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To Be Argued By:
Kathleen M. Sullivan

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE-JEEP,
GREEN MOUNTAIN FORD MERCURY, JOE TORNABENE'S GMC,
ALLIANCE OF AUTOMOBILE MANUFACTURERS,
CHRYSLER LLC, GENERAL MOTORS CORPORATION and
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,

Plaintiffs-Appellants,

(Additional Caption on the Reverse)

*On Appeal from the United States District Court
for the District of Vermont (Burlington)*

**BRIEF FOR PLAINTIFFS-APPELLANTS
GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE-JEEP,
GREEN MOUNTAIN FORD MERCURY, JOE TORNABENE'S GMC,
ALLIANCE OF AUTOMOBILE MANUFACTURERS,
CHRYSLER LLC AND GENERAL MOTORS CORPORATION**

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Defendants-Appellees,

and

CONSERVATION LAW FOUNDATION, ENVIRONMENTAL DEFENSE,
NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB,
VERMONT PUBLIC INTEREST RESEARCH GROUP, and DENISE M. SHEEHAN,
in her official capacity as Commissioner of Environmental Conservation
of the State of New York,

Intervenors-Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants hereby state as follows:

1. Plaintiff-Appellant Green Mountain Chrysler-Plymouth-Dodge is owned by East Dorset Motor Company. East Dorset Motor Company has no parent company and no publicly held company owns 10% or more of the stock of either Green Mountain Chrysler-Plymouth-Dodge or East Dorset Motor Company.

2. Plaintiff-Appellant Green Mountain Ford Mercury is owned by Dorset Motor Company. Dorset Motor Company has no parent company and no publicly held company owns 10% or more of the stock of either Green Mountain Ford Mercury or Dorset Motor Company.

3. Plaintiff-Appellant Joe Tornabene's GMC is owned by Tornabene Inc. Tornabene Inc. has no parent company and no publicly held company owns 10% or more of the stock of either Joe Tornabene's GMC or Tornabene Inc.

4. Plaintiff-Appellant Alliance of Automobile Manufacturers is an I.R.C. Section 501(c)(6) not-for-profit trade association of car and light truck manufacturers and whose members include: BMW Group, Chrysler LLC, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mercedes-Benz USA, Mitsubishi Motor Sales of America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc. and Volkswagen of America, Inc. The Alliance

operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. The Alliance does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in the Alliance.

5. Plaintiff-Appellant Chrysler LLC is a wholly owned subsidiary of CarCo Intermediate HoldCo II LLC, which in turn is a wholly owned subsidiary of CarCo Intermediate HoldCo I LLC. Carco Intermediate HoldCo I LLC is a wholly owned subsidiary of Chrysler Holding LLC, the ultimate parent company of Plaintiff-Appellant Chrysler LLC. 80.1% of the shares of Chrysler Holding LLC are owned by CG Investment Group LLC, a private equity investment fund managed by Cerberus Capital Management, L.P.; the remaining 19.9% are jointly owned by DaimlerChrysler North America Finance Corporation and DaimlerChrysler Holding Corporation, each of which are wholly owned U.S. subsidiaries of Daimler AG.

6. Plaintiff-Appellant General Motors Corporation has no parent corporation. The following publicly held company beneficially owns more than 10% of General Motors Corporation's stock: State Street Bank & Trust Company (acting in various fiduciary capacities for various employee benefit plans).

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GLOSSARY

CAA	The federal Clean Air Act, as amended.
CAFE	The federal corporate average fuel economy standards promulgated under the Energy Policy and Conservation Act of 1975.
CARB	The California Air Resources Board
CO ₂	Carbon dioxide
E85	Motor fuel specified as a blend of 85% ethanol and 15% gasoline. 13 C.C.R. § 1961.1(d).
EPA	The U.S. Environmental Protection Agency
EPCA	The Energy Policy and Conservation Act of 1975
Fuel Economy	“[T]he average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used.” 49 U.S.C. § 32901(a)(10).
mpg	Miles per gallon
Model Year	“[T]he annual production period of a manufacturer ... that includes January 1 of that calendar year.” 49 U.S.C. § 32901(a)(15)(A). For example, the 2009 model year begins in calendar year 2008, and extends up to and past January 1, 2009.
NHTSA	National Highway Traffic Safety Administration
2007 EPCA Amendments	The Energy Independence and Security Act of 2007, amending EPCA.

PRELIMINARY STATEMENT

The issue in this case is whether a State, in seeking to regulate greenhouse gas emissions, may enforce emissions standards that displace the federal government in the task of regulating motor vehicle fuel economy. The answer is that it may not. The greenhouse gas standards adopted by Vermont and twelve other States are the functional equivalent of fuel economy standards, and thus conflict fatally with federal law.

Congress established a comprehensive federal program for the regulation of motor vehicle fuel economy in the Energy Policy and Conservation Act of 1975 (“EPCA”). For over three decades, the National Highway Traffic Safety Administration (“NHTSA”) has overseen that program. Congress and NHTSA have set national fuel economy standards that strike a balance between the public interest in energy conservation and the sometimes conflicting goals of vehicle safety, consumer choice, and employment in the U.S. auto industry. Congress and NHTSA cannot maintain a uniform and carefully balanced national program for fuel economy in the face of competing regulations at the state level. For that reason, EPCA preempts a State from adopting or enforcing any “law or regulation *related to* fuel economy standards.” 49 U.S.C. § 32919(a) (emphasis added).

Vermont’s regulation specifies emissions limits for greenhouse gas emissions, and does not expressly refer to fuel economy. But there is no practical difference

between regulating motor vehicle greenhouse gases and regulating fuel economy. Greenhouse gas emissions from gasoline-powered cars and trucks consist overwhelmingly of carbon dioxide (“CO₂”). The only feasible means of significantly reducing CO₂ is to reduce fuel consumption — or in other words, to increase fuel economy. In notice-and-comment rulemaking under EPCA completed in 2006, NHTSA found there was no practical difference between state greenhouse gas standards like Vermont’s and fuel economy standards, and concluded that such state standards are expressly and impliedly preempted by EPCA. The U.S. District Court for the District of Vermont (Sessions, J.) erred in holding to the contrary in the decision below, which is reported at 508 F. Supp. 2d 295 (D. Vt. 2007) (SPA__ - __).

The district court’s decision would permit the States to destroy the uniformity and balance that Congress sought to create in EPCA. That result is not only impermissible but wholly unnecessary. In the Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1492 (the “2007 EPCA Amendments”), enacted after this appeal began, Congress directed NHTSA to set fuel economy standards that will require the automobile industry to achieve at least a 35 miles per gallon (“mpg”) national average fuel economy standard by model year 2020. Because fuel economy regulation and greenhouse gas emissions control are inseparable, the new federal fuel economy standards will result in a 30 percent reduction in greenhouse gas emissions from new cars and trucks sold in the United States.

