UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP, *et al.*, Plaintiffs, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, Plaintiff, v. GEORGE CROMBIE, *et al.*, Defendants.	Case Nos.	2:05-CV-302, and 2:05-CV-304 (Consolidated)

MEMORANDUM OF PLAINTIFFS GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE, INC., *ET AL*. IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiffs Green Mountain Chrysler-Plymouth-Dodge-Jeep, *et al.* (collectively, "plaintiffs") respectfully submit this memorandum in opposition to the motion for judgment on the pleadings and dismissal filed in this action by defendants and defendant-intervenors (collectively, "defendants") on November 13, 2006.

Preliminary Statement

This action seeks pre-enforcement review of motor vehicle regulations adopted by the States of Vermont and New York in November and December 2005, respectively. The Complaint alleges among other claims that adoption and enforcement of the regulations are preempted by the Energy Policy and Conservation Act of 1975 ("EPCA"), 49 U.S.C. §§ 32901-32919. EPCA created a program for national fuel economy regulation using criteria specified by Congress. To ensure there would be no interference with the national fuel economy regulation, Congress included the following preemption provision:

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

49 U.S.C. § 32919(a). The Complaint alleges that the regulations challenged here – which set limits on "greenhouse gases," primarily carbon dioxide – amount to a *de facto* fuel economy standard, and interfere with the federal fuel economy program established under EPCA. The Vermont and New York standards are therefore both expressly preempted by EPCA, and are also subject to implied or "conflict" preemption under the rule in *Hines v. Davidowitz*, 312 U.S. 52 (1941), and *Geier v. American Honda Co.*, 529 U.S. 861 (2000).

At the time it was filed, defendants' motion to dismiss the claims under EPCA had two main prongs, only one of which now remains for the Court to resolve. The first theory for dismissal asserted that plaintiffs' claims under EPCA were not yet ripe or proper for adjudication, because the

Vermont and New York regulations could not become fully effective until the U.S. Environmental Protection Agency ("EPA") decided to waive preemption of the regulations under a separate federal statute, the Clean Air Act. That same challenge to the Court's jurisdiction had been presented in an earlier motion,[1] and was denied in the Court's memorandum opinion of November 30, 2006.[2]

Defendants' second theory for dismissal of the EPCA claim also depends on the Clean Air Act. In a nutshell, defendants claim that any state regulation that could pass muster under the Clean Air Act can be enforced, even if it amounts to a *de facto* fuel economy standard, and even if interferes with the goals and purposes of the federal fuel economy program established by Congress. Under defendants' theory, no federal court would have jurisdiction to hold a trial to determine if the impacts of a state scheme conflicted with EPCA, because such a regulation could not as a matter of law interfere with the federal fuel economy program established under EPCA, or be considered a regulation "related to" the federal standards.

No case cited by defendants supports such a result. When Congress chose to limit the scope of federal preemption under EPCA, it did so explicitly, by means of carefully defined savings clauses. (*See* pp. 16-19 below.) There is no exception in EPCA's preemption provisions for State regulations that must (for purposes of this motion) be deemed to set *de facto* fuel economy standards within Vermont and New York, and to acutely interfere with the federal fuel economy program by reducing consumer choice, destroying jobs, and increasing motor vehicle deaths and injuries. (*See* pp. 4-5 below (reviewing allegations of Complaint).) For its part, EPA is not required to decide whether a regulation offered to it for review under the Clean Air Act is preempted by EPCA; even

[1] Defendants' Rule 12(h)(3) Motion to Dismiss For Lack of Jurisdiction and Memorandum in Support (Doc. # 48-1), filed May 17, 2006.

[2] Memorandum Opinion and Order (Doc. # 165).

under the Clean Air Act, EPA's review of state regulations has been tightly circumscribed by administrative practice and at least one decision by the court of appeals. (*See* p. 33 below.)

Defendants' theory for dismissal would place their regulations in a jurisdictional vacuum, in which no federal tribunal would ever evaluate the specific effects of the regulation on the federal fuel economy program established by Congress. There is insufficient evidence in either EPCA or the Clean Air Act, much less a "clearly expressed congressional intention,"[3] that the federal courts were to be closed to hear the specific claims presented by plaintiffs in this case. It may well turn out that in the future, Congress may decide to regulate carbon dioxide from motor vehicles through a mechanism other than EPCA, so that EPA (and perhaps, by extension, some states) would be empowered to adopt limits on motor vehicle carbon dioxide. But speculation about future legislation does not relieve this Court of its obligation to decide now whether the particular regulations are expressly preempted by EPCA, or are invalid under principles of implied conflict preemption because they "frustrate[] the full effectiveness of federal law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971).[4]

The other issues in the Complaint that plaintiffs seek to resolve by trial involve separate claims of preemption under the Clean Air Act and preemption under the foreign policy provisions of

[3] *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

[4] For that reason, the outcome of *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, — U.S. — (2006), 2006 WL 1725113, is irrelevant to the preemption claims presented by plaintiffs in this case. Regardless of whether *EPA* has the authority to regulate carbon dioxide, the question would remain whether the regulations challenged here are either expressly preempted or are subject to implied preemption by frustrating the full effectiveness of the federal fuel economy program. *See* pp. 19-36 below; *see also* Plaintiffs' Memorandum in Response to Defendants' Motion to Modify the Scheduling Order (Doc. #87), filed July 25, 2006, at 10-14 (explaining that no stay of proceedings is necessary in light of *Massachussetts v. EPA*).

the U.S. Constitution. (*See* Complaint ¶¶ 111-118, 119-124).[5] The claim under the Clean Air Act is intended to permit individual manufacturer plaintiffs and other manufacturers who are members of the Alliance of Automobile Manufacturers to present evidence showing that enforcement of the Vermont or New York regulations would require them to limit the sales of some types of vehicles that are certified for sale, and can lawfully be sold, in California. Defendants' sole basis for opposing trial on this claim appears to be based on a misreading of this portion of the Complaint, which is explained below. (*See* pp. 36-39.) The claim based on the foreign policy power allocated to the national government states a claim for purposes of Rule 12(c) for the same reasons noted by the *Central Valley* court, which has heard and denied a similar motion for judgment on the pleadings. *See Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1175-83 (2006) and pp. 40-48 below.

Allegations of the Complaint

A motion under Rule 12(c) must accept as true all allegations of the Complaint. *Morris v. Schroder Capital Mgmt. Int'l*, 445 F.3d 525, 529 (2d Cir. 2005) (Rule 12(c) motion may not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Plaintiffs are not required to present evidentiary facts in support of a theory for relief on a Rule 12(c) motion, nor is there any mechanism on such a motion for a court to consider such facts. *Desiano v. Warner-Lambert Co.*, 467 F.3d 85, 89 (2d Cir. 2006).

The Complaint filed in November 2005 alleges, in brief, that the Vermont regulation (and by extension the New York regulation) will require dramatic increases in the fuel economy of most

[5] Plaintiffs are prepared voluntarily to dismiss without prejudice Counts V and VI of their Complaint, which presented claims under the Dormant Commerce Clause and the Sherman Act, in the interest of streamlining the issues for trial.

new vehicles sold in Vermont and New York above the levels set by the federal government under EPCA. *See* Complaint ¶¶ 56-60. The regulations require an increase in fuel economy because most of the reductions in greenhouse gas emissions mandated by the Vermont and the parallel New York regulations will have to come from reductions in the carbon dioxide released from vehicles. *Id.* ¶ 56. The only practical way to reduce carbon dioxide from gasoline-powered vehicles is to reduce fuel consumption, and thus to increase fuel economy. *Id*.; s*ee also id*. ¶¶ 10, 25-26, 58.

