

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 JEEP, *ET AL.* REGARDING *MASSACHUSETTS V. EPA***

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Pursuant to the Court's direction, plaintiffs in Case No. 302, Green Mountain Chrysler Plymouth Dodge Jeep *et al.* (collectively, "plaintiffs"), respectfully submit this memorandum discussing the decision of the U.S. Supreme Court in *Massachusetts v. EPA* (Oct. Term 2006, Case No. 05-1120), issued on April 2, 2007.

Preliminary Statement

The case before this Court presents preemption claims under the Energy Policy and Conservation Act of 1975 ("EPCA"). As plaintiffs have been predicting since this Court's first consideration of the significance of the *Massachusetts* case for this case, the Supreme Court's decision yesterday has no impact on the claims presented under EPCA. The Supreme Court has now decided that carbon dioxide ("CO₂") is an "air pollutant" within the meaning of the Clean Air Act. The practical significance of that decision within the realm of *federal* regulation of the automobile industry remains to be seen, as explained below. Putting that question to the side, however, the Supreme Court took no position on the question of *state* power to regulate carbon dioxide, including the question whether EPCA preempts a particular state regulation of carbon dioxide, and has left that question to this Court.

Yesterday's decision should dispel any doubt about the need to proceed with the type of trial sought by plaintiffs in Case 302. The evidence at trial will show that Vermont's regulations will have direct, severe and devastating impacts on the automobile industry and consumers, in ways that Congress disapproved when it enacted EPCA, including the preemption provision that is central to this case. If the federal courts are not open to ensure that state laws and regulations do not frustrate the goals and purposes of EPCA, then the intent of Congress will become unenforceable.

To be sure, one or more defendants will probably claim that the Supreme Court's decision clears the way for California to obtain a waiver of federal preemption under the Clean Air Act for California's CO₂ regulation, and for states like Vermont and New York to proceed with similar programs under section 177 of the Clean Air Act, 42 U.S.C. § 7507. As the Court will recall, however, plaintiffs in Case 302 have always assumed in their preparation of their case the following two propositions: (1) EPA can regulate CO₂ under the Clean Air Act, and (2) California can obtain a waiver of federal preemption under section 209 of the Clean Air Act.

Both of those two propositions are still no more than assumptions at this point, despite yesterday's decision, for the reasons explained below in the next section of this memorandum. The key point that the plaintiffs in Case 302 intend to prove is that even if EPA decides to regulate carbon dioxide, and that states can adopt some form of CO₂ regulation of their own, the specific regulations challenged in this action go too far. Those regulations are both (1) expressly preempted under section 32919(a) of EPCA, and (2) "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and are thus also subject to implied conflict preemption. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).¹

The Supreme Court's decision authorizes EPA to regulate CO₂ under the Clean Air Act; it certainly does not, however, immunize state regulations related to fuel economy standards from federal preemption analysis -- much less clear the way for the enforcement of such

¹ One plaintiff in Case No. 302, the Alliance of Automobile Manufacturers ("the Alliance") is an association that represents nine different motor vehicle manufacturers or affiliates. *See* Complaint in Case No. 302 filed Nov. 18, 2005 (Doc. No. 1) ("Compl.") ¶ 7. The Alliance does not take positions on competitive issues within the automobile industry, and so the evidence bearing on the impacts of the regulation on specific entities will be offered on behalf of plaintiffs other than the Alliance.

regulations when they have the impacts on consumers and the industry that plaintiffs are prepared to prove at trial.

1. Massachusetts v. EPA -- the Decision and its Requirements for EPA

Section 202(a)(1) of the Clean Air Act directs the Administrator of the U.S. Environmental Protection Agency (“EPA”) to establish new motor vehicle emissions standards for “any air pollutant ... which in his 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). The Clean Air Act thus establishes an analytical process in which EPA first must determine if an airborne substance is an “air pollutant,” and then, second, must consider whether that substance may reasonably be anticipated to endanger health or welfare. If EPA makes such an “endangerment finding,” then the third and final step in the regulatory process (conducted under section 202(a)(2) of the statute) is for the EPA to adopt standards that apply the “requisite technology” to control the relevant air pollutant, giving appropriate consideration to the time needed to deploy the necessary controls. *Id.* § 7521(a)(2).