The district court's failure to find EPCA preemption stemmed in part from its erroneous interpretation of the federal Clean Air Act ("CAA"). The CAA authorizes the U.S. Environmental Protection Agency ("EPA") to set national air pollution standards for automobiles and preempts all state standards relating to the control of motor vehicle emissions. The CAA allows EPA to waive such CAA preemption for certain motor vehicle emissions standards adopted by California and copied by other States (like Vermont). The district court misread that waiver provision to permit a State to escape EPCA preemption as well as CAA preemption, even though the CAA expressly states that a CAA waiver only exempts a State regulation from CAA preemption. Once that holding is understood to be erroneous, it follows inescapably that the Vermont regulation is preempted by EPCA.

If upheld, the district court's decision would permit Vermont and its sister States essentially to Balkanize the national fuel economy program, with a competing set of standards that pay no heed to balanced goals of EPCA. In the 2007 EPCA Amendments, Congress has provided a much more effective and less disruptive program to reduce fuel consumption and greenhouse gas emissions than the state regulations that the district court erroneously found to be free from preemption under EPCA. The judgment below should be reversed.

JURISDICTION

The district court had jurisdiction to consider the claims presented and to grant the relief sought under 28 U.S.C. §§ 1331, 1343, and 2201, and 42 U.S.C. §§ 1983 and 1988. Green Mountain Chrysler Plymouth-Dodge-Jeep, Green Mountain Ford Mercury, Joe Tornabene's GMC, the Alliance of Automobile Manufacturers, Chrysler LLC, and General Motors Corporation (collectively, "Plaintiffs") filed a timely notice of appeal from the district court's judgment (entered on September 12, 2007) on October 5, 2007. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Vermont's regulation is expressly preempted by EPCA, 49 U.S.C. § 32919(a), which prohibits the States from enacting or enforcing any regulation "related to fuel economy standards," because, as NHTSA has determined, Vermont's greenhouse gas emissions standards are functionally equivalent to fuel economy standards.

2. Whether Vermont's regulation is preempted by EPCA because, as NHTSA has determined, it conflicts with the objectives of the nationwide federal fuel economy program that Congress has established, especially in light of the 2007 EPCA Amendments.

3. Whether Vermont's regulation is preempted by EPCA even if EPA has granted such a regulation a waiver of preemption under section 209(b) of the CAA.

STATEMENT OF THE CASE

This case challenges Vermont's greenhouse gas regulation as preempted by EPCA and its implementing regulations. Vermont's regulation was adopted in reliance on sections 209(b) and 177 of the CAA, 42 U.S.C. §§ 7543(b) and 7507, which, contingent on an EPA waiver of CAA preemption, permit California to adopt and enforce regulations for the control of automotive air pollution, and which permit other States to adopt and enforce such California regulations. In September 2004, the California Air Resources Board ("CARB") amended its emissions control rules to include greenhouse gas standards and later sought a CAA waiver from EPA. In November 2005, Vermont became the first of twelve States outside California to adopt the California greenhouse gas standards.

Plaintiffs, a group of Vermont motor vehicle dealers, manufacturers, and an association of manufacturers, filed an action for declaratory and injunctive relief to invalidate Vermont's regulation as preempted by EPCA and its implementing regulations. Their case was consolidated in the district court with a case filed by a different manufacturers' association, the Association of International Automobile Manufacturers ("AIAM"). The State of New York, which adopted the greenhouse gas regulation in December 2005, intervened in the Vermont case, as did several environmental organizations.

In ruling on pretrial motions, the district court held that the claims presented under EPCA were ripe even though EPA had not yet granted the California greenhouse gas regulation a waiver from CAA preemption. In spring 2007, the district court conducted a bench trial. Following trial, the court issued findings of fact and conclusions of law denying relief.

The district court held that EPCA cannot preempt state regulations that receive an EPA waiver from CAA preemption. In the alternative, the court held that the Vermont regulation is not preempted by EPCA because the regulation is not “related to” fuel economy standards or in conflict with EPCA’s objectives. Timely appeals by Plaintiffs and AIAM followed and were consolidated by this Court.

On February 29, 2008, after the filing of this appeal, EPA denied California’s request for a waiver of CAA preemption of its greenhouse gas regulation.¹ The State of California and other parties, including the States of Vermont and New York, have filed multiple lawsuits under section 307(b) of the CAA, 42 U.S.C. § 7607(b), to overturn EPA’s decision.

¹ See *California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

While other similar cases remain pending, this case presents the first occasion for any court of appeals to determine the application of EPCA's preemption provision to state motor vehicle greenhouse gas emissions standards. An action was filed in December 2004 in the U.S. District Court for the Eastern District of California to enjoin enforcement of CARB's greenhouse gas standards in California. That court held that CARB may not enforce the greenhouse gas standards without first obtaining a waiver from EPA under the CAA. In December 2007, that court held on cross-motions for summary judgment that the greenhouse gas standards were not preempted by EPCA.² No final judgment has been entered in the California case. The U.S. District Court for the District of Rhode Island similarly has pending before it a challenge to the adoption of the California greenhouse gas standards in Rhode Island. In December 2007, that court, like the district courts in Vermont and California, denied a motion to dismiss.³

STATEMENT OF FACTS

This case involves a state effort to displace the comprehensive federal program established under EPCA for the regulation of motor vehicle fuel economy. The

² *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

³ *Lincoln-Dodge, Inc. v. Sullivan*, Nos. 06-70T, 06-69T, 2007 WL 4577377 (D.R.I. Dec. 21, 2007).

federal fuel economy program requires that vehicle manufacturers meet nationwide average fuel economy standards called the “corporate average fuel economy,” or “CAFE,” standards. For many years, CAFE standards required each manufacturer to meet the same set of fleet average fuel economy standards. In other words, if the CAFE standard for trucks was set at 21.0 mpg, each manufacturer’s truck fleet had to demonstrate compliance with the 21.0 mpg standard. But that approach had unintended, adverse consequences for the auto industry and consumers that led NHTSA to adopt “Reformed CAFE” standards for trucks. The new truck standards take account of differences in the mix of vehicles sold by each manufacturer, providing increased energy savings along with greater flexibility and fairness for manufacturers. In the 2007 EPCA Amendments, Congress ratified NHTSA’s Reformed CAFE approach to truck standards and extended the same approach to passenger cars.

While the federal CAFE reforms were under way, California and twelve other States, including Vermont in the regulation at issue here, adopted greenhouse gas emissions standards that function as the equivalent of fuel economy standards. Their actions led to a comprehensive examination of the scope of EPCA preemption by NHTSA, and also to this litigation.