The Complaint further alleges that the practical effects of the Vermont and New York regulations will be to disrupt some manufacturers' efforts to meet the federal fuel economy standards, by means of steady but graduated improvements in fuel efficiency, consistent with EPCA. *See id.* ¶¶ 35-36, 88-93. The challenged regulations will also eliminate some vehicles from the product lines of some manufacturers and dealers in states like Vermont and New York, reduce overall new vehicle sales, jeopardize traffic safety, and reduce employment in the automobile industry in the United States. *Id.* ¶¶ 4-5, 18, 60-63. Such impacts are inconsistent with the goals and purposes of EPCA and with the federal fuel economy standards administered under EPCA by the responsible federal agency, the National Highway Traffic Safety Administration ("NHTSA"). *Id.* at ¶¶ 34-36, 75-86 and pp. 24-36 below. What Congress called "economic practicability," "technological feasibility," and motor vehicle safety have been hallmarks of the national fuel economy regulatory program since its inception, both in the rulemaking process at NHTSA and in judicial proceedings that have reviewed NHTSA's action in the U.S. Court of Appeals for the District of Columbia Circuit. (*See* pp. 12-16 below.) The regulations challenged here upset the

balance carefully struck by Congress, the federal agency and the reviewing court, with no apparent environmental gain.[6]

ARGUMENT

I. The Complaint States Proper Claims of Preemption Under the Energy Policy and Conservation Act

Plaintiffs are prepared to prove each element of the claims they have raised under EPCA. That evidence will show that, despite being labeled as Clean Air Act regulations and however well-intentioned, defendants' regulations operate as fuel economy requirements and will have a dramatic impact on consumer choice, employment in the automobile industry, and traffic safety.[7] The allegations of the Complaint, which outline that evidence, state proper claims that entitle plaintiffs to go to trial.

A. Congress Gave Wide Latitude to the States to Regulate Motor Vehicle Emissions, But Reserved Comprehensive Regulation of Motor Vehicle Fuel Economy to the National Government.

The two federal statutes pertinent to defendants' motion both date in their most important parts from the 1970s. The Clean Air Act Amendments of 1970 created a comprehensive program

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[6] Defendants make unsubstantiated predictions that global climate change is having a number of alarming adverse effects, and suggest that the regulation challenged here will help address the conditions of concern. *See* Deft. Mem. at 1-2. As the Complaint alleges, and as plaintiffs are prepared to prove at trial if the issue is in dispute and considered material to the legal issues, the regulations challenged here will have no impact on temperature or climate, in Vermont or elsewhere, no matter how widely they are implemented, because carbon dioxide disperses globally and U.S. motor vehicles are only one source of carbon dioxide. *See* Complaint ¶¶ 31, 65. On the other hand, the regulation will have the unintended effect of increasing local emissions of smog-forming pollutants and other substances that are harmful to breathe. *Id.* ¶¶ 66-74.

[7] The relevant evidence of how the challenged 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 that does not take positions on competitive issues in the industry.

for the regulation of automobile emissions that are harmful to breathe. As amended in 1977, the Clean Air Act permitted States like New York and Vermont to participate directly in the regulation of such emissions. EPCA, which was enacted in 1975, created an equally broad program for regulation of automotive fuel economy. Unlike the approach taken in the Clean Air Act, however, EPCA generally permitted no role to the States in regulating automotive fuel economy. (*See* pp. 16-19 below.)

In addition, the EPCA statute directed the national government to balance the nation's need to reduce fuel consumption with other factors, including consumer choice, the national automotive economy and traffic safety. Accordingly, NHTSA and the federal courts supervising NHTSA's work have developed a carefully nuanced and balanced national fuel economy program. As NHTSA has recently explained, that program is placed in great peril by *de facto* state fuel economy regulations like those challenged in this action. (*See* pp. 25-26 below.)

1. *The Clean Air Act*

Congress passed the 1970 Clean Air Act Amendments in an effort to address local and regional air pollution that was toxic. These Amendments created EPA and directed 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 were to be used in defining specific 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); *Abramowitz v. EPA*, 832 F.2d 1071, 1073 (9th Cir. 1987) (early evolution of the Clean Air Act). Most controls on pollution were to be implemented at the state level. In recognition of the national distribution of automobiles, however, Congress directed EPA to create federal standards for the control of automotive pollutants. *See* S. Rep. No. 89-192, at 8 (1965) (Exhibit B).

While the regulation of the automobile was national in scope, the principal problems it was intended to address were still local or regional. The air pollution problems of southern California, in particular, drew Congressional attention. 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 C).

The solution to the problem of how to address California's unique air pollution problems was the "California waiver" provision, added to Title II of the Clean Air Act in 1967. 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 meet 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).

By 1977, it was clear that many States, not just California, were having difficulty in meeting some of the National Ambient Air Quality Standards, and in particular the smog standard. As part of a comprehensive amendment to the Clean Air Act, Congress added a new section to title I of the Act, now codified at section 177, that permitted States other than California to adopt and enforce the California automobile standards.

During the evolution of the Clean Air Act, and in early litigation under the Act, the carbon dioxide emitted from motor vehicles 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.[8] Congress has long recognized that, unlike smog and other similar air pollutants, 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 D).

The automotive air pollution standards established under the Clean Air Act were designed to be "technology forcing," *i.e.*, to push the automotive industry to invent and develop new hardware and emissions control systems that could reduce harmful pollutants. *See Natural Resources Defense Council v. EPA*, 655 F.2d 318, 329 (D.C. Cir. 1988). Today, both the federal standards administered by EPA and the separate California standards have reduced smog-forming emissions to near-zero levels.[9]

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," the 1975 Energy Policy and Conservation Act 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

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[8] *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.").

[9] Defendants' suggestion that the federal automotive air pollution standards are lax in comparison to the California standards is incorrect. Indeed, at one recent point, California was obliged to amend its motor vehicle tailpipe pollutant standards to make them more stringent, in order to keep up with the federal rules adopted by EPA. *See* California Air Resources Board, Initial Statement of Reasons at i (Oct. 20, 2000), *available at* http://www.arb.ca.gov/regact/mdv-hdge/isor.pdf.

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.

2. *Basic Provisions of EPCA*

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. 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 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 E).

When setting or revising CAFE standards, NHTSA must specify "maximum feasible average" standards, and in doing so the agency "consider[s] technological feasibility, economic practicability, the effect of other standards of the Government on fuel economy, and the need of the

[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).

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) (Exhibit F). 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 recognize[d] 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 E).

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 G). 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.*

3. *Early Administrative and Judicial Development of the CAFE Program*

Mindful of Congress's instructions to balance competing goals, NHTSA has from time to time found it necessary to adjust the CAFE standards in order to protect the national automotive economy.[12] For example, a sharp decline in gasoline prices in the early 1980s increased demand for larger, more powerful vehicles. Several large manufacturers were unable to sell enough smaller vehicles in order meet the CAFE standards. Accordingly, in November 1983, Ford Motor Company ("Ford") petitioned NHTSA to reduce the CAFE standards for model year ("MY") 1984 and MY 1985 trucks. Ford explained that it had applied all the fuel economy technologies contemplated by NHTSA but could not meet the fuel economy levels previously projected by NHTSA. NHTSA granted Ford's petition and relaxed the CAFE standard for MY 1985 trucks. *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, but 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 D.C. Circuit concluded that neither the statute nor the legislative history clearly addressed the issue. As a result, the court of appeals had to determine "whether the agency's interpretation represents a reasonable accommodation of the

[12] Like the text and 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).

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 adjust the MY 1987 and 1988 passenger car CAFE standards. The agency concluded that plans developed by Ford and GM to meet those standards had been overtaken by unforeseen changes in consumer demand. As a result, NHTSA concluded, the only actions then available to Ford and GM 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). On that basis, NHTSA relaxed the standards. That decision was also contested in the D.C. Circuit, which affirmed NHTSA's action in *City of Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990).[13]

4. *The CAFE Reform Rulemaking in 2006*

In recent years, as fuel efficiency technologies for trucks have advanced, NHTSA has significantly increased the truck CAFE standards. In each of the last seven years, for example, NHTSA has raised the truck CAFE standards, applicable for model years 2005 to 2011, at an

[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 Institute 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's decision was affirmed.

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 most recent rulemaking that increased the truck standards, NHTSA determined that it needed to account for 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.[14] 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 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:

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[14] National Academy of Sciences, EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) 24 (2002).

> 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.

