

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER-  
PLYMOUTH-DODGE JEEP, et al.,

Plaintiffs,

v.

GEORGE CROMBIE, in his official capacity as  
Secretary of the Vermont Agency of Natural  
Resources, et al.,

Defendants.

Case Nos. 2:05-CV-302 and  
2:05-CV-304  
(Consolidated)

THE ASSOCIATION OF INTERNATIONAL  
AUTOMOBILE MANUFACTURERS,

Plaintiffs,

v.

GEORGE CROMBIE, in his official capacity as  
Secretary of the Vermont Agency of Natural  
Resources, et al.,

Defendants.

**BRIEF OF PLAINTIFF ASSOCIATION OF INTERNATIONAL AUTOMOBILE  
MANUFACTURERS CONCERNING MASSACHUSETTS V. EPA**

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Pursuant to this Court's April 2, 2007, Notice of Hearing, Plaintiff, the Association of International Automobile Manufacturers ("AIAM"), hereby submits this brief to address the recent decision of the United States Supreme Court in *Massachusetts v. EPA*, No. 05-1120, slip op. at 16 (U.S. Apr. 2, 2007).

## **I. INTRODUCTION**

This action seeks judicial review of recent regulations adopted by the Vermont Department of Environmental Conservation (the "DEC Regulations"). The DEC Regulations adopt limitations enacted by the California Air Resources Board restricting the amount of greenhouse gases emitted from new motor vehicles. The primary greenhouse gas impacted by the regulations is carbon dioxide ("CO<sub>2</sub>") which accounts for approximately 95% of all greenhouse gas emissions from motor vehicles.

As AIAM is prepared to prove at trial, carbon dioxide emissions are inextricably linked to the amount of carbon-containing fuel consumed by an automobile, and the only practical way to reduce CO<sub>2</sub> emissions from a gasoline-powered motor vehicle is to improve the fuel economy of the vehicle. Accordingly, the DEC Regulations are barred by Section 32919(a) of the Energy Policy and Conservation Act of 1975 ("EPCA"), which preempts any State law or regulation "related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919. Both the plain text and the legislative history of EPCA's preemption provision indicate that the statute's fundamental goal is to ensure national uniformity in fuel economy regulation.<sup>1</sup>

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<sup>1</sup> For example, Congress considered but rejected narrower forms of express preemption such as provisions that would have allowed state fuel economy regulations so long as they were not "inconsistent" with federal fuel economy standards, labeling, or advertising, S. Rep. No. 94-179, at 25 (1975), and provisions that would have allowed state regulations that were

AIAM also is prepared to prove at trial that the DEC Regulations are impliedly preempted by EPCA because they intrude into the field of fuel economy regulation that has been reserved for the federal government and on their face conflict with the federal corporate average fuel economy (“CAFE”) program. The DEC Regulations effectively require fuel economy greatly in excess of the applicable federal levels – reaching over 43 mpg for the PC/LDT1 category and over 26 mpg for the LDT2/MDPV category – and thereby upset the balance required by EPCA between reducing fuel consumption, maintaining wide consumer choice, protecting the economic health of the automobile industry, and ensuring the safety of the vehicles Americans drive.

The Supreme Court’s decision in *Massachusetts v. EPA* did not address either of these issues of federal preemption of State authority. Rather, the Supreme Court simply held that the Environmental Protection Agency (“EPA”) has concurrent federal authority with the Department of Transportation to regulate carbon dioxide emissions from motor vehicles, and that EPA failed to provide a sufficient explanation consistent with the Clean Air Act for its decision not to regulate CO<sub>2</sub> from automobiles. The Supreme Court did not address the entirely different question of State authority to regulate greenhouse gas emissions, or whether such efforts are preempted by Section 32919(a) of EPCA. Nor did the Court consider whether a State has free reign to enact a regulation that conflicts with EPCA’s multifaceted goals. To the contrary, the Supreme Court’s decision advances EPCA’s goal of ensuring national uniformity in the field of fuel economy regulation, as evidenced by EPCA’s express preemption provision. The Court

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[Footnote continued from previous page]

“identical to” a federal requirement, H.R. Rep. No. 94-340, at 274 (§ 507 as introduced, § 509 as reported) (1975).

recognized that as sister agencies within the same Executive Branch, both EPA and the National Highway Traffic Safety Administration (“NHTSA”) will be able to coordinate their efforts so that “both [can] administer their obligations and yet avoid inconsistency.” No. 05-1120, slip op. at 29. Accordingly, the Court’s opinion does not support the notion that the State of California (and by extension the State of Vermont) can enact a regulation that is “related to fuel economy standards” or that frustrates the objectives of EPCA.

