. Congress thus spoke with distinctive clarity in the subsection of the EPCA preemption provision involved in this case.

Other provisions in the 1975 Act underscore the deliberateness of Congress' decision to provide for national control of vehicular fuel economy. The automotive fuel economy provisions of EPCA were contained in Part A of Title III. Part B of the same title addressed energy conservation programs for certain "covered products," including refrigerators, dishwashers, air conditioners and other major household appliances. Section 327(a) contained a preemption provision allowing the States to adopt stricter efficiency standards for these products under certain circumstances. Section 327(a) restricted State authority to adopt different efficiency standards for appliances:

> This part supersedes any State regulation insofar as such State regulation may now or hereafter provide for ... (2) any energy efficiency standard or similar requirement with respect to energy efficiency or energy use of a covered product -- (A) if there is a standard under section 325 applicable to such product and such State regulation is not identical to such standard, or (B) if there is a rule under section 323 or 324 applicable to such product and such State regulation requires testing in accordance with test procedures which are not identical to the test procedures specified in such rule.

Section 327(b) then provided:

> Notwithstanding the provisions of subsection (a), any State regulation which provides for an energy efficiency standard or similar requirement respecting energy use or energy efficiency of a covered product shall not be superseded by subsection (a) if the State prescribing such standard demonstrates and the Administrator finds, by rule that–(A) there is a substantial State or local need which is sufficient to justify such State regulation; (B) such State regulation does not unduly burden interstate commerce; and (C) if there is a Federal energy efficiency standard applicable to such product, such State regulation contains a more stringent energy efficiency standard than the corresponding Federal standard.

Section 327(c) also allowed States to establish stricter efficiency standards for their own purchases of covered products: "Notwithstanding the provisions of subsection (a), any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such State standards are more stringent than the corresponding Federal standard." In other words, when Congress wanted to allow a role for the States within the EPCA framework, it clearly knew how to do so, and could craft a particular approach for doing so

consistent with its other goals.

C. The Interface Between EPCA and the Clean Air Act

While ignoring the preemption provision in EPCA, defendants and their *amici* emphasize instead the provision of the 1975 Act that directs NHTSA to take account "the effect of other motor vehicle standards on fuel economy" when setting or revising CAFE standards. 49 U.S.C. § 32902(f). Defendants and *amici* even suggest that this provision holds the key to this case. Their reasoning is that if NHTSA is required to adjust its fuel economy standards to account for other standards adopted by other agencies -- including emissions standards adopted by California -- then Congress clearly did not intend for anything in EPCA (including the preemption provision in section 32919) to constrain what types of emissions standards California can adopt.

The function of the provision in EPCA on which defendants and their *amici* rely is the opposite of what they suggest. In 1975, Congress recognized that emissions standards set after EPCA's enactment might complicate efforts to meet the early CAFE standards. Congress therefore allowed manufacturers to seek *relaxation* of the CAFE standards corresponding to the amount of any "federal standards fuel economy reduction," including such California automotive air pollution standards as EPA authorized under section 209 of the Clean Air Act. *See* Pub. L. No. 94-163, § 301 (adding § 502(d)(2),(3)(D)), 89 Stat. 901, 904-05. That provision has since lapsed, leaving the text of EPCA directing NHTSA to account *sua sponte* for the effect of other standards on fuel economy. If, for example, CARB or EPA adopts an emissions standard to reduce pollution from motor vehicles that adds significantly to vehicle weight, or reduces available engine horsepower, NHTSA is supposed to consider whether a reduction in fuel economy standards are needed. On the other hand, if CARB or EPA adopts an emission standard that improves a vehicle's energy efficiency at the same time that it controls pollutants, then NHTSA could theoretically consider an increase in the fuel efficiency standards along with every other factor that it must consider. In either event, NHTSA makes the final determination after balancing *all* of the congressionally mandated factors.

Nothing in the Congressional design suggests, however, that the intent of section 32902(f) or its predecessor in EPCA was intended to repeal the preemption provision in the 1975 Act whenever California chooses to regulate automotive emissions. If defendants and their *amici* were correct, California could write any motor vehicle standard that it chose -- even one that NHTSA would find

under the same subsection of EPCA not to be "technological[ly] feasib[le]" or not "economical[ly] practicab[le]," *see* 49 U.S.C. § 32902(f) -- and it could go into effect, even if the rule would gravely impact employment in the automobile industry in this country or severely restrict consumer choice (which are two effects of the CARB rule that the dealer plaintiffs and manufacturers will be prepared to prove at trial).[15] The balance struck by Congress among competing goals for EPCA would be irrevocably compromised, as evidence here will demonstrate, and as NHTSA has already found.

Defendants also claim that California's ability to adopt air pollution regulations under the Clean Air Act, whose history is traced above (*see* pp. 11-14), demonstrates a Congressional intent to waive EPCA preemption for any rule adopted by the State that wins approval from EPA under the Clean Air Act. It is therefore important to look at the relevant text of the Clean Air Act and the judicial precedent that governs its interpretation.

First, in section 209(a) of the Clean Air Act, Congress generally preempted state regulation of motor vehicle emissions. Section 209(a) provides as follows:

> (a) Prohibition. No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or a) Prohibition

42 U.S.C. § 7543(a). Then, in section 209(b), the Clean Air Act creates the provision that allows California to avoid the preemption that would otherwise apply. Section 209(b) states:

> (b) Waiver. (1) The Administrator shall, after notice and opportunity for public hearing, waive application ***of this section*** to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that--
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and

[15] The relevant evidence of how the CARB regulation will affect the dealer and manufacturer plaintiffs includes evidence on how the regulation would affect competition in the automobile industry. One plaintiff in this action, the Alliance of Automobile Manufacturers ("the Alliance"), is a membership organization that includes a number of different manufacturers and does not take positions on competitive issues in the industry. The pertinent evidence will be offered by plaintiffs other than the Alliance.

extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.

42 U.S.C. § 7543(b) (emphasis added).

Congress thus provided in section 209(b) for EPA to waive application of "this section" of federal law -- *i.e.*, the preemption term in section 209(a) quoted above.[16] But it did not instruct EPA to consider whether the California regulation would interfere with any other federal law, such as EPCA. It was decided more than 25 years ago that under section 209(b), EPA had no duty to decide whether a given CARB regulation submitted to it for review met any criteria under federal law, other than those specifically enumerated in section 209(b)(1). *See Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1114-19 (D.C. Cir. 1979) *("MEMA*").

Outside this litigation, the State has seized upon the *MEMA* decision to limit the scope of EPA's review of its regulations, specifically with respect to EPCA. As the CARB Executive Officer stated in one EPA waiver proceeding in 2002:

> EPCA is administered not by U.S. EPA but by the National Highway Traffic Safety Administration (NHTSA). Arguments raising constitutional clams and preemption issues not involving the [Clean Air Act] are *beyond the scope of the Administrator's review* and a waiver or scope-of-the-waiver proceeding is *not the proper forum* for such claims.

See Letter from Alan C. Lloyd, CARB Chairman, to Christine Todd Whitman, U.S. EPA Administrator (May 21, 2002) (Exhibit N).

Under such a view of the federal statutes, any rule adopted by California -- regardless of its impact on the balance of factors that Congress created in EPCA -- could take full effect without any "up-or-down" review by either NHTSA or EPA. The emissions standards adopted by CARB could drive the national fuel economy levels (and consumer choice, along with automobile industry employment) in any direction chosen by the State. Equally to the point for this case, those standards could take effect without any judicial review of their impact on the operation of, or goals for, EPCA.

Defendants' view of federal law, which gives breathtaking power to the State regardless of the impact of an emissions regulation on the purposes of EPCA, has drawn the attention of the

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[16] Congress took the same approach in section 177, which waives Clean Air Act preemption for states adopting California's standards. Specifically, Congress provided that states could adopt California's standards "[n]otwithstanding section 209(a)."

agency in charge of EPCA's administration. In the April 2006 *Federal Register* notice adopting new truck fuel economy standards, NHTSA explained how the preemption provisions of EPCA and California's longstanding ability to set emissions standards for air pollutants are properly reconciled. *See* 71 Fed. Reg. at 17566-67.

NHTSA began its analysis by acknowledging that California and other States have permission under the Clean Air Act to regulate automotive emissions that form air pollution.[17] NHTSA noted in particular that the States have for many years regulated smog-forming emissions from motor vehicles, which can be controlled with devices such as catalytic converters. NHTSA found no conflict between adoption and enforcement of standards for smog-forming emissions and the preemption provisions of EPCA because compliance with those standards would "only incidentally or tangentially affect fuel economy." *See* 71 Fed. Reg. at 17699. NHTSA distinguished such standards from a state CO2 standard that has "essentially all of the effects of a fuel economy standard, but is not labeled as one." *Id.* NHTSA concluded that "[t]he Clean Air Act authorizes the States to regulate emissions other than CO2, but not CO2 itself." *Id.* at 17670. The pertinent text of NHTSA's analysis is worth quoting *in extenso*. NHTSA began with the interpretation of the statutes suggested by the movants in this case. NHTSA then opined:

> Such a reading would upset the carefully calibrated CAFE regulatory program under which NHTSA is [charged] with setting CAFE standards at the maximum feasible level, taking care neither to set them too high nor too low. … Congress was aware that setting overly stringent standards would excessively reduce consumer choice about vehicle design and performance and threaten adverse economic consequences.…
>
> NHTSA does not interpret EPCA's express preemption provision as preempting State emissions standards that only incidentally or tangentially affect fuel economy. … NHTSA considers such standards under [section 32902 of EPCA] since, under applicable law, they can be adopted and enforced and therefore can have an effect on

[17] As indicated by the movants, other States can "opt into" the California motor vehicle emissions control program. *See* 42 U.S.C. § 7607. What movants fail to note is that only States that have "plan provisions" in place -- *i.e.*, SIP requirements to reduce the air pollutants for which EPA has set a NAAQS -- are to take this action. That requirement for a SIP plan underscores that the California program under the Clean Air Act and any derivative programs in other States has to be tied to meeting or maintaining compliance with a national ambient standard -- and for the reasons outlined above and pleaded in the Complaint, *see* FAC ¶ 5, no such standard for CO2 has been or could ever be written, because the effective control of globally dispersed carbon dioxide cannot be accomplished at a state, regional or even national level. *See id.*

fuel economy.

Id. at 17699. NHTSA then explained that other potential state regulations should be considered preempted if they would interfere with the "carefully calibrated" CAFE program. The agency continued:

> Preempted standards include, for example:
>
> (1) A fuel economy standard; and
>
> (2) A law or regulation that has essentially all of the effects of a fuel economy standard, but is not labeled as one (example: State tailpipe CO_2 standard).
>
> This reading of EPCA's express preemption provision allows that provision to function in a consistent way, without irrational limitation, to protect the national CAFE program from interference by any State standard effectively regulating fuel economy. It also simultaneously maximizes the ability of EPCA and the Clean Air Act to achieve their respective purposes.