In the April 2006 rulemaking, NHTSA therefore adopted new fuel economy 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. This also allowed NHTSA to set more stringent standards for the industry as a whole, because it no longer had to be concerned about the impact of a unitary standard on manufacturers with the highest concentration of large, heavy trucks. The reform of the truck CAFE standards by NHTSA -- which permits more stringent truck standards while guarding against potential adverse effects on the industry -- stands in sharp contrast to the approach taken in the challenged regulations, which establish a "one size fits all" set of standards for trucks, and create some of the same economic risks that NHTSA is now seeking to avoid.

5. *The Preemption Provision in EPCA*

The preemption provision in EPCA had its origins in the earliest versions of the federal fuel economy law. 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 H) (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. 94-179, at 45 (1975) (emphasis added) (Exhibit I); *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 E) (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) (Exhibit J).

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 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) 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 section 509 of EPCA 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 that is involved in this case.

Other provisions in the 1975 Act underscore the deliberateness of Congress's 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) restricted State authority to adopt efficiency standards for "covered products" that were different from any federal standards established under the authority of EPCA:

> 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), however, permitted States nonetheless to enforce their own energy efficiency standards for "covered products" under certain narrowly circumscribed circumstances:

> 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.

B. A State Regulation That Operates As A *De Facto* Fuel Economy Standard "Relates To" Fuel Economy Standards For Purposes of EPCA's Express Preemption Provision.

Because the Vermont and New York regulations operate as *de facto* fuel economy standards, they are invalid under EPCA's preemption provision. That provision, now codified at 49 U.S.C. § 32919(a), preempts "any law or regulation related to fuel economy standards." The Supreme Court has explained that the phrase "related to" in an express preemption clause indicates Congress's intent 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). The Court has described "reference to" preemption as occurring 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. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995); *see also Egelhoff*, 532 U.S. at 147-48 (distinguishing "generally applicable laws" that have "incidental" effects on the federal program).[15]

The allegations in the Complaint establish that the Vermont and New York regulations clearly have a "connection with" and are thus "related to" fuel economy standards. The Complaint states, for example, that the regulation requires "substantial reductions in carbon dioxide, which can only be achieved with reductions in fuel consumption, and thus increases in fuel economy." *See* Complaint ¶ 56.[16] The Complaint further alleges that the States' standards "can be readily translated into fuel economy levels, based on miles per gallon," and that, for instance, the model year 2016 standard for passenger cars and smaller light-duty trucks effectively requires a fuel economy level of 43.2 miles per gallon, even though the relevant federal CAFE standard for passenger cars alone is

[15] The cases cited come from the context of the Supreme Court's interpretation of ERISA, but the Court has indicated that this case law provides appropriate guidance in the interpretation of other statutes with "related to" preemption provisions. *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 here"); *see also Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (relying on ERISA cases in interpreting "relating to" provision of INA); *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (when Congress uses same term in two statutes with "similar purpose" the Court presumes the same meaning in both).

[16] There is a direct chemical connection between the amount of gasoline consumed by an automobile and the amount of carbon dioxide emitted. Complaint ¶ 10. There is no technology that would alter this direct chemical linkage. *Id.* at ¶ 26. Thus, the only way to reduce carbon dioxide emissions from gasoline-powered motor vehicles is to increase their fuel economy.

27.5 miles per gallon. *Id*. ¶ 58. These allegations squarely assert that the challenged regulations operate as a *de facto* fuel economy standard for automobile manufacturers, and thus constitute "direct regulation" of the subject matter preempted by 49 U.S.C. § 32919(a).

It bears emphasis that plaintiffs are not claiming that EPCA preempts all state motor vehicle emission regulations that have some incidental effect on the fuel economy of particular vehicles. Rather than preempting all laws or regulations relating to "fuel economy," 49 U.S.C. § 32919(a) only preempts those laws or regulation relating to "fuel economy ***standards***." State regulations that set highway speed limits or that tax gasoline sales certainly have an effect on fuel consumption, but they are not related to fuel economy "standards." Likewise, most state motor vehicle emissions regulations have effects on fuel economy standards that can be considered "incidental," *Egelhoff*, 532 U.S. at 147-48; such regulations do not remove control of the fuel economy level that the industry must achieve from Congress and NHTSA. On the other hand, a state regulation that itself establishes a *de facto* fuel economy standard within the borders of a given State must surely be preempted, in order for the text of the section 32919(a) to have any meaning. Certainly, the inclusion of the phrase "relating to" within EPCA's express preemption provision "'necessarily' signaled Congress's intent to cover 'a range of activities beyond those'" of actually setting fuel economy standards. *Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (quoting *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073 (9th Cir. 2000)); *cf. In re WTC Disaster Site*, 414 F.3d 352, 377 (2d Cir. 2005) (holding that the statutory provision allowing recovery for injuries "resulting from or *related to* terrorist-related aircraft crashes of September 11, 2001" applied not only to those who "were on the hijacked plains or present at or in the immediate aftermath of the crashes" but also to those whose who were injured from the inhalation of toxic air).

Relying on language taken out of context from *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), defendants seize on the cliché that in

some sense everything is related to everything else, and imply that for this reason it is unnecessary to analyze the actual relationship between the Vermont and New York regulations and fuel economy standards. Deft. Mem. at 18-19. But this would take too far the lesson of *Travelers*, which is best read as demanding a close connection in order to trigger a "related to" preemption clause, as opposed to "only a tenuous, remote, or peripheral connection." *Travelers*, 514 U.S. at 655; *see also In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005) (analyzing the scope of preemption based on how close a connection the claims had to the attacks on the WTC). *Travelers* provides no license for disregarding the Supreme Court's command that 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). By choosing to preempt state regulations "related to" the fuel economy standards, Congress "necessarily" sought to preempt state-specific *de facto* fuel economy standards. *Kamagate*, 385 F.3d at 154. *f*

In its recent rulemaking to reform the truck fuel economy standards, NHTSA expressed a similar view of the reach of EPCA's express preemption provision. NHTSA began its analysis by acknowledging that California and other States have the ability to regulate automotive emissions that form air pollution via waivers of federal preemption under the Clean Air Act. 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. In NHTSA's view, because compliance with standards for smog-forming emissions would "only incidentally or tangentially affect fuel economy," those standards do not "relate to" the federal fuel economy standards for the purposes of EPCA's preemption provision. *See* 71 Fed. Reg. at 17699. NHTSA distinguished such standards from a state standard for greenhouse gases that has "essentially all of the effects of a fuel economy standard, but is not labeled as one." *Id.* Thus, NHTSA concluded that

it did not interpret "EPCA's express preemption provision as preempting State emissions standards that only incidentally or tangentially affect fuel economy" *Id.* at 17699. This understanding "allows that provision to function in a consistent way, without irrational limitations, to protect the national CAFE program" without reaching the other state emission standards." *Id.*[17]

NHTSA's analysis -- along with that advanced by plaintiffs -- solves the problem that defendants 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 "given the direct relationship between a vehicle's fuel economy and the amount of CO2 it emits." *Id*. at 17670. NHTSA's discussion merits due consideration in light of the Second Circuit's recognition that agencies are qualified to interpret the express preemption provision in their governing statutes. *See Green Mountain Rail Road Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005) ("As the agency

[17] For example, if it is true, as plaintiffs have alleged, that the model year 2016 standards for passenger cars and smaller light-duty trucks set by Vermont and New York amount to a fuel economy level of 43.2 miles per gallon, the only role left for NHTSA or Congress to play with respect to the setting of fuel economy standards effective in the Vermont and New York new motor vehicle markets would be to set an even higher standard; indeed, any lower standard established as a matter of federal CAFE would effectively be meaningless in those states, because automobile manufacturers would still have to comply with the higher standards set by the challenged regulations. Yet as defendants have acknowledged, "EPCA leaves the ultimate determination of CAFE levels to NHTSA." Deft. Mem. at 13. The only way to ensure that the ultimate determination of CAFE levels does in fact rest with NHTSA is to preempt state statutes that operate as *de facto* fuel economy standards, whether or not they are covered by a waiver of preemption issued under the Clean Air Act.

authorized by Congress to administer the Termination Act, the Transportation Board is uniquely qualified to determine whether state law … should be preempted by the Termination Act.").