A. The Federal Fuel Economy Program

Congressional attention to energy policy began as a response to the 1973-74 oil embargo. In 1975, Congress enacted EPCA, Pub. L. No. 94-163, § 301, 89 Stat. 871, 902 (1975), which included automotive provisions now codified at 49 U.S.C. §§ 32901-32919. The 1975 statute set fuel economy standards for passenger cars that required each vehicle manufacturer to achieve an average fuel economy of 27.5 mpg across all its passenger cars by model year 1985 — roughly twice the average fuel economy of late-model cars on the road in 1972.⁴ The statute delegated to the Secretary of Transportation the authority to set CAFE standards for other vehicles. 49 U.S.C. § 32902(a), (c), (f). The Secretary in turn delegated those functions to NHTSA. 49 C.F.R. § 1.50(f). From the outset, EPCA contained a broad express preemption provision prohibiting States from adopting or enforcing “a law or regulation related to fuel economy standards.” 49 U.S.C. § 32919(a).

The federal fuel economy program has consistently taken into account the “economic practicability” of the CAFE standards for the auto industry. The 1975 Act gave the industry approximately nine years to meet the 27.5 mpg passenger car standard, and gave the Secretary of Transportation (and, by delegation, NHTSA) the

authority to adjust the passenger car CAFE standard if necessary. 49 U.S.C. § 32902(c). The Act specified that fuel economy levels in any given model year were to be set at the “maximum feasible” level, but this did not mean the highest fuel economy level that could possibly be achieved based solely on technological considerations. Rather, the statute provided that, in determining whether any average fuel economy standard in any model year was the “maximum feasible” standard, the Secretary was to consider not only “technological feasibility” but also “economic practicability.” *Id.* § 32902(f).⁵

Congress was particularly concerned about the ability of domestic manufacturers to invest in the necessary fuel economy technologies and remain competitive. As Representative Sharp of Indiana, one of EPCA’s House sponsors, put it:

It is a problem all of us have struggled with . . . as to how far we can go without damaging the American industry, because we have several goals we are trying to achieve. The first goal is energy savings. At the same time, we

⁴ U.S. Department of Transportation, *Study of Potential for Motor Vehicle Fuel Economy Improvement — Technology Panel Report* (Jan. 10, 1975) 2-2 to 2-7 (“1975 Technology Report”).

⁵ While Congress did not set a specific target for trucks like the 27.5 mpg level for cars, the same set of criteria, including “economic practicability,” were to be used by the Department of Transportation in setting CAFE standards for trucks. 49 U.S.C. § 32902(a), (b).

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. 18,675 (June 12, 1975); *see also* H.R. Rep. No. 94-340, at 87 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1849 (recognizing “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”).

Because the primary goal of EPCA was to achieve *national* reductions in fuel consumption, Congress expected the CAFE standards to apply to each manufacturer’s *nationwide* sales fleet. This feature of the federal fuel economy program takes account of the fact that the motor vehicle market in the United States is large and diverse, and demand for specific types of vehicles varies among states and regions. For example, consumers in some areas prefer hybrid vehicles that get high gas mileage, while others prefer full-size trucks with cargo space and towing capacity. Vehicle manufacturers thus produce and sell a wide range of vehicles to satisfy the broad demand of the national new-vehicle market. This allows consumers in each local market to choose the particular mix of vehicles that meet their specific preferences.

By permitting manufacturers to meet *national* averages set by Congress or by NHTSA, the federal CAFE program allows manufacturers to maintain these different mixes of vehicles in different markets. The federal CAFE program thus “ensure[s] wide consumer choice by leaving maximum flexibility to the manufacturer” in deciding how to meet the specified fuel economy levels. *Center for Auto Safety v. Thomas*, 847 F.2d 843, 863-64 (D.C. Cir.) (separate opinion of Buckley, J.) (quoting S. Rep. No. 94-179 (1975)) (internal quotation marks omitted), *vacated on unrelated grounds*, 856 F.2d 1557 (1988).

B. Reform Of The Federal Fuel Economy Program

The fuel economy standards established under the 1975 Act had unintended consequences for competitive balance in the auto industry, energy conservation, and vehicle safety.

Because they required each manufacturer to meet *the same* maximum feasible nationwide fuel economy levels, these unitary standards had disparate impacts on different manufacturers. This is because a vehicle’s fuel economy is related to its mass and engine power, and different manufacturers sell fleets of vehicles with significantly different average weights and power. The early CAFE standards therefore required some manufacturers to make more costly fuel economy improvements than others. As a 2002 report by the National Research Council explained, “differential or disparate impacts [are] inherent in a regulatory standard that

sets the same performance measure for all manufacturers regardless of the [different] type[s] of vehicles they produce.”⁶

These disparate impacts led NHTSA to relax the CAFE standards several times during the 1980s, because the standards were not feasible for some manufacturers.⁷ Each relaxation of the CAFE standards, however, permitted all manufacturers to reduce the average fuel economy of their vehicles. This system of unitary, one-size-fits-all standards thus not only created disparate impacts but also hampered the Nation’s ability to achieve EPCA’s main goal of energy conservation.

The 1975 Act fuel economy standards also had unintended consequences for vehicle safety. Because all vehicles had to meet the same standards regardless of weight, one way to meet the CAFE standards was to “downsize” in order to reduce vehicle weight. But downsizing contributed to crash-related injuries and deaths. The

⁶ A-__ (DX 2007 at 20).

⁷ A number of such relaxations were challenged in review proceedings in the U.S. Court of Appeals for the District of Columbia Circuit, and each time the court declined to reverse NHTSA’s actions. As then-Circuit Judge R.B. Ginsburg explained in one such case, EPCA permitted NHTSA to make a “reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute.” *Public Citizen v. NHTSA*, 848 F.2d 256, 265 (D.C. Cir. 1988) (internal quotation omitted); *see also Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1338-41 (D.C. Cir. 1986); *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) (per curiam); *Center for Auto Safety v. Claybrook*, 627 F.2d 346 (D.C. Cir. 1980).

early CAFE standards resulted in at least 1,300 additional motor vehicle fatalities and 97,000 additional crash-related injuries in a single year (1993). A-__ (DX 2007 at 27).

NHTSA and Congress have taken steps in recent years to address these unintended consequences, first in NHTSA's adoption of "Reformed CAFE," and second in Congress's enactment of the 2007 EPCA Amendments.

1. "Reformed CAFE"

In 2006, following several years of study, NHTSA promulgated regulations adopting a new approach called "Reformed CAFE."⁸ This approach replaced a single set of standards for "non-passenger automobiles" (then classified in EPCA as including sport-utility vehicles, minivans, and pickup trucks) in favor of an "attribute-based" formula that separates vehicles into size-based categories and sets maximum feasible standards for each category. While Reformed CAFE applies the same formula to all manufacturers, it effectively sets different fuel economy standards for each manufacturer because each manufacturer produces and sells a different mix of larger and smaller vehicles.

As NHTSA explained in its 2006 rulemaking, Reformed CAFE aimed to address the three unintended consequences of original CAFE. *Average Fuel Economy*

⁸ Reformed CAFE was an optional method of compliance in model year 2008, and becomes mandatory in model year 2011.