Id. NHTSA's analysis solved the problem that defendants and their *amici* never satisfactorily address, which is to give full meaning and effect to all the provisions of EPCA, including the preemption provision, and to reconcile EPCA with the Clean Air Act. Regulations of the type that Congress clearly contemplated in the 1960s, 1970s and 1980s under the Clean Air Act -- standards whose "regulation [is] not directly and inextricably linked to fuel economy," as NHTSA put the matter -- would not be preempted. *Id.* But the opposite would be true for standards that would require the control of carbon dioxide emissions:

> [A]CO2 emissions standard stands apart from those other emissions standards. NHTSA has concluded that such a standard functions as a fuel economy standard, given the direct relationship between a vehicle's fuel economy and the amount of CO2 it emits. In contrast, no such relationship exists between a vehicle's fuel economy and the emissions currently regulated by EPA.
>
> Interpreting EPCA's preemption provision as preempting only those State regulations that directly regulate or have the effect of directly regulating fuel economy gives, to the extent possible, maximum effect both to EPCA and to the preemption waiver provision in the Clean Air Act. This is necessary and appropriate, especially considering the importance of the goals of the Clean Air Act and the attention paid by Congress in drafting EPCA to the relationship of the CAFE program to the Clean Air Act. EPCA's express preemption provision cannot be interpreted as preempting all State laws relating to a fuel economy standard, no matter how tangential the relationship. Such an interpretation would largely, if not wholly, negate the Clean Air Act's preemption waiver provision and leave few, if any, emission standards to be considered by NHTSA under [section 32902 of EPCA].

Id. at 17670.

Defendants call NHTSA's position "wrong," but offer no response to NHTSA's point that

the reading it adopts preserves the State's ability to adopt regulations to help meet the national ambient air quality standards, while also preserving the federal government's ability to adopt "carefully calibrated" fuel economy standards. It also bears noting that, prior to this litigation and out of court, the position of the Executive Branch of the State of California's position was the same as that of NHTSA.

In 1990, for example, the California Legislature passed a bill (Senate Bill 1905) that would have established a sales tax/credit surcharge program for new vehicles with the intent of encouraging individuals to purchase vehicles with low emissions of regulated pollutants and/or CO2. *See* Senate Journal at 8568 (Oct. 1, 1990) (Exhibit O). Then-Governor George Deukmejian refused to sign the bill. The Governor cited preemption by the federal fuel economy law as one of the reasons to reject the bill. He explained that the bill would have included carbon dioxide emissions in the credit/surcharge tax on vehicles. The Governor further recognized that "[a]ny carbon dioxide provision is in reality, a fuel economy requirement since fuel economy is determined by measuring the amount of carbon emissions and calculating the amount of fuel consumed, based on the amount of carbon contained in a quantity of gas." He concluded: "Since federal law preempts fuel economy standards, I believe this bill will be unenforceable." *Id.* Writing in the same year, the California Attorney General at the time also conceded the scope of federal preemption, stating that in EPCA, "Congress has occupied the field on fuel economy standards, thus preempting any state from establishing higher standards."[18] Accordingly, the then-Attorney General participated vigorously in the litigation at the time, challenging the stringency of NHTSA's fuel economy standards, in a type of implicit admission that the exclusive authority to control CO2 lay with the federal government.[19]

D. The California Legislation and the CARB Rulemaking

This litigation arises from the decision of the state government to take a different path from the one charted in the 1990s. In July 2002, at the end of its 2001-2002 Regular Session, the California Legislature approved and then-Governor Davis signed Assembly Bill 1493 ("A.B. 1493").

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[18] *See* John K. Van de Kamp, *Outer Continential Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVT'L L. REV. 73, 128 n.206 (1990).

[19] *City of Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990) (challenge to CAFE standards based, in part, on global warming).

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Codified at California Health & Safety Code § 43018.5, A.B. 1493 directed CARB to adopt greenhouse gas standards by the end of calendar year 2004, to take effect on January 1, 2006. *See id.*, subsection (a). Although defendants contend in their motion papers now that the "focus" of the legislation and the resulting rule should not be on carbon dioxide and fuel economy, the legislative history is to the contrary. (Defs' Br. at 5.) In reviewing the bill that eventually became A.B. 1493, the California Department of Finance noted that "the Air Board advises that the easiest and most cost-effective way to reduce carbon dioxide emissions is to make vehicles more fuel efficient."[20] Moreover, as pleaded in the Complaint (and as defendants cannot genuinely dispute), the only way to meet the standards that were set pursuant to A.B. 1493 is with significant reductions in carbon dioxide. (FAC ¶ 4, 37.)

The direct "focus" on carbon dioxide and fuel economy is confirmed by other parts of the legislative history of A.B. 1493. The intent of the bill was to empower or require CARB to adopt standards for greenhouse gas emissions, defined to include CO2 and a number of other gases. When the bill was under development, the proposed legislation was initially criticized because the statutory text failed to give CARB sufficient guidance on the appropriate level of stringency in any possible regulation.[21] When the bill was finally signed, it required the "maximum feasible and cost-effective reduction of greenhouse gas emissions," defined as follows:

> [1] [C]apable of being successfully accomplished within the time provided by this section, taking into account environmental, economic, social, and technological factors [and] [2] economical to an owner or operator of a vehicle, taking into account the full life-cycle costs of a vehicle.

Cal. Health & Safety Code § 43018.5(i)(2).

The metric for the stringency of the new standards was thus required to include what would

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[20] Department of Finance Bill Analysis of AB 1058 (May 11, 2001) (Exhibit P).

[21] *See* AB 1058 (Pavley) -- Bill Analysis for the Assembly Committee on Appropriations (bill as amended April 25, 2001), at 1 ("Since there is no health-based criteria by which the ARB would be able to establish goals … the process for developing these regulations could be relatively difficult."), (Exhibit Q); AB 1058 (Pavley) -- Bill Analysis for the Assembly Committee on Transportation (bill as introduced Feb. 23, 2001), at 2 ("It should be noted that the bill gives scant guidance to ARB as to how CO2 is to be regulated, what means of emissions reductions might be required, or what specific level of reduction should be sought…. [I]t affords the Legislature no indication of, nor any control over, the scope or nature of any resulting program.") (Exhibit R).

be "economical" for a vehicle owner. In keeping with that approach, CARB spent much of its effort in the rulemaking process on estimating what it considered to be the "payback period."[22] The "payback period" was the time that it would take what CARB considered a typical vehicle owner in California to get a full return -- ***in reduced gasoline costs*** -- from the additional cost of the hardware needed to comply with the A.B. 1493 greenhouse gas standards.[23] The estimated ***fuel economy*** of the motor vehicles to be regulated by CARB was thus the central fulcrum of CARB's regulatory approach.

It is also clear from the rulemaking history at CARB that, notwithstanding the strident claims in the moving papers, this regulation will have no practical impact on the environmental conditions of concern to the Legislature. In the truncated period allowed for public comment on the proposed standards, CARB was provided with analyses showing that even under extremely optimistic assumptions (from the State's perspective), any change in ambient temperature resulting from the A.B. 1493 standards would be too small to measure, and essentially would exist only in computer programs of climate change that could resolve to the third or fourth decimal place.[24] CARB did not disagree with that analysis, stating that "the reductions in climate change associated with individual policies or the actions of individual regions *will not be identifiable*," and could only be "quantified" with a computer model.[25] Likewise, CARB was also forced to admit that it could not claim any specific reductions in smog as a result of the regulation.

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[22] *See, e.g.*, Cal. Air Resources Bd., Initial Statement of Reasons for Proposed Rulemaking 97-100 (Aug. 6, 2003) ("ISOR"), *available at* http://www.arb.ca.gov/regact/grnhsgas/isor.pdf.

[23] *Id.* Plaintiffs do not agree with CARB's estimates, but for present purposes the mere fact that CARB's cost-effectiveness inquiry was based on gasoline costs belies any argument that the regulation is not a fuel economy regulation. If there were some other way to control carbon dioxide emissions, cost effectiveness could not be measured by anticipated fuel savings.

[24] In the rulemaking proceeding, CARB was advised that the temperature change that the 2004 regulation could cause would be too small to measure, and could only be quantified using a computer model and equations published in the scientific literature. The equations showed a theoretical temperature reduction "on the order of 0.0008 to 0.001 deg. C," according to one participant in the rulemaking, which the commenter correctly described as too small "to have any impact on or benefit for the State of California." Cal. Air Resources Bd, Final Statement of Reasons 377 (Aug. 4, 2005) ("FSOR"), *available at* http://www.arb.ca.gov/regact/grnhsgas/fsor.pdf.

[25] FSOR at 376.

Defendants' *amici* nonetheless claim that the incidence of "heat related deaths" and other public health risks depend on this litigation. But the rulemaking record (including CARB's admissions in the record) puts those claims in the proper light, as unsubstantiated by any evidence that CARB could gather to support the regulation. When challenged on this point in the rulemaking, CARB simply replied by claiming that (1) the wisdom of the regulation was not a proper issue for discussion, the Legislature having spoken; and (2) more to the point for the present matter, environmental impacts did not matter, because the rule would save gasoline and thus benefit new-car purchasers.[26] In the final analysis, the regulatory history thus confirms that the environmental value of the rule under review in this action is purely symbolic, and that the real impact -- and indeed, the metric used to determine the stringency of the regulation -- is based on fuel economy.

Two other points about the CARB rulemaking bear emphasis. First, although the CARB staff attempted to estimate the level of stringency in their *de facto* fuel economy standards that they believed consumers would find cost effective, using a rudimentary "payback" analysis, a more realistic assessment gave a different answer. Economists retained by the CARB staff determined, using a less rudimentary approach that involved consumer purchasing information, that the higher prices caused by the chosen standards would eventually depress demand for new vehicles in California.[27] In other words, CARB overshot the mark it was trying to hit. While the CARB-retained economists estimated what appears to be only a small drop in demand -- about 4.6 percent once the standards are fully implemented -- that drop in sales would have a major impact on margin-constrained new-car dealers.[28]

Second, the form of the CARB regulation differs significantly from the approach taken by NHTSA when it sets fuel economy standards, in ways that reduce the compliance flexibility, economic neutrality, and consumer choice that NHTSA's rules are intended to preserve. The

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[26] *Id.* at 145.

[27] ISOR at 179. Other estimates of the negative impact on new-vehicle sales are significantly higher.

[28] CARB estimated the effects of the regulation by using San Diego as a microcosm of California. ISOR at 192. Of course, economic conditions vary widely across the State, and estimated impacts of the rule in San Diego are not on their face valid for other areas, such as the Southern San Joaquin Valley.

1 CARB standards set a single limit for larger, full-size trucks which must be met on a sales-weighted average basis by all trucks in the category and by each manufacturer, regardless of the different mixes of trucks sold by each manufacturer. (FAC ¶¶ 72 (table), 73, 79.) Such standards are, in NHTSA's words, "inherently more challenging for manufacturers who have a high percentage of larger vehicles to meet than for those whose product lines emphasize smaller models." (*See* p. 23 above.) They create regulatory incentives at odds with consumer choice and the current economic conditions in the automobile industry. *See* 71 Fed. Reg. at 17588 (explaining why NHTSA has moved away from "requiring a uniform level of [truck] CAFE [standards]" in order to "more fully respect[] economic conditions and consumer choice").

CARB's approach is thus completely at odds with NHTSA's efforts to reform the federal CAFE standards for trucks in a "carefully calibrated" manner to meet the goals of EPCA, which include "an equitable CAFE regulatory framework" that is "market oriented" and permits the industry to respond to changes in consumer demand.[29] The upshot is that at the same time that the federal government is moving away from unitary standards and toward a more flexible and equitable approach, CARB is about to put into full effect a regulation that will both suppress consumer demand and injure competition.[30]

II. Argument

A motion for judgment on the pleadings must meet a high standard. "The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." Wright & Miller, 5C FEDERAL PRACTICE & PROCEDURE § 1367 (2006). It is well-settled that a court hearing a Rule 12(c) motion must not only accept the facts in the complaint as true, but also view

[29] 71 Fed. Reg. at 17570; *see also* pp. 17-19 above. Defendants have elsewhere admitted that the CARB regulation has different impacts on different manufacturers. *See* Defendants' Memorandum of Points and Authorities in Support of Motion to Continue Trial Date and Modify Scheduling Order, filed July 1, 2006 (Doc. No. 255) at 17 ll. 2-7 (some manufacturers can more readily meet CARB standards than others, and may be able to "over-comply" in the early years of the regulation).