C. No Authority Permits State Regulation That Would Acutely Interfere With The Purposes And Objectives Of The Federal Fuel Economy Program.

The Vermont and New York regulations are also invalid under principles of implied preemption. 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*, 402 U.S. at 652 (1971); *see also Hines*, 312 U.S. at 67 (conflict preemption principles require the Court to determine whether a state law "stands as an obstacle to the accomplishment and execution of the full principles and objectives of Congress"). Where federal law deliberately permits a certain degree of "flexibility" for a regulated party, state action that takes away such flexibility frustrates the full effectiveness of federal law, and thus violates the Supremacy Clause. *See Fidelity Fed. Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 155 (1982). Implied conflict preemption therefore creates an independent basis to examine whether a state regulation is invalid. *See, e.g., Geier*, 529 U.S. at 874.

As the *Central Valley* court found in ruling on a similar motion for judgment on the pleadings in that case, "among the objectives of the CAFE program are maximizing fuel economy, avoiding economic harm to the automobile industry, maintaining consumer choice, and ensuring vehicle safety." *Central Valley*, 456 F. Supp. 2d at 1169. Indeed, whenever NHTSA establishes or amends any of the CAFE standards under EPCA, it must consider the factors explicitly set forth in the statute, which are "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f); *see also id.* § 32902(a), (c). NHTSA must also consider the effect of

fuel economy requirements on safety. *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992). Unsurprisingly, the factors that NHTSA considers when setting fuel economy standards at the "maximum feasible level" themselves reflect the underlying policies of the federal CAFE program.

Plaintiffs have alleged, and at this point it must be taken as true, that the challenged Vermont and New York regulations will create a number of effects that disrupt the balance Congress and NHTSA have struck between the various objectives of the CAFE program. In particular, plaintiffs have alleged that the stringency of the regulation's standards will result in the elimination of many currently offered motor vehicle models, and that this will have "serious negative effects on consumer choice, the economic health of many automobile dealers in Vermont, and on employment in the automobile industry in the United States." *See* Complaint ¶ 60. Plaintiffs have also alleged that the challenged regulations will upset the balance that the federal CAFE program has struck between the goal of increasing vehicle fuel economy and the goal of maintaining motor vehicle safety. *Id.* ¶¶ 82-86. Plaintiffs' allegations are more than sufficient to establish that the challenged regulations will acutely interfere with the federal CAFE program. *See General Motors Corp. v. NHTSA*, 898 F.2d 165, 172 (D.C. Cir. 1990) (noting with regard to CAFE standards that "[t]he EPCA scheme embodies a carefully-crafted balance of conflicting policies"). At base, "[a]llowing [Vermont] to strike a different balance necessarily conflicts with the federal system." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 605 (1987) (Powell, J., concurring in part and dissenting in part); *see also California v. FERC*, 495 U.S. 490, 506 (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.").

NHTSA has also come to the conclusion that these state regulations conflict with EPCA. As NHTSA explained, a state carbon dioxide standard such as the regulation challenged here

"infringe[s] on NHTSA's discretion to establish CAFE standards consistent with Congress' guidance and threaten[s] the goals that Congress direct[ed] NHTSA to achieve." 71 Fed. Reg. at 17668. Indeed, NHTSA concluded that a state standard of this sort "render[s] NHTSA's careful balancing of consideration[s] a nullity." *Id.*

"Congress did not prescribe a precise formula by which NHTSA should determine the maximally-feasible fuel economy standard, but instead gave it broad guidelines within which to exercise its discretion." *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107, 121 (D.C. Cir. 1990). NHTSA's conclusions on the conflict between the federal program and the challenged regulations are particularly helpful because "[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; *Green Mountain Rail Road Corp*, 404 F.3d at 642; *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1136 (9th Cir. 2005); *In re MTBE Products Liability Litig.*, 457 F. Supp. 2d 324, 332 (S.D.N.Y. 2006) ("Evidence that may tend to show preemption may also include proof that the agency authorized to implement the federal statute has found that the state law would interfere with federal purpose.").

D. Defendants' Theory For Dismissal Of the EPCA Claims Would Eviscerate the EPCA Preemption Term, and Prevent Any Federal Tribunal From Ever Determining If A State Regulation Acutely Interfered With The Federal Fuel Economy Program.

Defendants argue that any state motor vehicle standard for which Clean Air Act preemption has been waived under section 209 of that Act would be immune from preemption under EPCA, by virtue of EPCA's language directing NHTSA to consider the effect of "other motor vehicle standards of the Government" when setting CAFE levels. Deft. Mem. at 9 (citing 49 U.S.C. § 32902(f)). As to express preemption, the defendants contend that for a state regulation to fall within the reach of section 32919(a), it must therefore both (1) relate to the federal fuel economy standards "***and*** [(2)]

fall outside Section 32902(f)." Deft. Mem. at 14. As to implied preemption, defendants assert that any state standard which NHTSA is directed to consider under section 32902(f) becomes part of the baseline from which NHTSA sets fuel economy standards, and that this incorporation within EPCA itself removes any possibility of conflict with EPCA.

Defendants' approach essentially treats section 32902(f) as a type of savings clause that limits the scope of the preemption provision in 49 U.S.C.§ 32919. But section 32919 already contains two savings clauses, neither of which covers the Vermont and New York regulations. Section 32919(b) allows states to adopt regulations on the disclosure of fuel economy or fuel operating costs if they are identical to the pertinent federal requirements. Section 32919(c) allows states to prescribe fuel economy standards for their own fleets. "The fact that Congress chose to [exempt] some forms of [regulations], but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 184 (1994); *cf. In re Bell*, 225 F.3d 203, 214 (2d Cir. 2000) ("Unable to point to a provision that supports her position, the appellee implicitly asks us to redraft the Code to include a provision that is conspicuously absent. It would be inappropriate to do so.").

By defendants' own admission, when Congress passed EPCA, it knew how to refer to state emission standards for which a Clean Air Act waiver had been issued. But Congress did not choose to insert any limitation on EPCA's express preemption provision for such state standards. Congress's decision to leave the phrase that it included in section 32902(f) out of section 32919's preemption provision must be treated as a conscious choice that undermines defendants' reading of the statute. *See, e.g.*, *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004); *Moreno-Bravo v. Gonzales*, 463 F.3d 253, 261 (2d Cir. 2006) ("Where Congress includes particular language in one section of a statute but omits it in another we should refrain from reading into the statute a phrase that Congress has left out of the latter section.") (internal quotation omitted).

In addition, defendants' analysis of section 32902(f) and its application to this case is circular. In logical terms, defendants' analysis has three steps:

- NHTSA must consider the effect of other motor vehicle standards when it sets fuel economy standards;
- The Vermont and New York regulations (and the California regulation on which they are based) are such motor vehicle standards; and
- Because NHTSA cannot consider invalid motor vehicle standards, the state regulations must be valid under EPCA.

Defendants' argument thus "assumes the consequent," in the parlance of logical reasoning: it would allow any state to adopt any regulation, no matter what impact it might have on the congressional program established in EPCA, and escape preemption. The question that defendants gloss over at the outset, however, is whether the state regulation is valid (or invalid) in the first instance. As NHTSA has explained, Section 32902(f) only "direct[s] NHTSA to consider those State standards that can otherwise be validly adopted and enforced under State and Federal law." 71 Fed. Reg. at 17669. One of the requirements for a standard to "otherwise be validly adopted," in turn, is that the standard must survive review under EPCA's preemption provision. Accepting the defendants' reading of the statute would simply assume that preemption provision out of existence. In contrast, the plaintiffs' reading of the statute gives effect to each clause.

Likewise, defendants' interpretation of EPCA's "related to" preemption clause leads to curious results. A state regulation that operated as a *de facto* fuel economy standard would presumably be "related to" the federal fuel economy standards up until the issuance of an EPA waiver under the Clean Air Act, but not thereafter. Yet the actual connection between the fuel economy standards and the state regulation would remain the same throughout, and it is the closeness of this connection that must be examined under the relevant Supreme Court jurisprudence, reviewed at pages 21-22 above.