In yesterday’s decision, the Supreme Court settled the question whether carbon dioxide (“CO₂”) is an “air pollutant,” dismissing EPA’s prior determination, in response to a petition for rulemaking filed in 2001, that CO₂ was not an air pollutant. *See Massachusetts*, slip op. at 26. The Court remanded the matter for EPA to conduct the second and third analytical steps, expressing no opinion on “whether ... EPA must make an endangerment finding,” or whether the EPA can employ what the Court called “policy considerations” in deciding, pursuant to section 202(a)(2), exactly what technologies to require and when to require them. *Id.* at 32. The practical significance of yesterday’s decision thus depends on two questions the Supreme Court did not address: whether current climate science and the available data compel EPA to make an

endangerment finding, and if so, what EPA will determine is the “requisite technology” to address the conditions of concern.

The Supreme Court also did not address California’s request for a waiver of Clean Air Act preemption for the California CO₂ standards under section 209(b) of the Clean Air Act. The *Massachusetts* decision clears the way for the waiver proceeding at EPA to get under way. EPA will have to decide if the California regulation does not comply with any of the criteria for approval of such regulations under section 209(b). EPA will not have to decide, however, whether the California CO₂ standards conflict with the goals and purposes of EPCA,² and California would undoubtedly challenge any attempt by EPA to do so.³ The upshot is that this Court remains the only forum that can resolve, in a timely and definitive manner, whether the specific CO₂ standards adopted by California are subject to EPCA preemption. *See Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp. 2d 1160, 1173 (2006) (“Section 209(b) [of the Clean Air Act] does not provide that the regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from preemption by other federal statutes.”); *see also* Doc. No. 195-1 at 31-33 (legal significance of waiver decision under section 209(b)).

² *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1119 (D.C. Cir. 1979).

³ In one letter sent to EPA in a 2002 waiver proceeding, the Chairman of CARB wrote:

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.

See Letter from Alan C. Lloyd, CARB Chairman, to Christine Todd Whitman, U.S. EPA Administrator (May 21, 2002), filed as Exhibit A with Doc. No. 67 on June 28, 2006.

Equally important, if EPA does grant a waiver, the effect of the waiver will not extend beyond Clean Air Act preemption. The Supreme Court not only failed to endorse defendants' arguments that a section 209(b) waiver, or a section 177 waiver, extends beyond the Clean Air Act, but in fact it expressly recognized that state regulation of "in-state motor-vehicle emissions might well be preempted." *Massachusetts*, slip op. at 16. This is consistent with the plain language of Section 209(b) of the Clean Air Act, which provides in pertinent part as follows:

(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. ...

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. Thus, whether California's CO₂ standards are preempted under EPCA is a question ripe for resolution by this Court.

2. Significance of the Massachusetts Decision for this Case

This Court recognized the possibility that the Supreme Court would resolve the *Massachusetts* case as it did, and it nonetheless declined to stay the case on that basis. For good reason. The plaintiffs have always assumed, in their briefing of the *Landis* stay and on the merits, that the Clean Air Act allowed state regulation of carbon dioxide and that EPA would grant California a waiver under Section 209(b). As plaintiffs said in the *Landis* stay briefing earlier this year:

“[P]laintiffs are prepared to assume *arguendo* that the *Massachusetts* petitioners achieve their most ambitious goal.... [P]laintiffs will assume ... that such an outcome could somehow invigorate defendants’ claim that EPA would ... have authority to waive Clean Air Act preemption for state carbon dioxide regulations. Those assumptions would still beg the key question presented here, as to which plaintiffs urgently need a judicial determination. Even if EPA and the states can adopt *some type* of carbon dioxide controls without upsetting the goals and purposes of EPCA, are *these particular* carbon dioxide regulations, specifically those adopted by the State of Vermont in the fall of 2005, impliedly preempted under EPCA owing to their impact on the federal fuel economy program established by Congress?

“ ... [I]n the *Central Valley* case, the California defendant presented virtually the same motion for judgment on the pleadings as was later filed by the Vermont defendants in this Court. In denying that motion, after receiving thorough briefing, Judge Ishii held that ‘[n]othing in the statutory language or the legislative history of the Clean Air Act, the EPCA, or any other statute indicates Congress’ intent that an EPA waiver [under the Clean Air Act] would allow a California regulation to disrupt the CAFE program.’ *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1172 (2006).

“Implicit in the *Central Valley* court’s correct reading of the federal statutes is the point that even if EPA and the states possess some regulatory power to control carbon dioxide under the Clean Air Act, an inquiry would still be needed into whether a specific use of that power by a state would ‘disrupt the CAFE program.’ That ‘disruption’ is exactly what plaintiffs in Case 302 are prepared to prove in this Court.”

See Doc. No. 220-1 at 17-18. Thus, with respect to the implied conflict preemption part of the case in this Court,⁴ the issue that existed before the *Massachusetts* decision still remains: is the State of Vermont permitted to adopt and enforce a regulation that will cause severe disruption in the Vermont new-vehicle market and the national automotive community?