## **II. OVERVIEW OF THE SUPREME COURT’S OPINION**

*Massachusetts v. EPA* presented two questions before the Supreme Court:

1. Whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1) [of the Clean Air Act, 42 U.S.C. § 7521(a)(1)] and
2. Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1).

See <http://www.supremecourtus.gov/qp/05-01120qp.pdf>. Since the Court cannot “address those two questions unless at least one petitioner has standing to invoke . . . jurisdiction under Article III of the Constitution,” slip op. at 2, it first entertained argument on this preliminary standing issue.

Turning to the justiciability question, the Court determined that Massachusetts had standing to pursue a challenge to EPA’s failure to regulate. In reaching this conclusion, however, Justice Stevens stressed the fact that the regulation of CO<sub>2</sub> is a federal matter and that Massachusetts had ceded its sovereign power to regulate these emissions from automobiles:

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U. S. 592, 607 (1982) (“One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is

one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers”).

These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the “emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U. S. C. §7521(a)(1).

Slip op. at 15

On the merits, the Court first concluded that Section 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles if the Agency makes an “endangerment finding”—in essence, concluding that such emissions contribute to climate change and thus ““may reasonably be anticipated to endanger public health or welfare.””

Slip op. at 25 (quoting 42 U. S. C. §7521(a)(1)). Relying on the broad definition of “air pollutant,” the Court then rejected EPA’s argument that CO<sub>2</sub> is not an “air pollutant” within the meaning of the Clean Air Act because Congress did not intend it to regulate substances that contribute to global climate change. *Id.* at 26. Rather, the Court explained that EPA still had authority to regulate CO<sub>2</sub> emissions even though reducing such emissions may implicate the Department of Transportation’s regulation of fuel economy. *Id.* at 29. Significantly, the Court observed that although the obligations of EPA and DOT “may overlap,” “there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” *Id.*

Addressing the final question of whether EPA abused its discretion in deciding that it would be unwise to regulate greenhouse gas emissions at this time, the Court found that EPA’s conclusion “rests on reasoning divorced from the statutory text,” *id.* at 30, because the Agency offered “no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change,” *id.* at 32. The Court therefore remanded the matter to EPA for reconsideration in light of the requirements of the Clean Air Act. The Court’s ultimate holding

was very narrow and did not “reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding.” *Id.* at 32. Rather, the Court simply held that “EPA must ground its reasons for action or inaction in the statute.” *Id.*

Significantly, the Court further observed that, in the event that EPA determines that emissions of greenhouse gases “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” 42 U.S.C. § 7521(a)(1), the Agency possesses broad discretion in determining what standards it should set, including coordination with its sister agencies. “EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.” *Slip op.* at 30.

### **III. THE SUPREME COURT’S OPINION DOES NOT ADDRESS THE ISSUES PRESENTED IN THIS ACTION**

A review of the Supreme Court’s decision in *Massachusetts v. EPA* clearly shows that the Court said nothing that would save the DEC Regulations from either express or conflict preemption. Indeed, the opinion repeatedly reaffirms the national nature of the global warming policy and the primacy of federal measures to address it.

#### **A. The Supreme Court’s Decision Is Silent On The Issue of Express Preemption**

AIAM’s claim for express preemption under EPCA is centered on the language of that statute’s preemption provision, 49 U.S.C. § 32919(a). By its very terms, that provision restrains only State authority in the field of fuel economy regulation, but has no impact on federal authority:

When an average fuel economy standard prescribed under this chapter [49 U.S.C. §§ 32901 et seq.] 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. §§ 32901 et seq.].

49 U.S.C. § 32919(a) (emphasis added). AIAM will demonstrate at trial that a State carbon dioxide emission standard is functionally indistinguishable from a fuel economy standard, and consequently is “related to fuel economy standards” under Section 32919(a).