Another strand of Supreme Court precedent is also relevant here. Even if the "other motor vehicle standards" language in section 32902 were considered to be a savings clause, the Supreme Court has "refused to read general 'saving' provisions to tolerate actual conflict both in cases involving impossibility and in 'frustration-of-purpose' cases." *Geier*, 529 U.S. at 874; *see also United States v. Locke*, 529 U.S. 89, 106 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."). There is simply no reason to "believe Congress intended to undermine this carefully drawn statute through a general saving clause." *Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987). Just as in *International Paper*, allowing Vermont or New York to adopt a standard such as the one at issue here would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 495. Accordingly, even if section 32902(f) were interpreted to save state regulations adopted under the Clean Air Act from EPCA's express preemption provision, that section still would not bar the operation of implied conflict preemption principles.

In any case, however, the function of section 32902(f) and the other provisions in EPCA on which defendants rely to support their interpretation of that section is virtually 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, but NHTSA still considers California standards when initially setting the fuel economy standards. If, for example, California 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 California 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 either section 32902(f) or its predecessor in EPCA (as originally enacted) were intended to repeal the preemption provision in the 1975 Act whenever California chooses to regulate automotive emissions.

NHTSA's consideration of the effect of "other motor vehicles standards" adopted by state governments does not equate to a directive that such standards "shall have the status of binding federal law for all purposes." Indeed, the original definition provision to which defendants refer (and which has now been deleted from the statutory text), *see* Deft. Mem. at 10, made clear that "emissions standards applicable by reason of section 209(b) of [the Clean Air Act]" were within the "category of Federal standards" only "***for purposes of this subsection***." Pub. L. No. 94-163 § 502(d)(3). Thus, by its own terms the provision relied upon only applied to subsection (d) of section 502 (which, as described above, allowed for NHTSA to relax the fuel standards), not the preemption provision in section 509 (codified at 49 U.S.C. § 32919), ***or even subsection (e) that specifies which factors NHTSA considers in setting the fuel economy standards***.[18] And the use of the term "Federal standards" within that repealed provision was neither a waiver of preemption nor an elevation of state emission standards to broad-ranging federal status; rather, it was merely a

[18] In fact, it appears that NHTSA now considers the effect of California standards *sua sponte* in its rulemaking process, and not because it is required by the statute to do so. NHTSA's decision to do so can hardly be considered a federalization of state regulations, *see* Deft. Mem. at xxx, particularly in light of its recent preemption analysis.

shorthand way of referring to the numerous standards that NHTSA was directed to consider.[19] At bottom, there is no indication that Congress intended -- via indirect language in EPCA's decisionmaking factors provision (section 32902(f)) -- to transform into federal law a regulation adopted by a Vermont agency, applicable only in Vermont, and enforceable only by Vermont. *Cf. Penn. Fed. of Sportsmen's Clubs v. Hess*, 297 F.3d 310, 326 (3d Cir. 2002) ("Despite plaintiffs' suggestion, the 'adopted under' clause cannot imbue a regulation enacted by a Pennsylvania agency, and *only applicable within Pennsylvania*, with federal authority.").

Nor can such intent be found in the Clean Air Act itself. In section 209(a) of the Clean Air Act, Congress generally preempted state regulation of motor vehicle emissions:

> (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 equipment.

42 U.S.C. § 7543(a). Then, in section 209(b), Congress allowed EPA to waive preemption under the Clean Air Act for California regulations meeting specifically prescribed criteria:

> (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

[19] In addition to EPA emission standards and state standards made applicable by section 209(b) of the CAA, NHTSA was also directed to consider – (1) Motor vehicle safety standards under the National Traffic and Motor Vehicle Safety Act of 1966; (2) Noise emission standards under section 6 of the Noise Control Act of 1972; and (3) Property loss reduction standards under title I of EPCA. Rather than repeating the four statutory references over and over again, the drafter of that subsection took the shortcut of including them all within the convenient term "federal standards."

> 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).

By its terms, a waiver of preemption under section 209(b) only waives preemption under "this section" -- i.e., the preemption that would otherwise apply under section 209(a); it does not block preemption that might apply under other federal statutes, such as EPCA. Similarly, the waiver of preemption under section 177 of the Clean Air Act, for states adopting standards identical to California's, also only extends to the preemption that would otherwise apply under section 209(a). 42 U.S.C. § 7507.

Moreover, neither section 209(b) nor section 177 elevates state standards adopted under those sections to "federal status." *See* Deft. Mem. at 12. 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." *United States v. Chrysler Corp.*, 591 F.2d 958, 961 (D.C. Cir. 1979). Congress did not choose to provide that States could adopt emissions regulations "notwithstanding any other provision of law" – a phrase Congress often uses. *Cf. United States v. Johnson*, 378 F.3d 230, 244 (2d Cir. 2004).

By itself, the effect of the issuance of a Clean Air Act waiver operates to remove the preemption that would otherwise obtain by virtue of Section 209(a), but it does not affect the preemptive force of other federal laws such as EPCA. *See, e.g.*, *Locke*, 529 U.S. at 106 (savings clauses 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.*, 479 U.S. at 493 (savings clause stating that "nothing in this section" preempts state law "does not purport to preclude pre-emption of state law by other provisions of the Act."); *Feikema v.*

Texaco, 16 F.3d 1408, 1414 (4th Cir. 1994) ("The natural reading of the phrase, 'nothing in *this* section shall restrict' does not preclude preemption by *other* sections of the RCRA.").

In addition, nothing in the EPA waiver process under the Clean Air Act to which defendants advert will ensure the absence of conflict between (i) a state motor vehicle emissions standard for which a waiver is being sought and (ii) the calibrated balance between the various policies of EPCA embodied in the federal CAFE program. The EPA waiver process is "modest in scope," *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1119 (D.C. Cir. 1979) ("*MEMA*"), and the only question before EPA in that process is whether the standards under consideration meet the specific criteria enumerated in section 209(b)(1)(A), (B) and (C) of the Clean Air Act.[20] Notably, none of those criteria require consideration of "economic practicability." As a textual matter, section 209(b) does not compel (and according to some, does not permit) EPA to determine how a regulation will affect consumer choice or the U.S. manufacturing industry, which are key elements of "economic practicability" under EPCA.[21]

[20] Owing to the modest scope of its review of waiver applications, EPA has felt itself compelled to issue a waiver even despite evidence that the standards under review would lead to "a more restricted model line" and that dealers would "suffer substantially" by increased costs and restricted product lines, as long as "at least one model of one manufacturer's product line for each class of vehicles [could] be certified." 40 Fed. Reg. 23102, 23104-23105 (May 28, 1975). But approving a regulation based on evidence that the State's rule will allow at least one manufacturer to produce one model in each vehicle class – which is the benchmark set by EPA for a waiver in 1975 – certainly does not ensure that the rule will preserve consumer choice or avoid injury to the U.S. automobile industry, which are part of the test for "economic practicability" under the EPCA statute. There is thus a wide gap between what EPA does in a Clean Air Act waiver proceeding, and what NHTSA does when setting or revising fuel economy standards under the terms of EPCA.

[21] In one recent waiver proceeding at EPA, the Executive Officer of the California Air Resources Board emphasized that EPA "cannot apply any additional criteria" beyond those specifically enumerated in section 209(b) in the waiver review process, and in particular could not consider "potential conflicts with other law," specifically including EPCA. (*See* Exhibit K at 10.).

The upshot is that if defendants' interpretation of EPCA were correct, then any state motor vehicle rule adopted under color of the Clean Air Act could take effect -- regardless of its impact on the balance of factors that Congress created in EPCA -- without any "up-or-down" review by any federal agency or any federal court to determine the specific impacts of the regulation on the federal fuel economy program. The emissions standards adopted by the States could drive the national fuel economy levels (and consumer choice, along with automobile industry employment) in any direction chosen by the States. California could write any motor vehicle standard that it chose -- even one that NHTSA itself would find not to be "technological[ly] feasib[le]" or not "economical[ly] practicab[le]," *see* 49 U.S.C. § 32902(f) – and other states could then adopt identical regulations under section 177 of the Clean Air Act. The balance struck by Congress among competing goals for EPCA would be irrevocably compromised.