[30] As noted above, *see* n.15, one plaintiff in this action, the Alliance of Automobile Manufacturers, represents a number of different manufacturers, and therefore does not take positions on competitive issues within the automobile industry.

them in the light most favorable to plaintiffs. *Living Designs, Inc.*, 431 F.3d at 360.

It is equally well-established that reliance by a movant on evidence, rather than the pleadings, would require the conversion of the Rule 12 motion into a motion for summary judgment, followed by appropriate proceedings to test the evidence offered by the movant. *See* Fed. R. Civ. P. 12(c). Defendants have chosen not to file their motion under the summary judgment standard. That would have required them to defend scientific fiction and to confront evidence establishing the devastating impact of CARB's rule on the automobile industry in California and nationwide. Taken for what it is -- a last-ditch effort to avoid the evidence -- defendants' motion should be denied.

A. Plaintiffs Are Entitled To Try Their Claim That The CARB Regulation Is Expressly And Impliedly Preempted By The Federal Economy Law.

Count I of the First Amended Complaint contains plaintiffs' express and implied claims under EPCA. Defendants claim that EPCA cannot as a matter of law apply to CARB's regulation. It is therefore fair to ask defendants what type of regulation they would consider barred by EPCA. For all that appears in their opening papers, the answer appears to be nothing -- except perhaps a state regulation that is actually labeled a "fuel economy standard." Of course, the issue of preemption is not controlled by labels. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 13-14 (1983); *Hawaiian Tel. Co. v. Public Utilities Comm'n*, 827 F.2d 1264, 1277 (9th Cir. 1987); *see also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992). If States could control the scope of federal preemption according to their own descriptions of their actions, the Supremacy Clause would be a dead letter.

In addition to failing to describe any meaningful role for the preemption provision in EPCA, defendants advance several theories for judgment on Count I, none of which withstands the appropriate level of scrutiny at this stage. In particular, they argue the following: (1) the purposes of CARB's regulation automatically save the rule from EPCA preemption; (2) the text of the 1975 Act must be construed so narrowly as to bar any role for EPCA in this case; (3) any reading other than their own would eviscerate the State's authority to regulate emissions under the Clean Air Act; and finally, in an argument closely related to the one just noted, (4) the Clean Air Act must be interpreted to have effected a type of implied repeal of EPCA, at least for purposes of the present regulation. Each of those arguments is addressed in turn below, along with the issue that defendants have

chosen largely to ignore, which is implied preemption under EPCA.

1. A Purpose Other Than Regulating Fuel Economy Does Not Save The CARB Rule From EPCA Preemption.

Defendants and their *amici* lay great stress on the perceived need for the 2004 CARB regulation to address the issue of global warming. There is no question that global warming is an issue of the utmost public concern. But a State's motives or purpose in enacting the regulation, "regardless of however commendable or different," cannot save a regulation from preemption if the State's action conflicts with federal law. *S. Pacific Transp. Co. v. Pub. Utility Comm'n of the State of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993) (quoting *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926)). The "controlling principle [is] that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *see also Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990) (although state law enacted for proper purpose, "state's action has the actual effect of frustrating Congress' intent" and the law was therefore preempted).

As the Supreme Court has repeatedly explained: "Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade,* 505 U.S. at 107. Similar to a rule that did not look past the label attached to the State's action, a rule that was confined to the purpose of the state regulation "'would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy--other than frustration of the federal objective--that would be tangentially furthered by the proposed state law.'" *Id.* at 106 (quoting *Perez,* 402 U.S. at 651-52 (1971)). Thus, a "dual impact state regulation cannot avoid ... pre-emption simply because the regulation serves several objectives rather than one." *Gade*, 505 U.S. at 106. This Court therefore must look further than CARB's labels and purposes to the actual effects of the 2004 regulation and the intent of Congress in EPCA.

2. The Preemption Provision In EPCA Is Properly Applied To CARB's Greenhouse Gas Regulation.

The "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)

(“Congress’ intent, of course, primarily is discerned from the language of the pre-emption statute and the ‘statutory framework’ surrounding it.”); *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (“[W]e look first and foremost to Congress’ express statement of its intent.”).

In expressing its intent regarding EPCA preemption, Congress chose to employ a phrase that it has repeatedly used, and the courts have repeatedly interpreted: “related to.” Congress chose to preempt state laws that “related to” fuel economy “standards,” not every law that is “related to” fuel economy. 49 U.S.C. § 32909. By doing so, Congress has expressly preempted both direct regulation of fuel economy standards and state regulations whose effect on fuel economy is so substantial that they amount to *de facto* fuel economy standards. *Cf. UPS v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003) (explaining that limiting a “related to” preemption provision to state laws that seek to directly regulate the preempted subject would read “related to” out of the statute).

Defendants claim, of course, that there should be a presumption against preemption, and that “related to” preemption terms must be given narrow construction.[31] Even granting for purposes of argument that such a presumption applies, it is well-settled in the Supreme Court that when Congress uses “related to” preemption clauses, Congress intended to preempt state laws that have a “connection with” or “reference to” the federal law at issue. *See*, *e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001); *see also Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1302 (9th Cir. 1997) (“The phrase ‘relating to’ should be construed … to mean ‘has a connection with or reference to.’”). Although the “connection with” or “reference to” test was developed primarily under ERISA, the language in EPCA’s preemption provision is identical and the same standards therefore apply here. *See*, *e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (explaining that “[s]ince the relevant language of the ADA is identical, we think it appropriate to adopt the same standard

[31] There is no presumption against preemption in this case because the regulation of fuel economy is not an area of traditional state regulation. *See*, *e.g.*, *Skysign International, Inc. v. City & County of Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002) (finding no presumption against preemption of aerial advertising because of history of federal presence). While the federal government has regulated fuel economy for almost 30 years, there is no history of similar state standards. Even if a presumption against preemption were to apply, however, it would not change the analysis. No matter how narrow an interpretation is given to EPCA’s preemption clause, the setting of a *de facto* fuel economy standard is one thing that EPCA clearly preempts.

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here"); *Californians for Safe & Competitive Dump Transp. v. Mendoca*, 152 F.3d 1184, 1188 n.4 (9th Cir. 1998).

"Reference to" preemption occurs when "a State's law acts immediately and exclusively" upon the preempted field by express reference. *Cal. Div. of Labor Standards Enfcmt. v. Dillingham*, 519 U.S. 316, 325 (1997); *see also District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992). "Connection with" preemption occurs when there is "direct regulation" of the preempted field, or when a state law "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to" amount to substantive regulation of the preempted field. *Travelers*, 514 U.S. at 668; *see also Egelhoff*, 532 U.S. at 147-48 (distinguishing "generally applicable laws" that have "incidental" effects on the federal program).

In this case, plaintiffs have alleged and are prepared to prove at trial that CARB's regulation has the requisite "connection with" the federal fuel economy standards to trigger preemption under the text of EPCA. First, plaintiffs have alleged and can prove that there is a direct chemical connection between a vehicle's carbon dioxide emissions and its fuel economy; by regulating carbon dioxide emissions, CARB is regulating fuel economy. (FAC ¶¶ 4, 37, 45.) Second, plaintiffs have alleged and will prove that in order to comply with CARB's regulation, a manufacturer must produce a fleet of automobiles with an average fuel economy that is determined not by federal law, but by CARB. (*Id.* ¶ 72.) Congress was concerned about the practical effect of state regulation in this area, and the sweep of federal preemption does not depend upon whether the State refers expressly to "miles per gallon" (as do the federal rules) or instead uses some other metric. *See* S. Rep. No. 93-526, at 66 (1974) (Exhibit K) ("State or local fuel economy standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight.") *and* p. 24 above.[32]

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[32] Any claim by some of the defendants in this action that CO2 standards are not "connected with" fuel economy standards could not be squared with their actions elsewhere. The petition for rulemaking at issue in *Massachusetts v. EPA* specifically sought the imposition of ***"corporate average fuel economy standards"*** to control carbon dioxide. 68 Fed. Reg. 52922, 52923 (Sept. 8, 2003) (emphasis added); *see also* Int'l Center for Tech. Assessment, Pet. for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles under s. 202 of the Clean Air Act, Docket No. A-2000-04, (Oct. 25, 1999), at 25-26 & n.121 ("Petitioners assert that Section 202 provides EPA with the authority to implement a corporate (Continued…)

3. The Scope of Federal Preemption Sought In This Case Preserves The Role of the States in Regulating Emissions and Fuel Economy

Defendants claim that the level of preemption sought by plaintiffs in this case would eviscerate any state regulation of motor vehicle emissions, as well as any state regulation affecting fuel economy indirectly such as a speed limit. They are crying wolf, for the reasons explained below.

As construed by NHTSA, and consistent with plaintiffs' approach here, EPCA's "related to" preemption provision would not preempt every state law or regulation that has some effect on fuel economy. If the state law or regulation does not amount to a direct regulation of fuel economy -- for example, by setting *de facto* fuel economy standards -- it would only be preempted if it "produce[d] such acute, albeit indirect, economic effects, by intent or otherwise," as to amount to substantive regulation of the preempted field. *Travelers*, 514 U.S. at 668. Thus, if a state law has some effect on the fuel economy, but not such an effect that it defines fuel economy standards, it would not be preempted by EPCA. For example, state laws that regulate vehicle speeds on the highway certainly will affect gasoline consumption in a given State. Those speed limits may even be enacted to reduce gasoline consumption. But they do not set standards that govern the fuel economy that any given vehicle must achieve, nor do they directly affect motor vehicle design. In a properly defined express preemption analysis, EPCA only preempts state laws and regulations that are "related to ***fuel economy standards*** and average fuel economy standards," not any such laws that are related in any broader way to fuel economy or fuel consumption.[33]

As another example, consider state regulations that did affect automotive design and caused either an increase or a decrease in fuel economy. An example in the first category would be an air pollution standard that encouraged the use of fuel-injected engines, rather than carbureted engines; fuel injection not only improves the efficiency of a catalytic converter in controlling pollution, but also promotes more efficient combustion and higher fuel economy. An example in the latter

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average fuel-economy based standard.") (Exhibit S). California is now, of course, a petitioner in the Supreme Court seeking to force such a interpretation in *Massachusetts v. EPA*, and Friends of the Earth, Bluewater Network's parent group, was one of the original petitioners.

[33] Of course, a state regulation that exerts an "acute" effect on the federal fuel economy program would still be preempted even if it did so only indirectly. *See Travelers*, 514 U.S. at 668.

category would be a "spark-retard" system, which depresses the formation of one type of smog precursor gas but also makes the engine less efficient. Both technologies -- spark-retard and fuel injection -- were introduced on motor vehicles sold in California, in response to CARB emissions regulations. Neither would fall within the scope of preemption under EPCA.

In the case of spark-retard systems, or any other requirement that had the effect of reducing fuel economy, CARB was not setting a *de facto* fuel economy *standard*. The regulation that encouraged spark-retard did not mandate a particular level of fuel economy level for any vehicles that used that technology. The vehicle manufacturer was left free to offset the decrease in fuel economy by applying other technologies that improve fuel economy, such as reductions in vehicle mass, or the use of a more aerodynamic design.