Standards for Light Trucks — Model Years 2008-2011, 71 Fed. Reg. 17,566, 17,622 (Apr. 6, 2006). First, Reformed CAFE makes it unnecessary to relax standards in order to avoid disparate impacts because manufacturers responding to consumer demand for larger (and usually more powerful) vehicles no longer have to meet the same standards as manufacturers who focus on other parts of the market. *Id.* at 17,570, 17,588.

Second, “Reformed CAFE increases energy savings” over original CAFE because, as NHTSA explained, by “account[ing] for size differences in product mix, virtually all light-truck manufacturers will be required to use advanced fuel-saving technologies to achieve the requisite fuel economy for their vehicles.” *Id.* at 17,569. Because an individual manufacturer’s fuel economy levels are determined by the size-based attributes of its fleet, Reformed CAFE allows NHTSA to require more improvements from each manufacturer than it could under the system of unitary standards.

Third, Reformed CAFE addresses the safety concerns caused by the “downsizing” of vehicles under original CAFE. Under Reformed CAFE, “[d]ownsizing of vehicles is discouraged ... since as vehicles become smaller, the applicable fuel economy target becomes more stringent.” *Id.*

2. The 2007 EPCA Amendments

In enacting the 2007 EPCA Amendments, Congress ratified the Reformed CAFE structure established by NHTSA for trucks, and expanded that structure to passenger cars as well. The Amendments not only permit but *require* NHTSA to adopt “attribute-based” standards. *See* Pub. L. No. 110-140, § 102(a)(2), 121 Stat. 1492 (2007), *codified at* 49 U.S.C. § 32902(b)(3)(A). The Amendments also direct NHTSA to set fuel economy standards for passenger cars and trucks at the maximum feasible levels through 2030, and set a specific target for overall fuel economy levels by model year 2020 of at least 35 mpg for passenger cars and trucks combined. *See* Pub. L. No. 110-140, §§ 102, 109, 121 Stat. 1492, *codified at* 49 U.S.C. §§ 32902(b)(2)(A), 32905. The Amendments preserve NHTSA’s authority to ensure that revised standards would be the “maximum feasible” standards — and thus include consideration of economic practicability. *See* Pub. L. No. 110-140, § 102(a), 121 Stat. 1492, *codified at* 49 U.S.C. § 32902(c).

C. The Clean Air Act

Under the Clean Air Act Amendments of 1970, Congress directed EPA to set national air pollution control standards for automobiles. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6, 84 Stat. 1676, 1690 (1970) (codified as amended at 42 U.S.C. § 7521). In what is now section 209(a) of the CAA, Congress provided: “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.” 42 U.S.C. § 7543(a). But section 209(b) permits EPA to waive preemption “of this section” for certain California regulations. *Id.* § 7543(b). And section 177 of the CAA authorizes other States to adopt the California standards that have received a waiver from EPA. Pub. L. No. 95-95, § 177, 91 Stat. 685 (1977), *codified at* 42 U.S.C. § 7507.

In September 2004, the California Air Resources Board (“CARB”) amended its emissions control rules to impose greenhouse gas emissions standards, and later applied for a waiver from EPA. In November 2005, Vermont adopted California’s standards, pursuant to CAA section 177.⁹ In doing so, Vermont relied heavily on analysis that CARB had performed. As the district court noted, “[t]he Air Pollution Control Division of Vermont’s Agency of Natural Resources (“ANR”) relied on CARB’s materials in its evaluation of the regulation, including CARB’s initial and final statements of reasons and the publicly available documents that CARB relied on” SPA-__ (508 F. Supp. 2d at 338).

The EPA has not yet granted a waiver of CAA preemption for California’s standards, and in fact denied such a waiver on February 29, 2008. That decision is

subject to pending litigation. Until a waiver is granted, neither California nor Vermont may enforce its regulation.

D. The Vermont Greenhouse Gas Regulation

Vermont’s greenhouse gas regulation, like the California regulation on which it is based, requires automobile manufacturers to reduce vehicles’ average CO₂ emissions as well as their “CO₂-equivalent” emissions of three other greenhouse gases — methane, nitrous oxide, and hydrofluorocarbons. 13 C.C.R. § 1961.1(a)(1)(B). The regulation sets standards for two different groups of vehicles: the limit for passenger cars and small trucks is 323 CO₂-equivalent grams per mile in model year 2009 and decreases rapidly to 205 grams per mile in 2016; the limit for larger trucks and medium-duty passenger vehicles is 439 CO₂-equivalent grams per mile in model year 2009 and decreases rapidly to 332 grams per mile in 2016. *Id.* § 1961.1(a)(1)(A).

1. Vermont’s Regulation Of CO₂ And Fuel Economy

The Vermont greenhouse gas standards primarily regulate CO₂ emissions⁹ and in so doing effectively regulate fuel economy. This is because there is an undisputed

⁹ See Air Pollution Control Regulations, Subchapter XI, Low Emission Vehicles: Regulations to Control Greenhouse Gas Emissions from Motor Vehicles & Table 4 (Apr. 27, 2007), available at <http://www.anr.state.vt.us/air/docs/apcregs.pdf>.

¹⁰ The other two greenhouse gases included in the overall “CO₂-equivalent” standard — nitrous oxide and methane — comprise a trivial percentage of the reduction required by the regulation. CARB’s own rulemaking estimated that (footnote continued)

direct relationship between CO₂ emissions and fuel economy. The less fuel consumed per mile, the less CO₂ will be emitted. As NHTSA explained in its 2006 rulemaking, “CO₂ emissions are always and directly linked to fuel consumption because CO₂ is the ultimate end product of burning gasoline Viewed another way, fuel economy is directly related to emissions of greenhouse gases such as CO₂.” 71 Fed. Reg. at 17,659. The district court recognized that “there is a near-perfect correlation between fuel consumed and carbon dioxide released,” SPA-__ (508 F. Supp. 2d at 352), and ample evidence, including from Vermont and California regulators, supported this finding. *See, e.g.*, A-__ (Trial Tr. 11-A, 51:11-23) (testimony of Vermont state official that “there’s a mathematical relationship between fuel consumption and carbon dioxide emissions”); A-__-__ (Albu Dep. 66:21-67:7 (PX1406)) (similar).