Ignoring the practical implications of their interpretation of section 32902(f), defendants contend that any reading other than theirs would lead to an "irreconcilable conflict" within the four corners of EPCA. Deft. Mem. at 12. Plaintiffs, and the federal agency that administers EPCA, disagree. As NHTSA has sensibly concluded, its consideration of other government standards under section 32902(f) does not require it to treat as lawful any state regulation for purposes of section 32902(f). The agency can choose to set national fuel economy standards that are premised on a considered judgment that some such standards are unlawful. It is not uncommon for agencies to be mandated to consider various factors by statute, but then to have discretion in balancing them and determining the ultimate standard. *See*, *e.g.*, *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (explaining that the Secretary's ultimate decision is review for an abuse of discretion but he must "consider" various factors in coming to that discretionary final conclusion); *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 77 (1st Cir. 2006) (Secretary has "broad

discretion" to determine "reasonable costs" under the Medicare Act although the Secretary is required to "consider" various statutory criteria).

Finally, there is also nothing in the legislative history of EPCA that suggests that California and Section 177 States are permitted to move beyond adopting regulations that may have some effect on fuel economy, into a realm in which they set what amount to their own, state-specific fuel economy requirements. Defendants make repeated reference to a statement in a Report on the Clean Air Act Amendments of 1977 by the House Committee on Interstate and Foreign Commerce, H.R. Report No. 95-294 (1977), that, in defendants' reading, stands for the proposition that "Congress declared that where emission standards have the effect of improving fuel economy both goals 'can and should be pursued.'" Deft. Mem. at 15. It is certainly a stretch to argue that a suggestion that some technologies could be used to improve both fuel economy and pollution control can be taken to mean that rules that require the use of fuel economy technologies are always lawful, even when embodied in *de facto* fuel economy standards like those challenged here.

Equally important, however, the Report on which defendants rely does not support their sweeping assertion. First, the quoted passage is not actually a congressional statement, but is part of a block quote from a National Academy study that in turn is used to support the statement that "The National Academy also concluded that technology developed to reduce automobile emissions may actually improve fuel economy as well." H.R. Rep. No. 95-294, at 247 (1977) (Exhibit L) . This "legislative history" citation is thus not even a statement of Congress's position, but rather a recitation of the position of the authors of a report attributed to the National Academy. Second, the citation does not come from any discussion of the effect of an EPA waiver or of NHTSA's obligation to consider state standards when setting federal fuel economy requirements, but rather from a discussion about the "proper balance between reducing new automobile emissions levels and improving fuel economy." *Id.* at 244. The statement upon which the defendants rely is merely used

to "again confirm[] the long-held Committee view that the fuel economy effect of any particular emission standard largely rests with the manufacturer," *id.*, which in turn suggests that Congress did not envision that state-adopted automobile *emissions* standards would or should ever have more than an incidental effect on the fuel economy levels of manufacturers' fleets.

What the legislative history actually reveals is that in the interest of ensuring uniform national fuel economy regulation, EPCA's framers decided early in their work that "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 H). At bottom, neither EPCA's text, nor its structure, nor its legislative history support the claim that 49 U.S.C. § 32902(f)'s directive for NHTSA to consider state motor vehicle emissions standards immunizes those state standards from preemption by EPCA. Rather, in all instances, Congress and NHTSA must be able to balance all of EPCA's underlying objectives in order to set fuel economy standards for the entire nation -- and the federal courts must be open to enforce the decision of Congress to provide for fuel economy regulation solely at the national level.[22]

II. Plaintiffs Are Entitled To Prove At Trial That Vermont's Regulation Violates The Limitations Established In Section 177 Of The Clean Air Act

Section 177 of the Clean Air Act, now codified at 42 U.S.C. § 7507, allows states that adopt automobile emission standards based on California standards to avoid preemption under section

[22] Section 32902(f) also does not save the Vermont and New York regulations from the possibility of field preemption. Field preemption occurs when a state "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively," *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990), and thus there is "the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973). EPCA has exclusively occupied the field of fuel economy standards, and defendants have unlawfully intruded on that field by promulgating a regulation which amounts to a *de facto* fuel economy standard. *Cf. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (defining standards).

209(a) of that Act only if certain conditions are met. First, the regulation must be "identical" to California standards for which California has received a waiver of Clean Air Act preemption under section 209(b). Second, the regulation must be adopted at least two years before the commencement of the relevant model year. Finally, as amended in 1990, section 177 provides that "Nothing in this section or in title II of this Act shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards . . . ." Pub. L. 101-549, § 232 (1990). Consistent with the canon against interpretations that render some congressional language as surplus, each of these limitations must be understood to possess independent force constraining state authority. *See, e.g.*, *Lutwin v. Thompson*, 361 F.3d 146, 157 (2d Cir. 2004).

Invoking the last of the three limitations contained in section 177 -- the 1990 amendment that forbids direct or indirect limits on the sales of California-certified vehicles -- plaintiffs have pleaded that the challenged regulation, when applied to some manufacturers, will result in the limitation on the sale of some types of motor vehicles certified by California. Complaint ¶ 113. Such a limitation will result because the challenged regulations require manufacturers to ensure that the mix of vehicles sold in Vermont and New York meets specific average CO2 levels on a multi-year basis, even though "the mix of various types of vehicles sold in Vermont [or New York] differs substantially from the mix of vehicles sold in California." *Id.* at ¶¶ 112-113. As a result, the regulation cannot escape Clean Air Act preemption through section 177.

Defendants assert that *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*, 17 F.3d 521 (2d Cir. 1994) ("*MVMA III*") forecloses plaintiffs' claim, but they overread the holding of *MVMA III*. In that case, New York had adopted California's "low-emission vehicle" (or "LEV") regulations, which included a requirement that a fixed percentage of all vehicles certified for sale be "zero-emission vehicles" (or "ZEVs"), meaning

"vehicles with no tailpipe emissions of any pollutants throughout their lifetimes, which are presumably electric cars." *See id.* at 528. The district court held, on cross-motions for summary judgment and as a matter of logic, that because "the ZEV sales quota would require the sale of a specified number of ZEVs, it would have the effect of limiting the sales of other California-certified vehicles." *Id.* at 531. On appeal, the Second Circuit overturned that broad ruling. It read the 1990 amendment to section 177 not to prohibit rules that depressed total vehicle sales in a given state, but only rules that "regulate against the sale of a particular type, not number, of California-certified cars." 17 F.3d at 536. In dicta, Judge Cardamone also spoke approvingly of the portion of the LEV regulation that permitted manufacturers the flexibility of meeting the limits set by the rule on smog-forming emissions on a fleet-wide basis. *Id.* at 528, 536-37.

This case presents precisely the situation that, according to *MVMA III*, Congress intended to address in the 1990 amendment to section 177. While it is true that the challenged regulations will reduce the number of new vehicles sold in New York and Vermont, that is not the effect giving rise to the claim presented in Count III of the Complaint. Plaintiffs intend to offer proof that enforcement of the fleet-wide standards contained in the new greenhouse gas regulations will force some manufacturers to limit the sales of *specific types* of vehicles in Vermont or New York that would otherwise be legal for sale without any penalty in California. States may adopt and enforce the California LEV standards -- which is the point established in *MVMA III* -- but under the clear terms of section 177, they cannot penalize the sale of specific types of California-certified vehicles. The Court of Appeals in *MVMA III* was confronted with a facial challenge without specific evidence demonstrating how state action was actually going to limit the sale of California-certified vehicles. *Cf. Brooklyn Legal Services Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006) ("Facial and as-applied challenges differ in *the extent to which* the invalidity of a statute need be demonstrated (facial, in all applications; as-applied, in a personal application)."). In this case, by

contrast, plaintiffs intend to demonstrate how the new regulations will limit the sales of specific models or types of vehicles.