In the case of fuel injection systems, or any other technology that would result in higher fuel economy, the manufacturer would also remain free (in the absence of a rule specifying CO2 levels) to determine the ultimate fuel economy of the vehicle. The manufacturer could use the increased power output from the fuel-injected engine to increase the vehicle's acceleration performance, or to make the vehicle more crash-worthy by adding additional weight. Fuel economy might or might not increase overall, once those enhancements had been made. The vehicle's fuel economy would remain a parameter within the control of the manufacturer, even though the assumed emission regulation required the use of fuel injectors to control air pollution from the engine.

The point is simply this: although many state regulations have some effect on fuel economy, they do not amount to a direct regulation of fuel economy because they do not define the ultimate fuel economy levels that a manufacturer must meet; in short, the regulations do not amount to a *standard* that affects what a manufacturer can sell. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004). In contrast, the CARB regulation challenged here limits carbon dioxide emissions directly. It thus results in a direct regulation of fuel economy and must be viewed as "related to" fuel economy standards for purposes of EPCA preemption.

The distinction between the direct regulation of fuel economy and regulations that have some effect on an automobile's fuel economy can be illustrated by reference to the text of EPCA. As defendants and *amici* point out, NHTSA is directed by statute to consider the effects of other governmental regulations in setting fuel economy. *See* 49 U.S.C. § 32902(f). In exercising its

expertise in determining the "maximum feasible average fuel economy" standards, NHTSA must consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." If, for example, EPA or California adopted a regulation that had the effect of reducing the fuel economy, NHTSA would account for that rule when evaluating determining the "maximum feasible average fuel economy." NHTSA could decide to reduce the fuel economy standards to account for the regulation, or perhaps it would keep them constant or even raise them in light of other considerations. The ultimate determination would remain with NHTSA.

The same would be true for an EPA or CARB regulation that has the effect of improving fuel efficiency. NHTSA could determine that, even though the EPA or CARB regulation required technology that would increase fuel efficiency (such as fuel injection), other factors included in section 32902(f) -- such as the overall "economic practicability "of raising fuel economy standards under some market conditions -- militated against any increase in the CAFE standards. NHTSA might instead decide that the market could readily bear an increase in fuel economy standards, and could decide that fuel injection permitted higher CAFE levels. Whatever the outcome, the decision would still be made by NHTSA -- which is what Congress intended. Fuel economy *standards* -- the fuel economy level that the fleet must achieve -- would continue to be set by NHTSA.

The CARB regulation challenged here is altogether different from earlier state regulations that have had what NHTSA accurately described in its recent Federal Register notice as an "incidental" effect on fuel economy. (*See* pp. 30-31 above.) No action that NHTSA could take in response or reaction to CARB's new standards under section 32902(f) would alter the fact that CARB, and not NHTSA, would be setting the de facto fuel economy limits for some vehicles sold in California -- and as plaintiffs are prepared to prove at trial, these particular CARB standards would eventually regulate the fuel economy of every gasoline-powered vehicle sold in the State. EPCA permits state regulations to have an effect on fuel economy, but EPCA precludes them from compelling vehicles to meet fuel economy standards, under any guise, that are set by any government agency other than NHTSA.

4. The CARB Rule Is Also Impliedly Preempted By EPCA

Plaintiffs are also entitled to proceed to trial on their claim that EPCA impliedly preempts

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CARB's Regulation. Regardless of whether some state regulation of carbon dioxide might escape express preemption under EPCA, this particular state regulation actually conflicts with federal law.

Even if a regulation is not expressly preempted by a statute, implied conflict preemption may nonetheless obtain. *See*, *e.g.*, *Geier*, 529 U.S. at 874. Indeed, conflict preemption applies even in the face of a savings clause. *Id.*[34] Conflict preemption arises not only when state and federal standards are completely incompatible—(*i.e.,* when simultaneous compliance with both regulations is impossible), but also when the state regulation "frustrates the full effectiveness of federal law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *Hines*, 312 U.S. at 67 (1941). Where federal law deliberately permits a certain degree of "flexibility" for a regulated party, it frustrates the full effectiveness of federal law, and thus violates the Supremacy Clause, for a State to take away that flexibility. *See Fidelity Fed. Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 155 (1982). Further, "[w]hen the federal government completely occupies a given field or an identifiable portion of it …, the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government." *Public Utility Dist. No. 1 of Grays Harbor County v. Idacorp Inc.*, 379 F.3d 641, 647 (9th Cir. 2004) (internal quotation marks omitted).

a. The Field of Fuel Economy Standards is Occupied By the Federal Government.

The scheme of regulation under EPCA is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973). Under the federal scheme there can only be one uniform, nationwide fuel economy standard. Some permissible regulations may affect the fuel economy of an automobile, but the field of *fuel economy standards* has been fully occupied by NHTSA. That EPCA preempts the field of fuel

[34] For example, in *Geier*, the National Traffic & Motor Vehicle Safety Act expressly exempted all state tort actions from preemption. 529 U.S. at 874. (compliance with federal standard "does not exempt any person from any liability under common law"). But the Supreme Court found such a provision insufficient to allow a state tort action that actually conflicted with the federal standards--that is, a state tort action that achieved a goal advanced by the federal regulations in question, but did so in a manner inconsistent with the method chosen by the federal agency involved. *Id.* at 871-72. Instead, the Court held that normal preemption principles apply even in the face of a savings clause. *Id.* at 869. The same situation applies to this case and therefore normal principles of conflict preemption apply.

1 economy regulation is evident from four critical features of the statute. First, Congress delegated to
2 a federal agency the task of establishing fuel economy standards by balancing several factors that are
3 of surpassing importance to the domestic economy, national energy security, and the personal safety
4 of drivers and passengers. *See* 49 U.S.C. § 32902(f); *see also Public Citizen v. NHTSA*, 848 F.2d
5 256, 263-65 (D.C. Cir. 1988) (discussing NHTSA's consideration of domestic "economic
6 practicability"); *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 120 n. 11 (D.C. Cir. 1990)
7 (discussing NHTSA's consideration of safety). Second, the "corporate average" model of regulating
8 fuel economy maximizes flexibility for manufacturers based upon a national average, but maximum
9 flexibility is only possible if the average is national. Third, EPCA contains a broad express
10 preemption clause, 49 U.S.C. § 32919(a). Fourth, EPCA contains extremely narrow reservations of
11 state authority. States may impose "disclosure" requirements only if those requirements are
12 "identical" to the federal requirements, *id.* § 32919(b), and "[a] State or a political subdivision of a
13 State may prescribe requirements for fuel economy for automobiles obtained for its own use," *id.* 42
14 U.S.C. § 32919(c). Congress plainly perceived that it was occupying a broad field of regulation if it
15 felt the need expressly to reserve the States' power to purchase vehicles of their choosing.

16 Defendant argues that *Pacific Gas & Electric Co. v. State Energy Resources Conservation &*
17 *Development Commission*, 461 U.S. 190 (1983), compels a different conclusion. Defendants
18 reliance on *Pacific Gas* is somewhat puzzling in light of the fact that the Court in that case
19 concluded that "the Federal Government has occupied the entire field of nuclear safety concerns,
20 *except the limited powers expressly ceded to the States*." *Id.* at 212. Thus, the Court explained that
21 "[w]hen the Federal Government completely occupies a given field or an identifiable portion of it, as
22 it has done here, the test of pre-emption is whether 'the matter on which the State asserts the right to
23 act is in any way regulated by the Federal Act.'" *Id.* at 212-13 (quoting *Rice v. Santa Fe Elevator*
24 *Corp*, 331 U.S. 218, 236 (1947)). Here, the federal government has occupied the entire field of fuel
25 economy standards, and has expressly ceded *nothing* to the states.

26 It bears repeating that there is a distinction between any regulation that has some effect on
27 fuel economy and the ultimate standard set. It is not plaintiffs' position that EPCA has occupied the
28 field of every regulation that has some effect on an automobile's fuel economy. EPCA does,
however, clearly occupy the field of the final average fuel economy that a manufacturer must

achieve.

In contrast to regulations that merely have some effect on fuel economy, the challenged regulation effectively creates a fuel economy standard. In particular, as plaintiffs have alleged, the only way vehicle manufacturers will be able to comply with the regulation will be to ensure that their entire fleet of vehicles sold in California emits dramatically less CO2 than the fleet they would otherwise sell; and the only way to ensure such a reduction in CO2 will be to increase the fuel economy of their vehicle fleet far beyond the requirements of federal CAFE. By creating a substantive fuel economy standard California has asserted "the right to act" on a matter that is solely to be regulated by the federal government. *PUD No. 1 of Grays Harbor*, 379 F.3d at 647. The regulation is therefore field preempted.

b. CARB's Greenhouse Gas Regulation Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Federal Law.

The California regulation has the effect of setting higher fuel economy standards than is mandated by federal law. Defendants and their *amici* point out that a manufacturer that meets CARB's standards will also comply with the federal fuel economy standards. In theory, a manufacturer could attempt to produce a fleet of vehicles for sale to the public that would be designed to meet CARB's 2004 standards, and such a fleet would also comply with the federal fuel economy standards -- federal law does not impose penalties for attempting to sell a fleet with higher average fuel economy levels than what NHTSA requires. But defendants and their *amici* fail to address the Congressional injunction that NHTSA set fuel economy standards at the "***maximum*** feasible level" after considering the various factors mandated by statute. 49 U.S.C. § 32902(f); *Center for Auto Safety v. Peck*, 793 F.2d 1322, 1338 (D.C. Cir. 1986). NHTSA sets federal fuel economy standards only after determining what the maximum fuel economy standard can be that is consistent with the balancing of multiple federal objectives. Any state action setting a higher standard necessarily disrupts the balance NHTSA has struck and thus interferes with the scheme established by Congress. *See*, *e.g.*, *Geier*, 529 U.S. at 879-880 (state tort action that would have required air bags in automobiles was conflict preempted even though regulatory scheme "provided a form of extra credit for airbag installation").

Congress has enacted a specific policy for setting the maximum feasible fuel economy

standards. NHTSA "shall consider": (1) technological feasibility; (2) economic practicability; (3) the effect of other government standards on fuel economy; and (4) the need of the United States to conserve energy. 49 U.S.C. § 32902(f). NHTSA, and the D.C. Circuit, have also interpreted EPCA to include the consideration of safety. *See Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992). The conflict between the state regulation and federal law is exemplified by the deviation from the federal program as explained above in Part I. (*See* pp. 35-36.) This is the very definition of frustrating federal law and therefore the state regulation is preempted. *See*, *e.g.*, *California v. FERC*, 495 U.S. 490, 506-07 (1990) ("Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination."). Indeed, the only way that NHTSA could set fuel economy levels would be simply to adopt the standards set by California, which would require it to ignore every other statutorily mandated criteria. At base, "[a]llowing [CARB] to strike a different balance necessarily conflicts with the federal system." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 605-06 (1987) (Powell, J., concurring in part and dissenting in part).

It is, of course, of no moment that California's regulation may advance some of the purposes embodied in EPCA. "In determining whether state law stands as an obstacle to the full implementation of a federal law it is not enough to say that the ultimate goal of both federal and state law is the same." *Gade*, 505 U.S. at 103 (internal citations and quotations omitted). A state law "also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *Id.* (internal quotation omitted). Congress has spoken as to its methods for setting the maximum feasible fuel economy levels. Few cases of interference with a federal policy could be more serious than a state's selection of a regulatory level that the federal government has determined it is not possible to achieve consistent with federal policy. *See*, *e.g.*, *Perez*, 402 U.S. at 652 ("[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."). The California regulation is clearly preempted.

The conflict is exemplified by looking at the facts alleged in the complaint. Congress sought significant fuel economy increases through "a series of graduated mileage requirements" that would "ensure wide consumer choice by leaving maximum flexibility to the manufacturer" in deciding how to meet the specified CAFE levels. *Center for Auto Safety v. NHTSA*, 847 F.2d 843, 863-64 (D.C.