Federal and state regulators routinely treat greenhouse gas standards that require reductions in CO₂ emissions as related to or interchangeable with fuel economy regulations. The federal fuel economy standards require automobile manufacturers to calculate motor vehicle fuel economy by measuring CO₂ emissions and using

eliminating all emissions of nitrous oxide and methane would equate to the control of only 1.9 grams per mile of CO₂, or roughly 0.6% of CARB’s 2009 model year CO₂-equivalent standard for cars and small trucks. A-__ (PX974); A-__ (PX189 at 79). Even if nitrous oxide and methane could be reduced to “absolute zero,” their elimination would still “just make a very small fraction related to what (footnote continued)

mathematical equations to convert those results to a miles-per-gallon figure. 40 C.F.R. § 600.113-78. And CARB officials admitted during California’s rulemaking that the state greenhouse gas standards could readily be converted into fuel economy standards. As one CARB official explained to the agency’s head administrator shortly before CARB proposed its regulation, the 2016 “standard for cars *amounts to 43 miles per gallon*, which isn’t a cake walk like some enviros seem to believe.” A-____-____(Albu Dep. 61:17-62:15, 63:10-64:11 (PX1406)) (emphasis added); A-__(PX1). More recently, since the filing of this appeal, CARB published a comparison of its fuel economy standards to those in the 2007 EPCA Amendments by explicitly converting its gram-per-mile greenhouse gas standards into miles-per-gallon fuel economy levels.¹¹ The following table is excerpted from CARB’s report:

[manufacturers] would have to do to meet the regulation in 2012,” let alone in later years. A-__(Trial Tr. 5-A, 44:2-15); A-____(PX978).

¹¹ See CARB, Comparison of Greenhouse Gas Reductions for the United States and Canada Under U.S. CAFE Standards and California Air Resources Board Greenhouse Gas Regulations (Feb. 25, 2008) (*available at* http://www.arb.ca.gov/cc/ccms/reports/pavleycafe_reportfeb25_08.pdf) (“CARB 2008 Report”). The CARB 2008 Report includes fuel economy comparisons between the federal program and possible future California greenhouse gas standards that have not yet been formally proposed or adopted.

Table 4. California CO₂ Equivalent Emission Standards and Estimated Fuel Economy in California

Model Year	PC/LDT1			LDT2 ^a			Fleet ^b		
	CO ₂ E ^c (g/mi)	%GHG Red	FE ^d (mpg)	CO ₂ E ^c (g/mi)	%GHG Red	FE ^d (mpg)	CO ₂ E ^c (g/mi)	%GHG Red	FE ^d (mpg)
2002 ^e	312	-	28.5	443	-	20.1	354	-	25.1
2009	323	0.0%	27.2	439	0.9%	20.0	360	0.0%	24.4
2010	301	3.5%	29.2	420	5.2%	20.9	338	4.6%	26.0
2011	267	14.4%	32.9	390	12.0%	22.5	304	14.2%	28.9
2012	233	25.3%	37.6	361	18.5%	24.3	271	23.5%	32.4
2013	227	27.2%	38.1	355	19.9%	24.5	265	25.2%	32.7
2014	222	28.8%	39.0	350	21.0%	24.9	260	26.6%	33.4
2015	213	31.7%	40.6	341	23.0%	25.5	251	29.1%	34.5
2016	205	34.3%	42.1	332	25.1%	26.2	243	31.5%	35.7
2017	195	37.5%	44.2	310	30.0%	28.0	229	35.2%	37.7
2018	185	40.7%	46.5	285	35.7%	30.4	215	39.3%	40.1
2019	180	42.3%	47.8	270	39.1%	32.1	207	41.5%	41.6
2020	175	43.9%	49.1	265	40.2%	32.7	203	42.8%	42.5

CARB 2008 Report at 8 (footnotes omitted). For example, the table above shows that, following adjustments for other types of greenhouse gas emissions, CARB predicts that its 2016 standard for passenger cars and light trucks (“PC/LDT1”) equates to a fuel economy standard of 42.1 mpg, while its 2016 standard for full-size trucks (“LDT2”) equates to a fuel economy standard of 26.2 mpg.

2. Other Aspects Of Vermont’s Regulation

The Vermont regulation also has provisions allowing manufacturers to obtain limited credit toward compliance without reducing CO₂ emissions. The first such credit applies to vehicles equipped with advanced air conditioning systems that operate more efficiently, employ better seals to control refrigerant leakage, or use new refrigerants. 13 C.C.R. § 1961.1(a)(1)(B)1.a. It was undisputed at trial that the credits available for the use of such systems can contribute only a trivial percentage to the required CO₂ reductions. *See* A-__-__(Trial Tr. 12-A, 109:9-110:5) (testimony of

defense expert Mr. Duleep estimating that, for passenger cars and smaller light trucks, “[t]he maximum available credit is in the range of 13 to 15 grams, depending on the air conditioner size;” and for larger trucks, “the maximum credit is around 18 or 19 grams”).

The second type of credit is theoretically available if manufacturers sell vehicles that can run on alternative fuels such as E85, a blended fuel containing 85% ethanol and only 15% gasoline, and those vehicles are actually operated on that alternative fuel. *See* 13 C.C.R. § 1961.1(a)(1)(B)2.a. It was undisputed at trial, however, that a network of pumping stations offering E85 at competitive prices does not exist in Vermont and is unlikely to be developed in the foreseeable future. A—(Trial Tr. 1-B, 35:16-17; 39:19-24). This E85 credit is therefore not a viable compliance option.

E. NHTSA’s Analysis Of State Greenhouse Gas Regulations

In the same 2006 rulemaking that established Reformed CAFE for non-passenger automobiles, NHTSA evaluated the state greenhouse gas regulations. In a detailed analysis that fills 16 pages in the *Federal Register*, NHTSA presented its “considered view ... that a State regulation that requires vehicle manufacturers to reduce [CO₂] emissions is a ‘regulation related to fuel economy standards or average

fuel economy standards” and thus is preempted by EPCA. 71 Fed. Reg. at 17,656 (quoting 49 U.S.C. § 32919).¹² Because the CARB standards — which are identical to the Vermont standards — require the control of CO₂ emissions, NHTSA views those standards as “clearly related to fuel economy standards and thus subject to the pre-emption provision in EPCA.” *Id.* at 17,667.

NHTSA observed that, while the CARB standards are not expressed using the metric of miles per gallon, EPCA’s express preemption provision uses “expansive language,” and thus “includes, but is not limited to, explicit fuel economy standards issued by States.” *Id.* at 17,656. “[T]o the extent that it regulates tailpipe CO₂ emissions, a State [greenhouse gas] standard has a direct and very substantial effect on EPCA’s objectives, placing it virtually at the very center of the reach of EPCA’s express pre-emption provision, not at or even near its periphery.” *Id.* at 17,657. This is so, according to NHTSA, because “CO₂ emissions account for over 90 percent of all CO₂ equivalent emissions from a motor vehicle To that extent, a State [greenhouse gas] standard is [a] fuel economy standard in almost all but name and stated purpose.” *Id.*

¹² Although the Ninth Circuit recently remanded the Reformed CAFE standards to NHTSA, that court explicitly declined to address NHTSA’s preemption analysis. *See Ctr. for Biological Diversity v. NHTSA*, 508 F.3d 508, 514 n.1 (9th Cir. 2007). (footnote continued)

NHTSA likewise concluded that conflict preemption principles established that the CARB standards were preempted because those standards “frustrate the objectives of Congress in establishing the CAFE [standards].” *Id.* at 17,667. NHTSA concluded that “it is disruptive to the orderly implementation of the CAFE program, and to NHTSA’s reasonable balancing of competing concerns, to have two different governmental entities assessing” the various competing congressional objectives underlying EPCA and “making inconsistent judgments about how quickly and how much of [a] single pool of [fuel economy] technology could and should be required to be installed.” *Id.* at 17,668.