The majority opinion never cites Section 32919(a) of EPCA or addresses the issue of whether that preemption provision bars state greenhouse gas regulations. Rather, the Court’s holding is limited to determining that EPA has the authority under Section 202(a) of the Clean Air Act to regulate emissions of CO<sub>2</sub> and other greenhouse gases from motor vehicles and that EPA acted arbitrarily and capriciously in failing to “ground its reasons for . . . inaction in the statute.” Slip op. at 32.

Moreover, the Supreme Court’s statement that NHTSA’s authority to regulate fuel economy did not limit EPA’s authority to regulate CO<sub>2</sub> emissions under the Clean Air Act says nothing about State authority to promulgate such regulations. On its face, the Court’s opinion addresses only the allocation of regulatory authority as between two sister agencies within the Executive Branch. *See* Slip op. at 29 (“The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”) Indeed, it is not unusual for Congress to grant two federal agencies with overlapping authority to regulate the same subject matter with the understanding that those two agencies will chart a single, coordinated and nationwide course. *See, e.g., United States v. S. Cal. Edison Co.*, 300 F.Supp.2d 964, 983-84 (E.D.Cal. 2004) (noting that although FERC is responsible for the issuance of hydroelectric licenses, “this power was not intended by Congress to ‘interfere with the special responsibilities which . . . [other] Departments have over the National Forests, public lands and navigable rivers.’ . . . . The fact that federal agencies have overlapping authority and work for the common purpose of protecting and advancing the interests of the United States is

evidenced by subsections of enabling statutes such as 16 U.S.C. § 803(a), which specifically acknowledge the fact that agencies are to work together”); *see also Rice v. Martin Marietta Corp.*, 3 F.3d 1563, 1568 (Fed. Cir. 1993) (in resolving a conflict between two different regulations on accounting for government contracts, the court explained that “[i]n resolving this controversy, we keep in mind the canon of statutory construction, equally applicable to regulations, that ‘where the text permits, statutes dealing with similar subjects should be interpreted harmoniously. We begin, therefore, with a preference for finding a reasonable interpretation of the regulations that does not create unnecessary conflict between them.’”) (citation omitted).

The defendants likely will argue that EPA’s authority to regulate CO<sub>2</sub> emissions under the Clean Air Act concurrently with NHTSA’s authority to administer the federal fuel economy program should be extended to the State of California by virtue of Section 209(b) of the Clean Air Act. That Section allows EPA to waive preemption under Section 209(a) of the Clean Air Act provided that certain preconditions are met. 42 U.S.C. § 7543(b).<sup>2</sup> Thus, the defendants

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<sup>2</sup> For example, EPA is not to grant a waiver of preemption if it finds that California “does not need such State standards to meet compelling and extraordinary conditions . . .” 42 U.S.C. § 7543(b)(1)(B). This limitation springs from the original justification for giving California the singular authority to enact motor vehicle emissions regulations: “the unique problems faced by California as a result of its climate and topography,” and in particular the acute smog problem of southern California. H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967); *see also* H.R. Rep. No. 728, *reprinted in* 1967 U.S.C.C.A.N. 1938, 1956 (waiver premised on the finding that “only the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards.”) The observation by the Court in *Massachusetts v. EPA* that the impacts of global warming are “widely shared,” Slip op. at 19, and that Massachusetts had standing to address the issue because of its “special position and interest,” *id.* at 15, would suggest that global warming is not a compelling and extraordinary condition of one State – California – within the meaning of Section 209(b) of the Clean Air Act.

may contend, if California obtains a waiver of preemption under the Clean Air Act, its regulation will be “federalized” and may exist alongside of EPCA in the same manner as an emission standard promulgated by EPA.