Cir. 1988) (separate opinion of Buckley, J.), *vacated on unrelated grounds*, 856 F.2d 1557 (quoting S. Rep. No. 94-179 (1975)) (Exhibit L) (internal quotation marks omitted). The authors of the 1975 Act emphasized that CAFE standards had to "be carefully drafted" in order to improve fuel economy without "unduly limiting consumer choice." H.R. Rep. No. 94-340, at 87 (1975) (Exhibit H). In other words, federal law regulates fuel economy without mandating which engines and propulsion systems consumers must buy or manufacturers must build. Manufacturers and consumers across the nation choose their own engines, so long as a manufacturer's ***nationwide*** fleet of cars and trucks meets the applicable corporate average. The CARB 2004 standards, however, will reduce consumer choice and force some manufacturers to withdraw substantial portions of their product lines from California. (FAC ¶ 84).

This conclusion is buttressed by NHTSA's determination after notice-and-comment. In addition to finding the CARB 2004 standards to be expressly preempted,[35] NHTSA also concluded that the CARB 2004 regulation would have the practical effect of frustrating federal policy. 71 Fed. Reg. 17667. Agencies are clearly well-positioned to determine if a state law frustrates the federal laws that they administer. Indeed, "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier*, 529 U.S. at 883; *Medtronic*, 518 U.S. at 496; *Credit Suisse First Boston Corp.v. Grunwald*, 400 F.3d 1119, 1136 (9th Cir. 2005). NHTSA's statements, published in the *Federal Register* after notice-and-comment, clearly reflect the "agency's fair and considered judgment" on the impact CARB's Regulations would have on NHTSA's ability to set meaningful fuel economy standards, and are therefore worthy of deference. *Geier*, 529 U.S. at 883 (quoting *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997)). In light of the conflict plaintiffs have alleged between CARB's Regulation and the federal CAFE scheme administered by NHTSA, and in light of NHTSA's own conclusion that CARB's regulation would frustrate federal policy, plaintiffs deserve the chance to proceed to trial on their claim that the CARB Regulation is impliedly preempted under EPCA.

[35] Plaintiffs generally agree with the position regarding deference to NHTSA's determination about express preemption that is laid out in plaintiff-intervenors' brief in opposition to the motion for judgment on the pleadings. *See* AIAM Br. at 16-19.

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5. The Clean Air Act Does Not Save All State Regulations from EPCA Scrutiny.

Instead of grappling with the central preemption issues raised by this case, defendants concentrate on their argument that California's "power" to regulate emissions under the Clean Air Act trumps any preemptive effect EPCA might otherwise have. As explained below, defendants' argument proves too much, and would require the Court to rewrite the 1975 Act and/or the Clean Air Act, in order to include an implied repeal of the EPCA preemption term than neither law contains.

As a threshold matter, plaintiffs are obliged to note that they would disagree with the main premises of defendants' argument on this score, which are that California had the power under the Clean Air Act to enact its 2004 regulation, and that EPA could properly grant a waiver for that regulation under section 209 of the Clean Air Act. Plaintiffs also part company with defendants in their views on the importance of the litigation over EPA's authority to regulate carbon dioxide under the Clean Air Act.[36] Even assuming *arguendo* that EPA could and would issue California a waiver under the Clean Air Act for the 2004 regulation, such a determination would not affect the issues presented under EPCA.

First, it is important to examine the text of the Clean Air Act on which defendants' analysis rests. Section 209(b) does not allow the waiver of any type of federal preemption for any type of regulation. Instead, its terms only permit the Administrator of EPA to "waive application of ***this section,***" meaning the preemption that would otherwise apply under section 209(a) of the Clean Air Act. 42 U.S.C. § 7543(b) (emphasis added); *see also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1091 n.47 (D.C. Cir. 1996) (describing, parenthetically, section 209(b) as allowing "California [a]

[36] Regardless of the outcome in *Massachusetts v. EPA*, the regulations adopted by CARB would still be preempted by EPCA. At most the Supreme Court would decide that EPA has authority to regulate carbon dioxide under the Clean Air Act. In such a case, NHTSA and EPA would have overlapping authority over, and would thus both be able to regulate, carbon dioxide emissions. *See Massachusetts v. EPA*, 415 F.3d 50, 72-73 (D.C. Cir. 2005) (Tatel, J., dissenting). At the same time, however, normal preemption principles would continue to operate with respect to the exertion of authority by any *state* to regulate carbon dioxide. Ultimately, whether or not EPA can regulate carbon dioxide under the Clean Air Act, EPCA precludes California from doing so. *Rhode Island v. Naragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) (preemption applies to conflict between state and federal law; implied repeal applies to conflict between two federal statutes). Nothing before the Supreme Court in *Massachusetts v. EPA* will alter that.

waiver from § 209(a) preemption"); *United States v. Chrysler Corp.*, 591 F.2d 958, 961 (D.C. Cir. 1979) ("Section 209(b) gives EPA authority ... to waive the applicability of section 209"). In section 177 of the Clean Air Act, Congress similarly provided that "[n]otwithstanding ***section 209(a),***" other States could adopt California regulations in certain instances. 42 U.S.C. § 7507 (emphasis added). Congress did not choose to provide that States could adopt emissions regulations "notwithstanding any other provision of law" -- a phrase Congress often uses. *Cf. Doe v. Rumsfeld*, 435 F.3d 980, 988 (9th Cir. 2006). Rather, Congress only removed Clean Air Act preemption.

The preemption of state regulations related to fuel economy standards under EPCA does not arise from the application of section 209; it arises from the 1975 Act itself. Thus, a waiver of the application of section 209 does not waive EPCA preemption. Section 209 may save some state regulations from preemption under the Clean Air Act, but by its terms it does not preclude preemption under a different federal statute. *See*, *e.g.*, *United States v. Locke*, 529 U.S. 89, 106 (2001) (savings clause with limiting language "may preserve a State's ability to enact laws of a scope similar to Title I but do not extend to subjects addressed in the other titles of the Act or other acts"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (savings clause that states that "nothing in this section" preempts state law "does not purport to preclude pre-emption of state law by other provisions of the Act."); *Bank of America v. City and 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").[37]

Furthermore, section 209(b) is not, in any way, an affirmative grant of authority to any State. It is beyond cavil that when federal law preempts a state law, it has displaced state authority. *See*, *e.g.*, *Olympic Pipe Line Co. v. Seattle*, 437 F.3d 872, 877 (9th Cir. 2006). For that reason, a waiver

[37] In *Intertanko v. Locke*, 148 F.3d 1053 (9th Cir. 1998), the Ninth Circuit squarely rejected the argument that a savings clause under one federal statute immunized state statutes from preemption under other federal statutes. In particular, the Court explained that the savings clause's limitation to "this Act" (the OPA) meant that "by its plain language [the savings clause] has no automatic impact on preemption caused by [other] statutes." *Id.* at 1060. Rather, the Court went on to state that it remained to "determine whether [different federal laws] otherwise impliedly or expressly preempt the [state] [r]egulations." *Id.* The *Intertanko* decision was reversed on other grounds by the Supreme Court, *see United States v. Locke*, 529 U.S. 89 (2001), but the Supreme Court did not in any way impugn the validity of the Ninth Circuit's analysis regarding the inapplicability of one federal statute's savings clause to preemption under other federal statutes.

of the decision to displace state authority merely allows the state to maintain the authority it otherwise had. As the D.C. Circuit has recognized with regard to section 209, "Federal preemption of state law displaces state authority. The decision not to preempt simply allows both federal and state authorities to regulate emission controls." *Chrysler*, 591 F.2d at 961. Section 209(b) is essentially a savings clause from Clean Air Act preemption, and "[a] saving clause does not create anything; it merely preserves from repeal what is already there." *Gorbach v. Reno*, 219 F.3d 1087, 1094 (9th Cir. 2000) (en banc). Thus, when California is granted a waiver under section 209(b), it is simply as though section 209(a) did not exist. Nothing more.

Ignoring the text and structure of section 209(b), defendant instead relies on a few snippets of legislative history to suggest that when the federal government decides not to displace state law for one purpose, it automatically immunizes that law against any displacement for any other purpose as well. In particular, defendant latches onto a statement from legislative history of the 1977 Clean Air Act Amendments that Congress intended to provide California with the "broadest possible discretion." (*See* Defs' Br. at 22.)

Of course, the broadest possible discretion would involve either a savings clause that waived all federal preemption (rather than just section 209 preemption) or, for that matter, a waiver provision that did not condition permission to regulate in a given area on compliance with criteria like that in section 209(b). Because Congress did not see fit actually to allow California "the broadest possible discretion," the statement from the 1977 legislative history must be considered with care. It is therefore necessary to consider what Congress actually did in the 1977 amendment to section 209 of the Clean Air Act.

Prior to the 1977 amendments, California's standards had to be as stringent as the federal standards with regard to each specific pollutant. California had consistently believed that the regulation of oxides of nitrogen was more important than the regulation of carbon monoxide, but it was technologically difficult to simultaneously meet the California NOx standard and the federal carbon monoxide standard. *See Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979). Thus, section 209(b) was amended in 1997 to require only that the California standards be as protective as the federal standards in the "aggregate" which allowed "California to address its NOx problem while easing up somewhat on CO requirements." *Id.* Congress intended to permit

California to decide which pollutants were most important and increased the state's flexibility by not requiring compliance with every federal standard for a waiver. But there is no evidence of any intent to displace other federal programs such as EPCA.

Defendants are also off-base in claiming that the Clean Air Act "federalizes" state emissions standards in a way that would place those standards beyond the reach of EPCA's preemption provision. Section 209(b)(3) of the Clean Air Act, which was also added in 1977, provides that compliance with a State standard will be considered as compliance with the federal standard in those states. The D.C. Circuit explained that because of the aggregation principle in the newly amended section 209(b) "cars meeting future California standards might well fail in some respects to meet comparable federal ones and thus could not receive the certificate of conformity which is a prerequisite to lawful sale in this country Congress added a new subsection 209(b)(3) to the waiver provision." *Ford Motor Co.*, 606 F.3d at 1297. Far from "federalizing" the state standards, or providing them with "equal dignity," section 209(b)(3) merely prevents an impossibility conflict from arising. *See Ford Motor Co.*, 606 F.2d at 1300 (Congress "included a new Section 209(b)(3) to deal specifically with any problems posed by vehicles that comply with California standards but not with federal ones"). Without section 209(b)(3) the waiver provision would have been eviscerated by conflict preemption. *Cf. Chrysler Corp.*, 591 F.2d at 961 (when preemption has been waived, both state and federal regulations apply). Section 209(b)(3) does nothing more.

Nor can defendants find support in the imputed "awareness" by Congress that emissions regulations promulgated under the Clean Air Act sometimes affect fuel economy. (*See* Defs' Memo. at 21-22.) To the extent that Congress had knowledge of the technical issues, it would have also understood that vehicle manufacturers can adjust their vehicle designs when a state regulation has an effect on a vehicle's fuel economy, so long as the regulation is not itself a fuel economy standard, either overtly or *de facto*, as explained above. (*See* pp. 41-43 above.) That is presumably one reason why Congress directed that in setting the "maximum feasible level" for fuel economy, NHTSA should balance the various factors and set the standard. This was certainly the understanding of the House Committee in charge of the 1977 Clean Air Act Amendments, which "confirm[ed] the long-held Committee view that the fuel economy effect of any particular emission standard largely rests with the manufacturer. If they choose to apply available, advanced technology there need be no

permanent fuel penalty . . . ." H.R. Rep. No. 95-294, at 244 (1977) (Exhibit T). This view of the effect of permissible regulations allows NHTSA to determine the "maximum feasible" standard. By contrast, CARB's 2004 regulation does not allow NHTSA or manufacturers any leeway regarding fuel economy. As plaintiffs will prove at trial, it dictates the actual fuel economy standard that manufacturers must meet.