Finally, NHTSA recognized that California and other States had for many years used federal waivers under the CAA to regulate the automotive emissions that form hazardous air pollution, principally smog. But such standards, NHTSA explained, are not “directly and inextricably linked to fuel economy.” *Id.* at 17,669. In contrast, “a CO₂ emissions standard stands apart,” because it “functions as a fuel economy standard, given the direct relationship between a vehicle’s fuel economy and the amount of CO₂ it emits.” *Id.* at 17,670. NHTSA believed that, by “[i]nterpreting EPCA’s preemption provision as preempting only those State regulations that directly

Nor did the Ninth Circuit’s decision call into question NHTSA’s decision to use “Reformed CAFE” standards.

regulate or have the effect of directly regulating fuel economy,” it avoided any potential conflict between the CAA and EPCA. *Id.*

F. The District Court’s Decision

The district court rejected Plaintiffs’ claim that EPCA preempts the Vermont regulation. The district court first held that preemption doctrines do not apply at all, on the theory that, once the EPA approves a state regulation under section 209(b) of the CAA, it has “the force of federal regulation” regardless of its content and impact on the federal fuel economy program, and is thus immune from EPCA preemption. SPA-__-__(508 F. Supp. 2d at 343-50). Alternatively, the court held that EPCA does not expressly or impliedly preempt Vermont’s regulation.

As to express preemption, the court asserted that Vermont’s regulation is outside the scope of EPCA’s express preemption provision. SPA__-__(508 F. Supp. 2d at 351-54). Despite acknowledging that “there is a near-perfect correlation between fuel consumed and carbon dioxide released,” the court held that this relationship “does not per se convert an emissions standard to a fuel economy standard.” SPA-__(508 F. Supp. 2d at 352). The court offered two reasons. First, it noted that “there is no such perfect correlation between fuel consumed and emissions of hydrocarbons or carbon monoxide,” two other greenhouse gases covered by the regulation. SPA-__(508 F. Supp. 2d at 352). Second, the court opined that manufacturers may seek to comply in part by “tak[ing] advantage of the regulation’s

credit for air conditioning, or may use alternative fuels, or may use plug-in hybrids.” SPA-__ (508 F. Supp. 2d at 352-53).

As to implied preemption, the district court asserted that Vermont’s regulation does not stand as an obstacle to EPCA’s goals, expressing doubt that Vermont’s regulation would “limit consumer choice, create economic hardship for the automobile industry, cause significant job loss, or undermine safety.” SPA-__ (508 F. Supp. 2d at 392). The district court relied primarily on defense expert Mr. Duleep’s opinion that the industry could generally meet compliance costs at some indefinite point in the future, even though he had not considered the impacts of Vermont’s regulation on any particular manufacturer and offered no testimony on when each manufacturer could bring its full product lines into compliance with Vermont’s standards. SPA__ (508 F. Supp. 2d at 329-30). Having rejected each of Plaintiffs’ preemption arguments, the district court entered judgment for Defendants.

SUMMARY OF ARGUMENT

This case involves fundamental questions about the relationship between the federal government and the States in the regulation of the Nation’s motor vehicle fuel economy. Vermont’s regulation subverts Congress’s carefully wrought federal scheme for balancing energy conservation against the economic health of the Nation’s auto industry, vehicle safety and consumer choice. The district court’s decision

upholding Vermont's regulation is incorrect as a matter of law, and its judgment should be reversed for each of the following reasons.

First, Vermont's regulation is expressly preempted under EPCA because it is clearly a regulation "related to fuel economy standards." 49 U.S.C. § 32919(a). As a practical matter, Vermont's greenhouse gas regulation gives manufacturers no choice but to meet ever-increasing average fuel economy levels in Vermont. Vermont's regulation therefore falls squarely within the scope of EPCA's preemption provision. And the district court had no legitimate basis for construing that provision more narrowly. The court also erred in disregarding NHTSA's considered view that regulations like Vermont's are "related to fuel economy standards" within the meaning of EPCA's preemption provision.

Second, Vermont's regulation is also impliedly preempted because it stands as an obstacle to Congress's objectives in enacting federal fuel economy standards. The regulation ignores the specific factors that NHTSA must consider and balance in setting or revising national standards, and unlike the federal program, it makes no provision for adjusting fuel economy standards when "economic practicability" requires. By imposing fuel economy standards that must be met solely on the basis of Vermont sales, Vermont's regulation destroys the flexibility that the CAFE program has always afforded through the use of nationwide averaging. And by requiring all manufacturers to meet the same standards in each model year, the Vermont regulation

reinstates the “disparate impact” on manufacturers that NHTSA and now Congress have rejected in preference for standards that vary with vehicle size. Finally, the Vermont regulation disserves the interests in consumer choice by forcing the industry as a whole to restrict product lines — a result Congress and NHTSA have always sought to avoid at the national level.

Third, the district court erroneously concluded that it need not even conduct a preemption analysis (although it provided that analysis in the alternative) because an EPA waiver of CAA preemption of a state greenhouse gas regulation would also immunize that regulation from preemption under EPCA. This reasoning is incorrect. Congress did not express any intent to federalize state emissions regulations, and nothing in the CAA or EPCA purports to save from EPCA’s broad preemption provision any state fuel economy regulation that receives a CAA waiver from the EPA.

For these reasons, the judgment below should be reversed.

STANDARD OF REVIEW

Whether a state law is preempted by a federal statute is a question of law that this Court reviews *de novo*. See *Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006).

ARGUMENT

“The foundation of preemption doctrines is ‘the Supremacy Clause, U.S. Const., Art. VI, cl. 2 [which] invalidates state laws that ‘interfere with, or are contrary to,’ federal law.’” *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 414-15 (2d Cir. 2002) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (in turn quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)) (alterations in original)). “Federal pre-emption of a state statute can be express or implied, and generally occurs: ‘where Congress has expressly pre-empted state law ... or where federal law conflicts with state law.’” *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007) (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005)) (alterations in original).

Express preemption arises where, as here, “Congress’ command is explicitly stated in the statute’s language.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Conflict preemption arises either when “compliance with both federal and state regulations is a physical impossibility,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where, as here, state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Geier v. Am. Honda Motor Co. Inc.*, 529 U.S. 861, 873 (2000).

Under these settled principles, Plaintiffs are entitled to a determination that Vermont's regulation is preempted under EPCA. As explained in the brief of Plaintiff-Appellant AIAM, the district court also erred in holding that Plaintiffs' separate preemption claim that the CAA preempted the Vermont regulation was moot. The district court should have entered judgment for Plaintiffs under the CAA. But reversal of the district court on CAA preemption grounds would not resolve this appeal or relieve Plaintiffs from the onerous effects of the Vermont regulation, in light of the district court's additional error in holding that *EPCA* does not preempt the Vermont regulation.