However, to say that both EPA and NHTSA have concurrent authority to regulate CO<sub>2</sub> emissions, does not mean that the individual States do as well. This is evidence in the plain language of Section 32919(a) of EPCA and Section 209(b) of the Clean Air Act. EPCA’s broad preemption provision expressly prohibits a State from adopting any “law or regulation related to fuel economy standards,” and provides no exception for regulations waived by EPA under the Clean Air Act. *See* Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566, 17669 (Apr. 6, 2006) (the “Light Truck Standards”) (“EPCA does not include any exception to its preemption provision that would cover State GHG and CO<sub>2</sub> standards.”). Similarly, although the Clean Air Act allows EPA to waive preemption of a California regulation, that waiver is explicitly limited to express preemption under “*this section*,” 42 U.S.C. § 7543(b)(1), and does not therefore amount to a waiver of preemption under EPCA.

Finally, the State of California cannot have it both ways. California is on record arguing that, in reviewing its emissions standards under Section 209(b), EPA cannot undertake the sort of inter-agency coordination the Supreme Court recognized would be part and parcel to any decision by EPA to regulate greenhouse gases. *See* Slip op. at 30 (“EPA no doubt has significant latitude as to the manner, timing, content, *and coordination of its regulations with those of other agencies.*”) (emphasis added); *id.* at 29 (“[T]here is no reason to think the two agencies [EPA and DOT] cannot both administer their obligations and yet avoid inconsistency.”) In stark contrast, the California Air Resources Board argues in its waiver request for the AB 1493 Regulation that EPA’s review is narrowly confined to the criteria specifically enumerated in

Section 209(b) and may not include considering interference with the implementation of other statutes: “U.S. EPA cannot apply any additional criteria – such as potential conflicts with other law – in evaluating California’s waiver requests.” *See* Request for Judicial Notice filed in support of AIAM’s Opposition to Defendants’ Motion for Judgment on the Pleadings (ECF 198-2), Exh. B at 10. In an earlier waiver request, CARB similarly claimed:

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

*Id.*, Exh. C at 15 (emphasis added). Thus, the very safety valve heavily relied upon by the Supreme Court – EPA’s ability to ensure that its regulation of greenhouse gases are consistent with NHTSA’s regulation of fuel economy – is absent in the DEC Regulations because California argues that the Agency is powerless to deny a waiver for a California regulation on the ground that the State standard conflicts with the federal fuel economy program.

**B. The Supreme Court’s Decision Is Silent On The Issue of Conflict Preemption**

Even if the Supreme Court had reached the issue of express preemption and held that the broad preemption provision of Section 32919(a) does not prevent the State of California from enacting greenhouse gas emissions standards, such a holding would not render the regulations immune from conflict preemption analysis. As the Supreme Court held in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), even where a State law or regulation is saved from express preemption pursuant to a federal statute, that does “*not* bar the ordinary working of conflict pre-emption principles.” *Geier*, 529 U.S. at 869 (italics in original). As the Court observed, it “has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” *Id.* at 870 (citing *United States*

*v. Locke*, 529 U.S. 89 (2000); *Am. Tele. & Tele. Co. v. Cent. Office Tele., Inc.*, 524 U.S. 214, 227-28 (1998) and *Tex. & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

Here, the purpose of EPCA is to secure a delicate balance between fuel economy, consumer choice, economic impact on the industry, employment, and safety. Based on these criteria, NHTSA determines the “maximum feasible” fuel economy level. *See, e.g.*, Light Truck Standards, 71 Fed. Reg. at 17569 (stating that NHTSA “balanced the express statutory factors and other relevant considerations, such as safety concerns, effects on employment and the need for flexibility to transition to a Reformed CAFE program that can achieve greater fuel savings in a more economically efficient way” and “determined that the standards ... represent the maximum feasible fuel economy level ...”). Even if a State were not expressly preempted from enacting a regulation that is “related to fuel economy standards” under EPCA, nothing in the Court’s opinion can be read to countenance a State regulation that presents an actual conflict with the goals of EPCA.

#### **IV. CONCLUSION**

For the reason’s set forth above, the Supreme Court’s decision in *Massachusetts v. EPA* does not answer the questions presented in this case: whether the DEC Regulations are “related to fuel economy standards” under 49 U.S.C. § 32919(a) or whether those regulations conflict with the federal fuel economy program.

DATED: April 3, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Debra L. Bouffard, counsel for Plaintiff Association of International Automobile Manufacturers, hereby certify that on April 3, 2007, I served a copy of Brief Of Plaintiff Association Of International Automobile Manufacturers Concerning Massachusetts v. EPA with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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