This finally brings to the surface defendants' underlying view that two federal statutes are somehow in conflict or tension with one another, and that the Court needs to invent a way to reconcile them. In defendants' view, the Clean Air Act should control matters. (Defs' Br. at 21-22.) Candor should require defendants to admit that nothing short of an implied repeal of the EPCA preemption term will suffice, in order to sustain a motion for judgment on the pleadings.[38]

To be sure, implied repeal is the appropriate inquiry when two federal statutes are at issue. *See*, *e.g.*, *Rhode Island v. Naragansett Indian Tribe*, 19 F.3d 685, 705 (1st Cir. 1994). Even assuming that two federal statutes are at issue here, "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. at 551. A federal court can effect an implied repeal only when there is an "irreconcilable conflict" between the two statutes. *Branch v. Smith*, 538 U.S. 254, 273 (2003).

The clash of statutes imagined by defendants in this case simply does not exist. The Clean Air Act and EPCA are capable of co-existence. All that is needed is to recognize that one set of state-promulgated emissions regulations -- those that dictate fuel economy standards -- are preempted by EPCA.. That can hardly be said to create an irreconcilable conflict. Under such an interpretation both statutes have meaning; under the defendants' position EPCA's preemption provision is entirely superfluous. *Cf. Dawson v. City of Seattle*, 435 F.3d 1054, 1063 (9th Cir. 2006) (statute should not be construed to render provision superfluous); *Naragansett Indian Tribe*, 19 F.3d

[38] It would appear that defendants have admitted as much in other pleadings. See Def's Memo. of in Support of Def's and Def-Ints' Motion to Continue Trial Date and Modify Scheduling Conference Order, at 13 (July 1, 2006) ("As explained in Defendant's motion, Defendants believe that EPA has authority over greenhouse gasses, and that as a result California has authority to adopt these regulations under the Clean Air Act, overriding any contrary suggestions elsewhere.").

at 705 (interpretation that does the least amount of violence to the statutory scheme prevails). Indeed, defendants' position would read the preemption provision out of EPCA except in cases in which a State explicitly labeled its regulation as a "fuel economy" standard; nothing could do more violence to the statutory scheme than that.

Similarly, it avails defendants nothing to observe that, as their *amici*'s brief suggests, "regulating agencies with overlapping jurisdiction each retain their authority under their relevant statutes." (*Amici* Br. at 28.) Even if EPA determines that the California regulation is consistent with the regulatory scheme that it administers (as plaintiffs assume for purposes of this argument), NHTSA retains its authority under EPCA. And under that statute, the CARB regulation is preempted. CARB cannot escape regulation from one federal agency, or its governing statutory scheme, merely because another federal agency has determined that the state regulation is acceptable under its own statute.

Taken together, the text, structure, and legislative history of the Clean Air Act indicate that there is no tension between EPCA and the Clean Air Act. All that section 209(b) and section 177 do is to remove one obstacle to state regulation: express preemption of such regulations under section 209(a) of the Clean Air Act. There is nothing in the Clean Air Act that is an affirmative grant of authority to California, and nothing in the Clean Air Act that would trump the application of EPCA's preemption provisions to the extent that a California emissions regulation established a *de facto* fuel economy standard prohibited by EPCA. Accordingly, defendants' Clean Air Act arguments are insufficient to deprive plaintiffs of their opportunity to proceed to trial on their claim that the CARB regulation is preempted under EPCA.

B. The Motion To Dismiss Count II of the First Amended Complaint Should Be Denied Because EPA Has Not Waived The Clean Air Act's Preemption For Defendant's Regulations.

Count II of the First Amended Complaint alleges that CARB's 2004 regulation is preempted by the Clean Air Act. Specifically, section 209(a) of that Act preempts all state "standards relating to the control of emissions from new motor vehicles or new motor vehicle engines." Section 209(b) allows EPA to waive this preemption only if California applies for a waiver and only if EPA then determines that certain criteria are met. When the First Amended Complaint was filed, the CARB Executive Officer had declined to state whether she agreed that California needed to apply for a

Clean Air Act waiver at all, and thus it was unclear whether CARB recognized that its 2004 regulation was preempted from enforcement without EPA's prior review and approval; accordingly, the main purpose of Count II was to preserve the issue of whether the Clean Air Act applies to greenhouse gas regulations. Judging from the CARB Executive Officer's later submittal of the 2004 regulation to EPA, the main issue still appears to be in doubt, although her Answer to the First Amended Complaint can be read otherwise.[39]

Taking all her recent statements and those of CARB together, it remains unclear whether the CARB Executive Officer is completely acquiescing, in a fully binding manner, to the waiver process under section 209 of the Clean Air Act. In their memorandum in support of their present motion, defendants explain at length why they think CARB is entitled to a waiver from EPA. But there can be no blinking the key facts that (i) no such waiver has been granted, (ii) the industry cannot wait for a decision from EPA before committing its resources to compliance, and (iii) the dealer plaintiffs are currently injured by the uncertainty about the matter.[40] Given these facts, it is only natural that the plaintiffs seek a resolution of the legal question whether, in the absence of a waiver, CARB's regulation is and will remain preempted by the Clean Air Act.

That is the only Clean Air Act issue that is before this Court. Although it is possible the

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[39] A letter sent to the Administrator of EPA by CARB on December 22, 2005, seeks EPA's approval for the greenhouse gas regulation, but simultaneously notes that CARB "reserve[s its] right to assert (at a later time) that no new waiver is required for California to adopt or enforce the subject regulations." See Letter from Catherine Witherspoon, CARB Executive Director to Stephen L. Johnson, U.S. EPA Administrator 1 n.1 (Dec. 21, 2005), available at http://www.arb.ca.gov/cc/docs/waiver.pdf. On the other hand, the Answer in this action (filed on Nov. 11, 2005) states that the rules adopted in 2004 "are a standard relating to the control of emissions from new motor vehicles." Defs' Answer to Plaintiffs' First Amended Complaint ¶ 108.

It should be noted that the Clean Air Act Count cannot afford plaintiffs in this action complete, timely and lasting relief. Because EPA can waive Clean Air Act preemption (though the parties disagree as to the propriety of such an act), and can do so at an undetermined time in the future, manufacturers cannot await a decision from EPA before deciding to comply with CARB's regulation. Due to the long lead times necessary for compliance, and the fact that California would enforce the regulation immediately if EPA grants a waiver, the manufacturers must commit resources on compliance with the regulation until *permanent* relief has been received, such as would occur through a ruling on EPCA preemption.

[40] *See also* Order on Def's and Def-Ints' Motion to Modify the Scheduling Order at 5, 6 (July 18, 2006).

State will receive a waiver in the future, its arguments that it should get a waiver are currently irrelevant. The Court certainly cannot dismiss Count II because EPA may at some point in the future waive the application of section 209(a) to the CARB regulation. Stated another way, judgment on the pleadings for defendants would be appropriate only if they were prepared to argue and could demonstrate that section 209(a) did not apply to CARB's rule. They make no such argument, and therefore the Clean Air Act Count in the First Amended Complaint cannot be dismissed.[41]

C. The First Amended Complaint Adequately Pleads Facts Establishing that California's Action Is Inconsistent With and Conflicts With United States Foreign Policy And The Foreign Affairs Power.

Count III of the First Amended Complaint alleged that CARB's regulation conflicts with the foreign policy of the United States and the foreign policy power of the President and Congress in the area of national policy for the control of greenhouse gases. (FAC ¶¶ 52-57, 95.) Among other evidence, it is based on reports (never denied by the CARB Executive Officer) that state officials, apparently considering CARB to be like a full-fledged nation, embarked in 2004 and early 2005 on efforts to conduct what amounted to an international environmental initiative to convince the Government of Canada to adopt CARB's rule, undermining the bargaining position of Congress and the Executive Branch in this area. (*Id.* at ¶ 70.) As stated in the First Amended Complaint, EPA reached the following conclusion on the subject of "unilateral" commitments to reduce greenhouse gases in 2003:

> Unilateral EPA regulation of motor vehicle GHG emissions could ... weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. Considering the large populations and growing economies of some developing countries, increases in their GHG emissions could quickly overcome the effects of GHG reduction measures in developed countries. Unavoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them.

68 Fed. Reg. 52922, 52931 (Sept. 8, 2003); (*see* FAC ¶ 57.) Because EPA has decided that it cannot proceed unilaterally, then no individual State should do so, either -- but CARB's intent is apparently

[41] It also bears noting that the defendants in this action are no longer claiming that the Court should dismiss the case on some theory that EPA needs to address the issue of preemption under the Clean Air Act before the Court does so, nor are they seeking a primary-jurisdiction referral to EPA. An earlier attempt at those arguments in this Court failed. *See* Order Denying Motion to Dismiss at 26-27 (Oct. 20, 2005).

to supplant the national government in the negotiation of international greenhouse gas standards for motor vehicles. Plaintiffs seek the opportunity to prove at trial that CARB's actions intrude on the foreign policy of the United States, and should meet the same the fate as similar State incursions into foreign policy in other cases. (FAC at ¶¶ 128-133.)

The governing case law extends at least as far as Z*schernig v. Miller*, 389 U.S. 429 (1968). In Z*schernig*, the Supreme Court held that the Foreign Commerce Clause field preempted an Oregon statute being used to take property from a decedent's estate under Oregon's escheat power, where the property otherwise would have descended to heirs in the former East Germany. More recently, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Supreme Court invalidated Massachusetts' so-called Burma Law, which saw the Commonwealth of Massachusetts barring state entities from buying goods or services from companies doing business with Burma.

In the Burma Law litigation, the lower courts had held that the Massachusetts law was preempted by foreign policy preemption and by the field preemption established by *Zschernig*. *See National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff'd sub nom. National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999). The Supreme Court affirmed in *Crosby*, but exercised judicial restraint to avoid ruling on constitutional grounds. Instead, the Court held that the Massachusetts Burma law was preempted by a federal statute establishing Burmese trade sanctions. *See Crosby*, 530 U.S. at 374 n.8; *see also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 272 (1977) (explaining that preemption "is treated as 'statutory' for purposes of [the federal] practice of avoiding unnecessary constitutional adjudications").

Closer to home, in 2003 the Supreme Court invalidated California's Holocaust Victim Insurance Relief Act ("HVIRA") as preempted based on a conflict with the United States foreign policy and foreign affairs power. *American Ins. Ass'n v. Garamendi*, 539 U.S. 395, 424 (2003). The test established in *Garamendi* is whether a plaintiff can "demonstrate[] a sufficiently clear conflict to require finding preemption." *Garamendi*, 539 U.S. at 420. The fact-specific balancing test in *Garamendi* makes judgment on the pleadings plainly inappropriate.

Garamendi is also instructive in other ways. The *Garamendi* Court explained that, as in *Crosby*, the national Executive Branch needed "the coercive power of the national economy" as "a tool of diplomacy," which would be denied if California regulated unilaterally in "a large sector of

the American insurance market." 539 U.S. at 424. In like fashion, California is attempting in this case to lead much of the American motor vehicle market into a program for greenhouse gas controls that could remove any realistic prospect of obtaining *quid pro quo* regulation by foreign governments. The State may not agree with the measured approach taken by the national government with respect to climate change, any more than it did with regard to insurance claims by Holocaust victims and survivors. But the State's disagreement is immaterial. As the Supreme Court noted in *Garamendi*, "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that ... the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach verses the other are beside the point...." *Id.* at 427.