Defendants contend that the Second Circuit has already rejected any attempt to challenge a State's decision to opt-in to California's standards on the ground that a California fleet-averaging requirement (otherwise adopted in identical terms) would create an indirect sales limitation. Defendants themselves, however, recognize that the Second Circuit's discussion of "fleet averaging" provisions in California law was dicta and was an argument that had not been raised by the parties. *See* Deft. Mem. at 30. Dicta, of course, does not bind District Courts within the Second Circuit. *See, e.g., United States v. Giffen*, — F.3d —, 2006 WL 3544862, at *10 (2d Cir. 2006) ("[T]hese observations are dicta and do not bind the district court"); *Nash v. Bowen*, 869 F.2d 675, 678 (2d Cir. 1989). Because only the ZEV sales quota was actually before the *MVMA III* panel, anything it stated about other aspects of the LEV program that went unchallenged (such as fleet averaging generally) can only be regarded as non-binding dicta. Accordingly, *MVMA III* does not require dismissal of Count III, and defendants' motion for judgment on the pleadings with respect to this Count should be denied.[23]

[23] In addition, it bears noting that the reasoning of *MVMA III* may not be consistent with the Supreme Court's subsequent decision in *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). Analyzing the parent preemption provision to section 177 under Title II of the Clean Air Act, Section 209(a), *Engine Manufacturers* rejected the argument that local California air quality rules were not preempted "standards" because they restricted vehicle purchases and not sales. *See id.* at 255. Like the Ninth Circuit ruling overturned in the *Engine Manufacturers* case, *MVMA III* was based on formalism. Just as a purchasing restriction was deemed in *Engine Manufacturers* to have the same effect as a sales restriction (with the same preemption consequences), so should an indirect sales limitation be treated for preemption purposes in the same fashion as an explicit sales limitation.

III. The Complaint Adequately Pleads Facts Establishing that Vermont's Action Is Inconsistent With And Conflicts With United States Foreign Policy And The Foreign Affairs Power.

Count IV of the Complaint alleges that the Vermont regulation (and by extension also the New York 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. (Complaint at ¶¶ 49-54, 119-124.) Specifically, the regulations would interfere with the ability of the Nation to speak with one voice in the area of foreign affairs and with the President's ability to negotiate for multilateral reductions in greenhouse gas emissions. Plaintiffs seek the opportunity to demonstrate that Vermont's and New York's actions intrude on the foreign policy of the United States, and hence that their regulations should meet the same fate as similar incursions into foreign policy in other cases. (Complaint at ¶¶ 119-124.)

As stated in the Complaint, EPA reached the following conclusion in 2003 on the subject of "unilateral" commitments to reduce greenhouse gases:

> 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. 52,922, 52,931 (Sept. 8, 2003); (*see* Complaint at ¶ 54.)

Since the filing of the Complaint, the Solicitor General of the United States has taken the step of expressly endorsing EPA's explanation of the Executive Branch's foreign policy as it bears on greenhouse gas emissions issues.[24] Thus, the Solicitor General has removed any doubt about the

[24] The Solicitor General is statutorily authorized to represent the United States in litigation before the Supreme Court. *See* 28 U.S.C. §§ 505, 518(a); *see also United States v. Savin*, 349 F.3d 27, 31 n.1 (2d Cir. 2003). The Solicitor General makes statements in his brief in *Massachusetts v. EPA* about

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nature and content of American foreign policy, and in the process unmistakably cemented the legal viability of Count IV of this Complaint. This Court is explicitly permitted to take judicial notice of the Solicitor General's statements defining American foreign policy as it bears on the issue of global warming. *See* Fed. R. Evid. 201. For the Court's convenience, moreover, the most salient statements are reproduced below. Particularly in light of that brief, but also in light of controlling case law, defendants' attempt to dismiss Count IV of the Complaint should be rejected.

First, the Solicitor General made clear in his brief at several points that EPA's position in its 2003 decision (i.e., that the foreign policy of the United States would be disrupted by piecemeal unilateral domestic regulation efforts) represented the considered and harmonized views of the entire Executive Branch, and indeed that Congress had confirmed EPA's central role in such matters of international policy:

> Petitioners and their amici suggest that it was inappropriate for EPA to consider the potential international implications of regulating greenhouse gases. But EPA has direct familiarity with the Executive's foreign policy on global climate change. In addition, EPA is periodically involved in discussions with the Department of State on this issue, and the two agencies have entered into multilateral and bilateral agreements with other countries on matters relating to global climate change. . . . Moreover, Congress has specifically recognized EPA's familiarity with such international efforts. In the Global Climate Protection Act of 1987, for instance, Congress directed EPA to submit, 'jointly' with the Secretary of State, an 'assessment of United States efforts to gain international cooperation in limiting global climate change,' and 'a description of the strategy by which the United States intends to seek further international cooperation to limit global climate change.' § 1104(2) and (3), 101 Stat. 1409 (15 U.S.C. § 2901 note).

S.G. Brief at 48-49 n.24 (Exhibit M).

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the Executive Branch position as a whole, about EPA's position, about the Department of Transportation's position (in terms of its role in administering the fuel economy program), and about the position of the State Department, with whom EPA regularly consults on international global warming policy. These statements are the result of a coordinating process overseen by the Solicitor General whose aim is to present the unified policy of the United States in any filing with the Supreme Court.

Second, the Solicitor General defended in straightforward fashion EPA's rationale for declining to regulate carbon dioxide emissions from automobiles under the Clean Air Act for foreign policy reasons simply by restating what EPA itself had said: "The agency observed that unilateral regulation could 'weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies,' and that '[a]ny potential benefit of EPA regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions.'. . . Those concerns were premised in part on EPA's experience with efforts to control the phenomenon of stratospheric ozone depletion." *Id.* at 48-49. Nowhere in this passage does the Solicitor General differentiate between different types of "unilateral regulation." It is true that only the question of federal authority to regulate carbon dioxide emissions from automobiles is directly at issue in *Massachusetts v. EPA*, U.S. No. 05-1120 (Aug. 31, 2006). But the logic of the Executive Branch's position applies equally well to unilateral *state* regulation, just as it plainly applies by its terms to unilateral federal regulation.

Third, and finally, the Solicitor General cautioned the Supreme Court that it should not second-guess the Executive Branch's carefully crafted foreign policy on climate change issues: "Particularly given the complexity and global nature of the climate change issue, it would be inappropriate for a court to set aside the Executive Branch's judgment as to the likely effects of domestic regulation on its active efforts to encourage the reduction of greenhouse gas emissions in foreign countries – where the vast majority of worldwide greenhouse gas emissions are produced." *Id.* at 49. The reference to "domestic regulation" within this definitive statement of the Executive Branch's position applies equally to both federal and state regulation. Defendants' argument that "Plaintiffs cannot meet their burden to show a conflict based on specific 'executive authority,'" Deft. Mem. at 33, thus misses the point that *any sort* of unilateral domestic regulation would interfere with ongoing efforts to persuade developing countries to enter into an overarching agreement or treaty.

And the same is true for any efforts that the Executive Branch may have underway to negotiate voluntary reductions with other nations.

The statements of the Solicitor General and of the EPA demonstrate why the various arguments defendants make to obtain dismissal of Count IV of the Complaint must fail. First, defendants argue that foreign policy preemption applies only to state law that causes more than an incidental effect on federal foreign policy, and that courts adjudicating such preemption claims must take state interests into account, citing *American Insurance Association v. Garamendi*, 539 U.S. 396, 420 (2003). The views that the Solicitor General and EPA have set forth concerning international greenhouse gas emissions policy make clear, however, that the interference that unilateral regulation of any sort would cause to United States foreign policy would not be "incidental." If unilateral regulation would have only an incidental effect, EPA would not have invoked foreign policy concerns in its *Federal Register* ruling, and the Solicitor General would not have endorsed such statements on behalf of the entire Executive Branch.