Following the district court's erroneous EPCA determination, EPA issued a decision denying California a waiver of federal preemption under the CAA. But EPA did not address the issue of EPCA preemption, and its decision does not moot the EPCA preemption claims presented here. California and other States (including Vermont) will try to put their greenhouse gas standards into full effect should they succeed in their efforts to overturn EPA's recent waiver denial decision through judicial challenge, administrative reconsideration by EPA, or a new request to a future EPA in a new Administration. Indeed, CARB, the state agency that licenses new vehicles for sale in California, has advised the auto industry that manufacturers must

comply with the greenhouse gas standards within 45 days of a judicial decision permitting the standards to take effect under the CAA,¹³ and there is no reason to doubt that Vermont would follow suit. Forty-five days would not provide sufficient lead time for manufacturers to comply with the state greenhouse gas program.

Under these circumstances, Plaintiffs' EPCA claims would not be moot even if this Court determined that the state regulations were currently preempted by the CAA, and this Court accordingly should reach the district court's EPCA decision, regardless of its disposition of the CAA preemption issue. Mootness could attach to the EPCA preemption claim only if "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citations and quotation

¹³ The California district court hearing the preemption case in California entered a preliminary injunction against enforcement of the greenhouse gas standards there unless and until EPA waives preemption under the CAA. *See Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CV F 04-06663 AWILJO, 2007 WL 135688, *15 (E.D. Cal. Jan. 16, 2007). CARB has issued licenses permitting the sale of model year 2009 vehicles in California without compliance with the greenhouse gas standards, but those licenses (called "Executive Orders") state that if the California district court dissolves its injunction, a manufacturer "will have **45 days** from ARB notification to demonstrate compliance with AB 1493 requirements, including the determination of the greenhouse gas values for the test group listed in this Executive Order." CARB Executive Order A-014-0618, *available at* (footnote continued)

marks omitted). For the reasons given above, neither condition is present here. Accordingly, only a decision on the merits of Plaintiffs' EPCA claims can provide appropriate relief in this case.¹⁴

I. EPCA EXPRESSLY PREEMPTS VERMONT'S REGULATION BECAUSE THE REGULATION IS "RELATED TO FUEL ECONOMY STANDARDS."

When a federal statute "contains an express pre-emption clause, 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). Here, the broad text of EPCA's express preemption provision states: "[w]hen 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*

http://www.arb.ca.gov/msprog/onroad/cert/pcltdmdv/2009/toyota_pc_a0140618_3d5_u2.pdf.

¹⁴ *Cf. Exxon Mobil Corp. v. Saudi Basic Ind. Corp.*, 544 U.S. 280, 291 n.7 (2005) (holding that a judgment subject to further judicial review does not have the effect of mooting a related case); *see also Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 124 (1974) (holding that termination of strike did not moot a challenge to a state law providing benefits to striking workers because "the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers"); *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 66 (1st Cir. 2001) ("Only if it were indisputable that no form of relief could be provided would a mootness claim lie.").

or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.” 49 U.S.C. § 32919(a) (emphasis added).

That provision clearly encompasses Vermont’s regulation, which limits the average amount of CO₂ that a manufacturer’s fleet of motor vehicles can emit. Because there is a direct, irrefutable relationship between CO₂ emissions and fuel economy, the only means of complying with Vermont’s regulation is to meet a state-specific average fuel economy level. Such a regulation thus comes squarely within the scope of EPCA’s preemption provision, and the district court erred in holding otherwise.

A. Vermont’s Regulation Is The Functional Equivalent Of A Fuel Economy Standard.

As the Supreme Court recently restated, a federal statutory provision that preempts state laws “related to” its subject matter is to be construed broadly. *See, e.g., Rowe v. New Hampshire Motor Transp. Ass’n*, 128 S. Ct. 989, 995 (2008) (“related to” preemption provision preempts “at least” state laws that have a ““significant impact”” related to Congress’s statutory objectives) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)); *In re WTC Disaster Site*, 414 F.3d 352, 376 (2d Cir. 2005) (while “not a self evident guide to the precise extent of Congress’s preemptive intent,” a “phrase such as relat[ing] to” defines a “clearly expansive” preemptive scope) (alteration in original) (internal quotation omitted).

A “related to” preemption provision thus reaches state laws that have a “connection with” the relevant federal subject matter. *See Calif. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 328 (1997); *ACE Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 773 (2d Cir. 1999). And such a “connection” exists whenever there is “direct regulation” of the preempted field or whenever 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 Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). Only where a state law has an indirect effect that is “too tenuous, remote, or peripheral” to the federal regulation is the requisite “connection” not present. *Morales*, 504 U.S. at 390 (internal quotation omitted).

Under these settled principles of construction, the Vermont standards are plainly preempted because they “relate[] to” fuel economy standards. Based on an apparent concern that EPCA’s “related to” provision “could be interpreted to include virtually all state provisions with even a tangential connection to fuel economy,” the district court concluded that Congress must have intended a narrower construction that avoided “displac[ing] emission regulation by California that would have an effect on fuel economy.” SPA-__ (508 F. Supp. 2d at 353-54).

Contrary to the district court’s erroneous suggestion, however, there is nothing “tangential” about the connection between Vermont’s regulation and fuel economy standards, even if the regulation is expressed conveniently in terms of greenhouse gas emissions. The district court itself recognized that “there is a near-perfect correlation between fuel consumed and carbon dioxide released.” SPA-__ (508 F. Supp. 2d at 352); *see also* A-__ (PX 970) (chart illustrating near-perfect correlation). Indeed, the relationship between fuel consumed and carbon dioxide released is so well established that it is “possible to express [the State] emissions standards as fuel economy standards in miles traveled per gallon of gasoline consumed.” SPA-__ (508 F. Supp. 2d at 342 n.49); *see also* CARB 2008 Report at 8.

Even CARB admitted that it performed this conversion from CO₂ grams per mile to miles per gallon of gasoline consumed (*i.e.*, fuel economy) when it was framing the California greenhouse gas regulation on which Vermont’s regulation is based. A-___-___ (Albu Dep. 61:17-62:15, 63:10-64:11 (PX1406)) (CARB official’s admission that one of its model year 2016 standards equates to about 43 mpg); *see also* CARB 2008 Report at 8. California even took pains in the 2004 rulemaking process to avoid reference to “fuel economy” — which one official called “the dreaded two words.” A-___, ___ (Albu Dep. 326:16-22, 327:1-21 (PX1406)); A-__ (PX5).

But CARB’s efforts to avoid denominating its greenhouse gas standards in miles per gallon cannot save them from preemption. A State may not circumvent

federal preemption merely by using different terminology than is used in the federal statute. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). As NHTSA explained in its 2006 rulemaking, EPCA's preemption provision is not limited to regulations that explicitly set fuel economy standards in miles-per-gallon terms. *See* 71 Fed. Reg. at 17,656. Such a simplistic approach would be contrary to Congress's stated intent 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) (emphasis added) (discussing earlier version of EPCA's preemption provision, which also applied to state regulations "related to" fuel economy standards). Here, Vermont's specification of permissible emissions of CO₂-equivalent grams-per-mile is simply another such "parameter" for fuel economy.