Defendants try to deploy the Supreme Court's decision in *Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), to reach a different result. In *Barclay's*, the Supreme Court upheld, against Foreign Commerce and Due Process Clause challenges, a California taxation method applied to multinational corporations. The Court found that "Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting." *Id.* at 329. From *Barclay's*, defendants argue that what they consider Congressional inaction in the field of automotive greenhouse gas regulation should immunize CARB's rule from challenge under the foreign policy preemption and related doctrines. (*See* Defs' Br. at 27-28.)

The Supreme Court's holdings in both *Crosby* and *Garamendi* should make short work of defendants' argument. First, in *Crosby*, Massachusetts advanced an argument quite similar to that of defendants here, and claimed that the failure of Congress to adopt an express preemption provision targeted specifically at Massachusetts' trade sanctions on Burma "demonstrate[d] implicit permission" for those state trade sanctions. *Crosby*, 530 U.S. at 387. The Court rejected that argument and pronounced Congress's silence in the Burma context ambiguous, noting that "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply ...." *Id.* at 387-88.

Second, in *Garamendi*, California had argued that Congress's grant of authority to the States to regulate the business of insurance in the McCarran-Ferguson Act meant that California's holocaust insurance statute, HVIRA, could not be assailed by foreign policy preemption. The

Supreme Court rejected that argument, stating "a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs." *Garamendi*, 539 U.S. at 428. The fact that in this case Congress has allowed the States to regulate some forms of vehicular air pollution, and has not yet instructed the Executive Branch to regulate motor vehicle greenhouse gases in a particular manner, similarly should not clear the way for the State to inject itself into international environmental policy controlled by Congress and the Executive Branch.

Barclay's is better read as a simple case involving the failure of Congress to take clear steps to overrule the 1983 decision in *Container Corp. of Am. v. Franchise Tax Board*, 463 U.S. 159 (1983). That decision had indicated that the United States had developed no clear foreign policy concerning tax reporting contrary to the California method. By contrast, in the realm of greenhouse gas control, the United States has been anything but inactive and purely silent. (*See* pp. 15-16 above and 60-63 below.)

California also tries to argue that under *Garamendi*, plaintiffs must demonstrate a "clear conflict" between federal foreign policy and challenged state law, suggesting that the presence of any ambiguity in U.S. foreign policy would warrant judgment on the pleadings. (*See* Defs' Br. at 28.) To the contrary, *Garamendi* actually holds that a number of factors have to be weighed before a court can decide whether foreign policy preemption arises -- factors such as the strength of the state interest, the likely impact on U.S.-foreign relations, and whether the state is regulating in a traditional area subject to its authority. *See* 539 U.S. at 420. Ambiguities teased from the instruments of international diplomacy certainly do not warrant dismissal of a foreign policy claim at the pleadings stage.

The decision in *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), is illuminating this regard. In that case, the District Court barred an attempt by States to force electric utilities to reduce greenhouse gas emissions under the common law of nuisance. In her decision, Judge Preska explained why a factual debate over the nature of foreign policy was clearly implicated by the lawsuit:

> The parties dispute what effect, if any, the relief sought by Plaintiffs would have on United States foreign relations. Plaintiffs contend that there would no effect because the "[o]fficial United States policy is to reduce domestic emissions." Pl. Opp. at 20.

> [citing various unofficial sources]. However, official United States policy is expressed by statutes and treaties in force, not press releases. And in interpreting a statute, "[o]ne must . . . listen attentively to what it does not say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 535-36 (1947). The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the "initial policy determination[s]" addressing global climate change is an undertaking for the political branches.

Id. at 273-74 (footnote omitted). *Connecticut v. AEP* is currently on appeal to the Second Circuit, but whatever the outcome reached on Judge Preska's invocation of the political-question doctrine there to dismiss that case, her conclusion that current American foreign policy opposes mandatory, unilateral regulation of CO2 emissions is unassailable.

Defendants also try to claim that the Rio Treaty (or the United Nations Framework Convention on Climate Change ("UNFCCC")), which was signed by the President George H.W. Bush and ratified by the Senate, establishes a foreign policy that commits the United States to lead developing countries by example on the issue of global warming, including by instituting mandatory regulatory GHG reductions. (*See* Defs' Br. at 28-29.) Defendants' reading of the Rio Treaty is hardly a basis for dismissal of Count III and is unsound in any event.

The Rio Treaty establishes a Conferences of Parties ("COP") mechanism for achieving the goals of the UNFCCC. At the first COP ("COP-1") in Berlin in 1995, COP-1 produced the "Berlin Mandate," which concluded that developing countries were not making adequate commitments to the UNFCCC. The Berlin Mandate clearly found, however, that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." UNFCCC/CP/1995/7/Add. 1, at 5 (June 6, 1995).[42]

Neither the Berlin Mandate nor the subsequent Kyoto Protocol developed in December 1997

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[42] Judicial notice is appropriate at some points of litigation. But resolving the foreign policy conflict on judicial notice in light of the current posture of this case would be incorrect. *See Lee v. City of L.A.*, 250 F.3d 668, 689-90 (9th Cir. 2001) (error to take judicial notice of disputed *contents* of documents the *existence* of which was properly noticeable); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982) (court could take judicial notice of a range of inconsistent verdicts under Fed. R. Evid. 201(d), but "the court erred in arbitrarily choosing one of these verdicts, that in *Borel*, as the bellwether").

at COP-3 actually solved the problem of ensuring adequate participation by developing nations. Hence, the issue has been placed on the provisional agenda for each COP occurring since 1997, but in every such instance the issue has not been resolved because a group of developing nations including China (the "Group of 77") have successfully blocked resolution of this key issue.[43]

Contrary to suggestions by defendants that the current Administration is acting out of step with the Rio Treaty, both Democratic and Republican administrations have taken a consistent position on binding commitments by developing nations. President Clinton stated:

> The industrialized world must lead, but developing countries also must be engaged. The United States will not assume binding obligations unless key developing nations meaningfully participate in the effort .... If the entire industrialized world reduces emissions over the next several decades but emissions from the developing world continue to grow at their current pace, concentrations of greenhouse gases in the atmosphere will continue to climb.

President's Remarks at the National Geographic Society, 2 Pub. Papers 1408, 1410 (Oct. 22, 1997).

President Clinton's tough pragmatism was fully warranted. If California and a group of other States adopt their own greenhouse gas regulatory programs, the President's leverage over developing nations is diminished. Additionally, the President's ability to conduct a coherent foreign policy is threatened with embarrassment if one State or a group of States are allowed to coordinate its actions with other foreign nations like Canada as if California were itself a sovereign nation, instead of part of a federated republic. *See Zschernig*, 389 U.S. at 435 (the Oregon statute's "great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle").

In addition, events in the Senate following in the wake of the UNFCCC and Kyoto processes have elevated the President's powers to conduct foreign policy in the area of global warming. The United States Senate has specifically rejected the Kyoto Protocol's attempt to avoid a firm solution to the problem of developing country participation in regulations to reduce greenhouse gas emissions. *See* S. Res. No. 98. The Senate adopted this so-called "Byrd-Hagel Resolution" by a vote of 95 to 0. It expressed concern over binding the United States to Kyoto unless: (1) developing

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[43] As one report has stated, "The fundamental issue that divided developed and developing countries was whether the implementation of the Article should be interpreted as opening up a discussion on commitments for [developing] Parties." Issues in the Negotiation Process -- Second Review of the Adequacy of Article 4.2(A and (B) of the FCCC, U.N.F.C.C.C., updated May 5, 2003, *available at* <<http://unfccc.int/issues/secreview.html>> .

countries were bound to emissions reductions on the same timetable as that set for developed nations; and (2) any new emission reduction commitments would not impose significant economic harm on the United States economy. The Senate's action supporting the Executive Branch's position on this issue thus puts Presidential power at its "apex."[44]

Defendants offer several responses, none of which warrant credence at the pleadings stage. First, defendants argue that even if Executive Branch policy controls, CARB's greenhouse gas regulation does not conflict with Executive Branch policy because the Executive Branch's current policy is to *refuse* to negotiate with developing countries to achieve binding emissions reductions. (*See* Defs' Br. at 29-30) (citing statements of State Department officials Harlan Watson and Paula Dobriansky). First, it should be pointed out that such an argument is at odds with *Crosby* and *Garamendi*. The President is certainly entitled to determine whether and when negotiations with other nations on global warming issues are to be controlled and when they are at an end. Second, defendants' reading of the President's position is simply wrong. The President has long made clear his willingness to work with major developing nation emitters to reduce emissions on a multilateral basis.[45] Putting the Watson and Dobriansky documents in proper context, what they mean is that so long as there is (in Watson's words) "no change in current conditions that would result in a negotiated agreement consistent with the U.S. approach," the United States will not engage in further

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[44] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). *Youngstown* is contrary to California's insistence that Byrd-Hagel's nature as "non-binding" is somehow relevant, and that only congressional *statutes* count for purposes of establishing the foreign policy preemption baseline. This is simply incorrect. The Supreme Court held in *Youngstown* that mere "implied authorization" by Congress is sufficient to maximize the President's powers. And the Supreme Court has further made clear in *Crosby* and *Garamendi* that *Youngstown*'s analytical framework is directly relevant to preemption questions based on foreign policy and the foreign affairs power. *See Garamendi*, 539 U.S. at 414-15, 427; *Crosby*, 530 U.S. at 375, 381.

[45] "The world's second largest emitter of greenhouse gases is China, yet China was entirely exempted from the requirements of the Kyoto Protocol. India [is in a similar position] . . . . We want to work cooperatively with these countries in their efforts to reduce greenhouse emissions and maintain economic growth . . . . I've asked Secretary Powell and Administrator Whitman to ensure they actively work with friends and allies to explore common approaches to climate change." Presidential Speech (June 11, 2001), *available at* <<http://www.whitehouse.gov/news/releases /2001/06/20010611-2.html>>.

negotiations likely to prove unfruitful in achieving its policy objectives. Watson's and Dobriansky's recognition of a present impasse in global warming negotiations with developing nations does not remotely empower California to chart its own path contrary to that of the President.

Defendants also argue that none of the Congressional enactments cited in the First Amended Complaint, (FAC ¶¶ 52-57), establishes a foreign policy "against unilateral domestic action." *See* (Defs' Br. at 30-33.) This ignores Judge Preska's wise admonition (quoting Justice Frankfurter) to "'listen attentively to what [the documents] do[] not say.'" *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535-36 (1947)). Defendants also would require the Court to disregard the EPA *Federal Register* notice that expressly indicates that the United States foreign policy seeks only multilateral action. See pp. 56-57 above and FAC ¶ 57. Defendants must surely be aware that a pronouncement of that magnitude by EPA in the *Federal Register* would have been reviewed and approved by the White House. They are not free to read it out of the pleadings and thus obtain judgment on what would be left without it.[46]

D. The Dormant Commerce Clause Claims In This Action Are Also Sufficient to Proceed to Trial.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Supreme Court held that state law violates the Dormant Commerce Clause if it "impose[s] burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits.'" 397 U.S. at 142 (citation omitted). This

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[46] Defendants perceive a "glaring contradiction" between the allegation that the federal government has for many years regulated greenhouse gas emissions by virtue of the federal fuel economy regulations, and the claim that the federal government opposes a mandatory reduction of emissions absent a multilateral agreement." (*See* Defs' Br. at 33.) They misunderstand the issue entirely. The federal government has *functionally* regulated greenhouse gas emissions from new motor vehicles for more than 25 years pursuant to the CAFE program, to achieve the ends specified in EPCA, which was enacted before climate change became a significant public issue. NHTSA has calculated environmental CO2 impacts of its latest CAFE rulemaking for the limited purposes of performing the required environmental-impacts analysis under the National Environmental Policy Act and engaging in the cost-benefit analysis required by Executive Order 12,866. *See, e.g.,* 71 Fed. Reg. at 17589, 17591, 17638, 17672 (Apr. 6, 2006). For purposes of more direct regulation of greenhouse gases, the Congress and two Administrations have decided that it is wise to restrict the Nation to non-mandatory approaches, pending the negotiation of a multilateral agreement or treaty involving developing nations. That is hardly a "contradiction" that would save the CARB regulation from further examination in this litigation.

provides the ground for the challenge to the CARB regulation under the Dormant Commerce Clause in Count IV of the First Amended Complaint.