The Supreme Court’s decision advises EPA that it has authority that the agency had previously forsworn. It now allows for the possibility of regulatory “overlap” at the federal level, in which EPA might regulate CO₂ levels under the Clean Air Act and NHTSA would do so

⁴ Plaintiffs in Case No. 302 are in general agreement with the analysis of the significance of the *Massachusetts* decision for express preemption under EPCA offered by plaintiff in Case No. 304, the Association of International Automobile Manufacturers.

under EPCA.⁵ The intersection of statutory authority over a given matter is unexceptional and not problematic as a general matter. Of course, the Supreme Court did not foreclose the possibility that EPA might promulgate a *particular* CO₂ regulation that posed an “irreconcilable conflict” with EPCA’s regulatory scheme, which would be invalid under an implied repeal analysis, *Handberry v. Thompson*, 446 F.3d 335, 345 (2d Cir. 2006), but even assuming it had foreclosed the possibility of such a conflict at the federal level, the Supreme Court did not address a *State*’s authority to promulgate *any* CO₂ regulation. It certainly did not suggest that such a state regulation could escape the scrutiny of a federal preemption analysis. Quite the opposite, the Supreme Court recognized that “[i]n some circumstances the exercise of [a State’s] police powers to reduce in-state motor-vehicle emissions might well be pre-empted.” *Massachusetts*, slip op. at 16. That is precisely the issue presented in this case: whether California’s CO₂ regulation frustrates the purpose and objective of EPCA’s regulatory scheme and is thus preempted.

Defendants have argued that the grant of authority to EPA under the Clean Air Act both (1) limits the scope of an express state-law preemption provision in another statute, *and* (2) immunizes a state law or regulation concerning the same subject-matter from any conflict preemption scrutiny. Defendants could not cite any precedent to support such an immunity theory in earlier motions practice, and the majority’s decision in *Massachusetts* does not supply one. As the Supreme Court has repeatedly recognized, state regulations that may be saved from

⁵ It bears noting again that whether EPA will actually establish any CO₂ standards, or in particular any CO₂-based “mileage standards” under the Clean Air Act, is an open question. The *Massachusetts* decision preserves EPA’s ability to exercise discretion not to adopt any particular type of regulation, particularly, one that does not apply a truly effective “requisite technology” to the issue of global warming. *See Id.* at 32.

preemption by one provision are not immune from the preemptive scope of other provisions. *See, e.g., United States v. Locke*, 529 U.S. 89, 106 (2001) (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. v. Ouellette*, 479 U.S. 481, 493 (1987); *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 565 (9th Cir. 2002) (savings clause reference to “‘this subchapter’ indicates that the EFTA’s anti-preemption provision does not apply to other statutes”); *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.”).⁶

In sum, the Supreme Court’s decision charges this Court with the fundamental responsibility of interpreting and applying the preemption provisions of EPCA. It remains true that, if defendants’ interpretation of EPCA and the Clean Air Act were correct, then any state motor vehicle regulation 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

⁶ Even if the Clean Air Act and EPCA grant EPA and NHTSA overlapping regulatory authority, “[o]verlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both.” *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004); *see also Morton v. Macari*, 417 U.S. 535, 552 (1974) (“courts are not at liberty to pick and choose among congressional enactments”); *United States v. City of New York*, 359 F.3d 83, 97 (2d Cir. 2006) (same). Defendants cannot argue that the waiver provision of the Clean Air Act creates an “irreconcilable conflict,” and thus impliedly repeals EPCA’s preemption and balancing provisions. *Handberry*, 446 F.3d at 345. The waiver provision does not confer on the States any federal authority to regulate; it merely allows the States to exercise their police powers without the impediment otherwise imposed under Section 209(a) of the Clean Air Act. *See United States v. Chrysler Corp.*, 591 F.2d 958, 961 (D.C. Cir. 1979).

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.

Conclusion

While its practical significance remains unclear, the Supreme Court’s decision in *Massachusetts v. EPA* may open the way for EPA to collaborate with NHTSA in the regulation of fuel consumption from automobiles, at the federal level. But the decision says nothing about the relationship between federal and state power in this area, and in particular the lines of demarcation between the types of action forbidden to the States by EPCA, notwithstanding their authority under the Clean Air Act. That is the issue for this Court to decide, in the specific context of the regulation challenged in this action.

Dated: April 3, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Derek S. Bentsen, certify that on April 3, 2007, I served Plaintiffs' Memorandum Regarding *Massachusetts v. EPA* by causing copies to be served electronically through the CM/ECF system and e-mailed to:

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