Next, defendants claim that because Vermont is purporting to operate under authority of Section 177 of the Clean Air Act, Vermont must have strong state interests that require balancing under the governing *Garamendi* test. Deft. Mem. at 31. Of course, even putting aside that this contention presumes that Count III (alleging the inconsistency of DEC's rule with Section 177) of the Complaint is invalid, such an argument fails because it is directly contrary to *Garamendi*. In *Garamendi*, California argued that it was authorized by the McCarran-Ferguson Act's grant of regulatory powers to States in the insurance area to enforce its Holocaust Victim Insurance Relief Act ("HVIRA"), despite impacts on federal foreign policy. Justice Souter rejected those arguments in his opinion for the Court: "[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.

Section 177 of the Clean Air Act is every bit as much domestic commerce legislation as McCarran-Ferguson is. Hence, the authorization provided to Vermont in Section 177, even if applicable, could not serve as a perfect talisman against foreign policy preemption. Judge Ishii agreed with this argument in rejecting California's claim that authorization to California under Section 209(b) of the Clean Air Act (the analogue to Vermont's invocation of Section 177 here) required dismissal of a foreign policy preemption challenge to its greenhouse gas rule. *See Central Valley*, 456 F. Supp. 2d at 1182 ("Defendants have pointed to no basis, either in the language or legislative history of the statute, to believe that Congress, in providing for a section 209(b) waiver, contemplated the effects of California emissions regulations on foreign policy and intended to endorse such regulations even when they interfered with foreign policy goals.").

Defendants next argue that under *Garamendi*, foreign policy preemption can occur only where executive agreements exist or where federal foreign policy is to pursue mandatory international agreements and not voluntary international agreements. *See* Deft. Mem. at 32-34. This is not true. There are Supreme Court cases exploring foreign policy preemption other than *Garamendi*, and one of them clearly holds state action preempted even in the absence of a specific executive agreement. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court held, despite an amicus brief from the Solicitor General disclaiming an actual impact on Executive Branch foreign policy, 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. The *Garamendi* Court did not disturb *Zschernig*'s field preemption approach, holding only that whether conceived of as field preemption or conflict preemption, the California HVIRA was preempted by federal foreign policy. *See Garamendi*, 539 U.S. at 419-20.

Placing heavy reliance on former Secretary of State Madeline Albright's *Massachusetts v. EPA* brief, defendants proceed to argue that state regulation of greenhouse gases could only conflict with an Executive Branch foreign policy calling for mandatory and not voluntary action. *See* Deft. Mem. at 33-36. But this argument is flatly contrary to *Garamendi* – a case that Secretary Albright's brief does not acknowledge or even cite. *See* Br. for Amicus Curiae Madeline K. Albright in Support of Petitioners in *Massachusetts v. EPA.* In *Garamendi*, the core of the relevant U.S. foreign policy comprised efforts to engage other nations in a voluntary effort to resolve Holocaust-related insurance disputes amicably, and without litigation. *Garamendi* is replete with expressions of the voluntary nature of the web of international agreements that the Clinton Administration negotiated (under Secretary Albright herself). *See*, *e.g.*, 539 U.S. at 405-407, 421. Despite the voluntary rather than mandatory nature of the measures the U.S. was pursuing, the *Garamendi* Court nonetheless found that California's unilateral actions "threaten[ed] to frustrate the operation of the particular mechanism the President has chosen." *Id.* at 424.

Beyond its inconsistency with *Garamendi*, the argument advanced by former Secretary Albright and the defendants is illogical. Unilateral state regulation of greenhouse gases would undermine the Executive's leverage to obtain a comprehensive set even of purely voluntary agreements, just as it would undermine any leverage to obtain mandatory agreements.[25] Either way,

[25] Plaintiffs do not concede that federal foreign policy concerning global warming regulation is to seek exclusively voluntary agreements. Current foreign policy is better described overall as seeking voluntary agreements only because a comprehensive mandatory agreement is opposed by China and India, and because undue harm to the United States economy must also be avoided. This is the reason for Chairman Connaughton linking the notion of developing countries' (read: China's and India's) reticence to join a comprehensive mandatory treaty with his discussion of interim voluntary international agreements. *See* Deft. Mem. at 35. And the key proviso in the statement of State Department official Harlan Watson is that a negotiated position "consistent with the U.S. approach" is unlikely to emerge given doubts about whether a treaty could be fashioned that would include

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the question is one of who speaks for the Nation, and whether a state's action should be allowed to dilute the Executive's voice. As *Garamendi* stated: "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 .... But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress." *Id*. at 427.

Turning to the realm of legislative foreign policy (which the Court need not even reach given the clear conflict plaintiffs have alleged with Executive Branch foreign policy), defendants contend that the Rio Treaty (or the United Nations Framework Convention on Climate Change ("UNFCCC")), which was signed by the elder President 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 Deft. Mem. at 36-37. Contrary to suggestions that the current Administration is acting out of step with the Rio Treaty, however, in fact both of the Administrations to have faced this issue have taken a consistent position about the need to secure binding commitments by developing nations to emissions reductions. President Clinton stated, for instance:

> 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.

China and India, while not unduly damaging the American economy. *Compare* Deft. Mem. at 36 n.23.

President's Remarks at the National Geographic Society, 2 Pub. Papers 1408, 1410 (Oct. 22, 1997) (Exhibit N). It is this foreign policy – shared by the current President Bush – which Vermont's piecemeal regulatory approach threatens. Clearly, if Vermont and California, and potentially all 48 other States, pursuant to Clean Air Act section 177, adopt their own greenhouse gas regulatory programs, the President's leverage over developing nations is diminished.

Defendants also assail the mention in the Complaint (¶¶ 49-54) of a so-called "hodgepodge of domestic laws" bearing on foreign policy preemption, arguing that "[n]one of these laws establishes a federal policy that state regulatory action to reduce GHG emissions should be withheld or conflicts with foreign policy objectives." Deft. Mem. at 37. But defendants fail to recognize that the collection of laws cited all establish two critical points that form the scaffolding upon which current Executive Branch foreign policy clearly continues to rest: *First*, the Kyoto Protocol was rejected by the Senate by a vote of 95-0 because it would have committed the United States to a binding international treaty that did not include two significant sources of emissions (China and India) and because it would have unduly damaged the United States economy. *See* S. Res. 98, S. Rep. No. 105-54 (1997). In the Knollenberg Amendments, appropriations riders were also adopted to reinforce the Byrd-Hagel point for a period long enough to make clear that Congress would tolerate no attempt to adopt Kyoto as then framed. *See, e.g.*, Pub. L. 105-276, 232 (1998). *Second*, wherever Congress has acted in the area of global warming policy it has always proceeded to establish non-mandatory programs, such as the Global Climate Protection Act of 1987, which authorizes further study of the issue and internal Executive Branch policy coordination. The Solicitor General similarly cited this statute to support a delegation of authority concerning foreign policy to EPA. *See* S.G. Br. at 48-49 n.24. The National Climate Program Act of 1990 and the Global Change Research Act similarly focus on authorizing only further research.

In all of these instances, defendants fail to perceive the salient point. But Judge Preska of the United States District Court for the Southern District of New York grasped the point perfectly well when she observed in other global-warming related litigation:

> The parties dispute what effect, if any, the relief sought by Plaintiffs would have on United States foreign relations. Plaintiffs contend that there would be 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.

Connecticut v. American Elec. Power Co., 406 F. Supp. 2d 265, 273-74 (S.D.N.Y. 2005) (footnote omitted) (appeal pending). Taken together, the statutes cited in the Complaint undercut any argument that the United States has already committed itself to unilateral mandatory reduction of greenhouse gases. These sources, along with the statements U.S. EPA has made and the views expressed so recently by the U.S. Solicitor General, provide ample reason for the Court to deny defendants' motion for judgment on the pleadings with respect to plaintiffs' claim of foreign policy preemption.

CONCLUSION

For the reasons stated, defendants' motion for judgment on the pleadings should be denied and the case should proceed to a Bench Trial on the schedule ordered by the Court.

Respectfully submitted,

/s/ Robert B. Hemley

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