Defendants maintain that increased new vehicle prices do not provide a valid ground for a Dormant Commerce Clause challenge to the State's greenhouse gas regulations. (*See* Defs' Br. at 35.) Defendants cite no Ninth Circuit case to support that argument and it is contrary to the law in at least one sister Circuit.

In *Yamaha Motor Corp., U.S.A. v. Smit*, 276 F. Supp. 2d 490 (E.D. Va. 2003), the District Court attempted to rule (in a fashion similar to defendants' argument) that a *Pike* claim failed because it was based purely on predicted economic effects. The District Court in *Yamaha* went on to state that even if it were incorrect that *Pike* was categorically unavailable, it still would have rejected Yamaha's *Pike*-based claim on different grounds. "[E]ven if the deleterious effects of reduced intrabrand and interbrand competition were cognizable, Yamaha has produced no evidence showing that prices for motorcycles, in fact, have increased as a result of [the challenged state law]. At most, Yamaha has shown a reduction in competition, but without some evidence quantifying the price effect of that reduction, it is impossible to conclude that this burden clearly exceeds the putative local benefit." *Id.* at 514.

The Fourth Circuit reversed, effectively holding that the District Court's finding that a price increase caused by state law (even purely as a matter of economic theory) was sufficient in the overall context to require the District Court to allow the plaintiffs to prevail on their *Pike* claim. *See Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 566 (4th Cir.), *cert. denied sub nom. Smit v. Yamaha Motor Corp., U.S.A.*, 126 S. Ct. 422 (2005). *Yamaha* establishes plaintiffs' right to proceed to trial here under the Dormant Commerce Clause, absent some proof outside the pleadings why it would be impossible to meet the *Pike* test in this case.

Defendants also claim that the *Pike* doctrine should be limited to cases in which the state law at issue creates a "disparate impact." *See Automated Salvage Transp., Inc. v. Wheelabrator Envt'l Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288 (2d Cir. 1995). Such an unjustified narrowing of *Pike* improperly conflates the two separate strands of Dormant Commerce Clause analysis -- (1) discrimination analysis and (2) undue burden analysis. Moreover, to the extent that defendants would rely on cases from the Second Circuit, it

should be noted that the Second Circuit has actually enunciated the *Pike* test in terms more complex than defendants allow:

> To this point [under the *Pike* standard], we have recognized three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states.

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth., 438 F.3d 150, 156-57 (2d Cir. 2006). The First Amended Complaint pleads many effects of the type that would meet the *United Haulers* test. (FAC ¶¶ 77, 81, 82, 96, 101.a, 103.)

Defendant's main argument with respect to Count IV appears to be that greenhouse gas regulations could never run afoul of the Dormant Commerce Clause's ban on discriminatory or excessive state interference with interstate commerce because Congress specifically authorized California to "set standards applicable to automobile manufacturers selling new cars in California." (Defs' Br. at 34.) That is another version of the argument that section 209(b) of the Clean Air Act should control all other provisions of federal law. Under the circumstances defined in section 209(b) of the Clean Air Act, California can be authorized to set emission standards for new automobiles and engines. Notwithstanding that carefully defined authority under the Clean Air Act, other federal laws can still evince Congressional intent to safeguard interstate commerce by placing further limitations on the scope of California's regulatory authority, which EPA would not consider in a waiver proceeding under the Clean Air Act.[47]

Congress may indicate its intent regarding the level of protection it desires for interstate

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[47] EPA's review of CARB regulations under section 209 are certainly limited. In *Motor Equipment & Manufacturers Association v. EPA*, 627 F.2d 1095, 1114-19 (D.C. Cir. 1979) (*MEMA*), the D.C. Circuit held that EPA did not need to consider whether a CARB regulation complied with any provision of federal law other than the criteria enumerated in section 209(b). EPA later expanded the rule in *MEMA* and held that it was not required to consider in a section 209 proceeding whether enforcement of California standards would violate other provisions of the Clean Air Act, specifically section 177 of the statute. *See* U.S. EPA, Waiver of Federal Preemption for California Low-Emission Vehicle Standards (Jan. 7, 1993) (Exhibit U). For its part, CARB has stated that EPA is absolutely forbidden to consider the issue of EPCA preemption when reviewing state regulations under section 209. *See* Exhibit N.

commerce in any source of federal law, and frequently does so in explicit terms.[48] EPCA demonstrates a clear congressional intent to protect interstate commerce in vehicle production from state fuel economy regulation.[49] The cases cited by defendants do not involve situations where multiple federal statutes were involved, or situations where the federal statute being relied on as authorization for state regulation also imposed limits on such state regulation. *See*, *e.g.*, *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981) (McCarran-Ferguson Act involved exclusively, which imposed no limits on State regulatory authority); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) (federal block-grant statutes at issue did not restrict state authority in any relevant way). None of those cases addressed a situation like the present one, in which there is certainly no clear expression of Congressional intent to approve any type of state regulation if the limited criteria in the Clean Air Act are satisfied.

Finally, defendants cite the District Court decision in *Oxygenated Fuels Ass'n, Inc. v. Davis*, 163 F. Supp. 2d 1181, 1188 (E.D. Cal. 2001), *aff'd* 331 F.3d 665 (9th Cir. 2003), to support its argument that congressional authorization to any extent terminates Dormant Commerce Clause scrutiny of state action. *Oxygenated Fuels* relied on the Supreme Court's decision in *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 720-21 (1985). For its part, *Hillsborough* upheld a District Court decision rejecting a statutory preemption challenge based in part on burdens placed on interstate commerce, but only after a bench trial. Therefore, contrary to the *Oxygenated*

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[48] *See, e.g.,* 7 U.S.C. § 7701 (Congress finding that alien "plant pest[s] or noxious weed[s] could constitute a threat to crops or other plant products of the United States and burden interstate commerce"); 12 U.S.C. § 95(a) (one purpose of the National Banking System and Federal Reserve System are to "relieve interstate commerce of [certain] burdens and obstructions" during emergency periods); 15 U.S.C. § 78b(1) (securities transactions "constitute an important part of the current of interstate commerce"); 15 U.S.C. § 1203(c)(1)(B) (allowing the Consumer Product Safety Commission to exempt from preemption state flammable fabric standards that, *inter alia*, do not "unduly burden interstate commerce").

[49] *See* 49 U.S.C. § 32919(a) (express preemption provision); *see also* 42 U.S.C. § 32913 (including the Federal Trade Commission in administering the CAFE program to ensure against lessening economic competition in the national vehicle market), 42 U.S.C. § 32916 (requiring an annual report to Congress to embrace the results of a requirement that the Secretaries of Transportation and Labor attempt to ensure that the CAFE program not "cause[] unreasonable harm to the automobile manufacturing sector in the United States" and "promote[s] employment in the United States related to automobile manufacturing."); (FAC ¶¶ 44, 76) (describing relevant legislative history and case law bearing on Congress's purpose in EPCA to protect national consumers and commerce).

Fuels court's suggestion that undue-burden claims were inherently speculative and therefore defective as a matter of law, *Hillsborough* confirms the need for a trial. Nothing *in Oxygenated Fuels* specific to that case should be read to establish a different general rule for Dormant Commerce Clause cases, and certainly the facts pleaded here set this case apart from the *Oxygenated Fuels* case.

E. The Plaintiffs' Antitrust Preemption Claim Is Also Proper and Warrants Trial.

Defendants also challenge the legal sufficiency of Count V to the Complaint alleging antitrust preemption. Count V is based on the requirement in the CARB regulation that companies with relatively small (10 percent or greater) overlap in equity ownership must, under some circumstances, demonstrate joint compliance with the aggregate with CARB's new standards. This would in some situations require companies that would otherwise remain fierce competitors to set prices in concert with one another, and to behave as a cartel created by a regulation.

Count V presents proper antitrust preemption challenges in a pre-enforcement review context. Plaintiffs have alleged and are certainly prepared to prove that competition will be injured by the California greenhouse gas rules. (*See* FAC ¶¶ 143-44.) Undoubtedly, some regulations that require a demonstration of aggregate compliance with a given set of standards would be permissible. For example, such requirements involving a parent company and a company whose voting stock is controlled by the parent would not trigger the type of Sherman Act claim involved here. When the two firms are not properly considered part of the same economic unit, however, the Sherman Act preempts the state rule. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773-74 (1984).

Plaintiffs have not brought a facial challenge to this aspect of CARB's regulation, but seek to prove specific anticompetitive effects that trigger preemption under the Sherman Act.[50] The Ninth Circuit's opinion in *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd on other grounds Washington v. Glucksberg*, 521 U.S. 702 (1997), is instructive in this regard. In that case the plaintiffs brought a pre-enforcement challenge to Washington's assisted suicide law,

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[50] *Rice v. Norman-Williams Co.*, 458 U.S. 654, 659 (1982), is not to the contrary. That case involved only a facial challenge and was thus subject to the higher standards. This case, however, involves an as-applied challenge.

but with regards to certain applications. Ultimately, the Ninth Circuit held the law unconstitutional "as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths." 79 F.3d at 798. The court explained that declaring a "statute unconstitutional as applied to members of a group is atypical but not uncommon" and because the court was "not deciding the facial validity of [the regulation], there can be no question that the exacting test for adjudicating claims of facial invalidity announced in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), is inapplicable here." 79 F.3d at 798 n.9; *see also American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000) (viable pre-enforcement review challenge based on as-applied First Amendment grounds); *McCarthy v. Briscoe*, 553 F.2d 1005, 1007 (5th Cir. 1977) (noting that three-judge District Court had invalidated, in a pre-enforcement capacity, a Texas election statute on constitutional grounds as applied to federal presidential candidates).

Because this is not a facial challenge, defendants' arguments for judgment on the pleadings miss the mark. It is of no moment that the regulation's aggregation rule will only apply in some instances. That issue will only go to the appropriate remedy. *Cf. Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006). Regardless of whether the effects of the regulation constitute *per se* violations, *see United States v. Container Corp.*, 393 U.S. 333, 336-37 & n.4 (1969), or whether the plaintiffs would need to introduce evidence at trial to support a rule-of-reason standard, s*ee, e.g., Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998), there is no basis for granting judgment to the defendants on the pleadings.

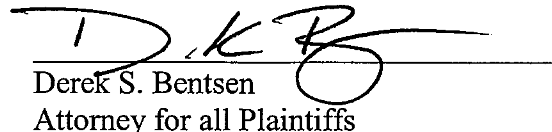
Conclusion

For the foregoing reasons, the motion for judgment on the pleadings should be denied.

DATED: July 24, 2006.

Respectfully submitted,

KIRKLAND & ELLIS LLP



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