Congress might have chosen to preempt only those state standards actually expressed in terms of miles per gallon or to preempt only regulations "related *exclusively* to" fuel economy standards. But it did not. Congress was well aware that States could craft equivalent regulations using proxies for fuel economy, and it chose language that would preempt such fuel economy standards by other means. Congress also maintained the preemption provision's broad language in the 2007 EPCA Amendments, and did not add state greenhouse gas regulations to the types of state and local regulations related to fuel economy standards that were explicitly saved

from preemption. *See* 49 U.S.C. § 32919(b)-(c) (saving certain labeling regulations and government vehicle purchase requirements from preemption); *cf. Rowe*, 128 S. Ct. at 997 (recognizing that while a federal statute “explicitly list[ed] a set of exceptions” to its preemption clause, the list did not include the preempted state “public health” regulation).

Nor does it matter whether Vermont intended by its regulation to address the issue of climate change. Preemption does not depend on whether a state’s action “serves several objectives rather than one [preempted objective]” or “articulates a purpose other than (or in addition to)” a preempted purpose. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 105-107 (1992); *see also Rowe*, 128 S. Ct. at 996-97 (“Despite the importance of the [state regulation’s] public health objective, we cannot agree with Maine that the federal law creates an exception on that basis, exempting state laws that it would otherwise pre-empt.”).¹⁵

¹⁵ In the litigation concerning the California regulation in the Eastern District of California, the district court held that EPCA’s preemption provision should be construed as applying only to “those state regulations that are explicitly aimed at the establishment of fuel economy standards.” *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1175. That holding conflicts with *Gade*. The fact that a State has not explicitly stated its intent to regulate fuel economy is not relevant to the preemption analysis. *See Gade*, 505 U.S. at 105-107. Such a rule would create a preemption doctrine readily circumvented by any State.

Whatever its outer contours, the meaning of “related to fuel economy standards” is broad enough to reach a regulation that effectively compels manufacturers to meet a state-specific average fuel economy level. *See Morales*, 504 U.S. at 383-84 (recognizing expansive sweep of “related to” language in a preemption clause). Thus, given the undisputed relationship between CO₂ emissions and fuel economy, Vermont’s regulation plainly falls within the scope of EPCA’s preemption provision.

B. Other Aspects Of Vermont’s Regulation Do Not Save The Regulation From Express Preemption.

The district court believed that Vermont’s regulation could escape its irrefutable relationship to fuel economy standards because it also encompasses a very small percentage of motor vehicle greenhouse gas emissions that do not have the same “perfect correlation” as CO₂ emissions do with fuel economy, SPA-__ (508 F. Supp. 2d at 352), and it provides certain credits toward compliance through improving a vehicle’s air conditioning unit or using alternative fuels, SPA-__ (508 F. Supp. 2d at 353). The district court erred, however, in holding that such trivial or illusory features could save the Vermont regulation from express preemption. The existence of small amounts of non-CO₂ greenhouse gas emissions does not alter the fact that there is a direct relationship between CO₂ emissions and fuel economy. And it was legal error to fail to consider the feasibility of complying with the regulation by reducing non-CO₂ emissions or obtaining air conditioning or alternative fuel credits. Because it is

uncontested that the only feasible means of complying with Vermont’s regulation is to meet a state-specific average fuel economy level, these ancillary provisions are irrelevant, and Vermont’s regulation is simply a fuel economy regulation by another name.

1. Vermont’s Regulation Of CO₂-Equivalent Emissions Does Not Save The Regulation From Preemption.

Contrary to the district court’s suggestion, the fact that Vermont also regulates the CO₂-equivalent emissions of nitrous oxide and methane does not save its regulation from preemption. The undisputed direct relationship between CO₂ emissions and fuel economy satisfies the “related to” test under any meaning of those words, even though Vermont’s regulation also applies to emissions that do not have the same relationship. This is clear from the Supreme Court’s recent decision in *Rowe*.

In *Rowe*, the Supreme Court held that a state regulation of tobacco “delivery service[s]” was preempted by the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), which preempts state laws “related to” motor carrier services, 49 U.S.C. § 14501(c)(1). Because the state regulation “focuse[d] on trucking and other motor carrier services (*which make up a substantial portion of all ‘delivery services’*),” the Court found that the regulation had “a direct ‘connection with’ motor carrier services” for purposes of the FAAAA’s express preemption provision. *Rowe*, 128 S. Ct. at 995 (emphasis added). The state regulation therefore “related to” motor

carrier services, even though it also applied to “delivery services” that were not motor carrier services within the meaning of the FAAAA. Likewise, the fact that Vermont’s regulation also applies to nitrous oxide and methane in addition to CO₂ — greenhouse gases which do not have the same “near-perfect correlation” with fuel economy — does not undermine the regulation’s “direct connection with” fuel economy standards.

2. The Vermont Regulation’s Credit Provisions Do Not Provide An Alternative Feasible Means Of Compliance.

In addition to giving credit for reducing non-CO₂ emissions like nitrous oxide and methane, Vermont’s regulation gives credits for improving a vehicle’s air conditioning or use of alternative fuels. But those features cannot save the regulation from preemption because none provides a *feasible* alternative means of complying with the regulation. It is irrelevant whether increasing fuel economy is the “sole” method of complying with Vermont’s regulation when it is indisputably the sole method that can actually work.

This is clear from this Court’s and the Supreme Court’s decisions holding that, where a state statute includes non-preempted features, those features must offer a feasible path to compliance in order to save the statute from preemption. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 n.25 (1978), for example, the Supreme Court upheld a state regulation of tanker design, even though a federal statute covered the same subject matter, because the state regulation provided an exemption from its design requirements for tankers that employed a tug escort. The Court concluded that,

given the negligible cost of tug escorts, “it is very doubtful that the provision will pressure tanker operators into complying with the [State’s] design standards.” 435 U.S. at 173 n.25. Thus in *Ray*, the tanker design regulation was not preempted only because it offered a genuinely feasible alternative method of compliance.

Under the same principle, this Court reached the opposite result in *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 63-65 (2d Cir. 1982), invalidating a state television antenna system regulation that, by failing to provide a genuinely feasible alternative method of compliance, would have pressured providers to reduce reliance on a type of programming delivery service (“MDS”) that the FCC sought to promote. Specifically, a state regulation of “master antenna television” (“MATV”) systems would have pressured MATV systems to reduce MDS services, contrary to the FCC’s objective of promoting it. The State argued that its MATV regulation should not be preempted because MDS services could be delivered by means other than MATV systems. This Court rejected that claim, reasoning that, because “delivery of MDS services is most economically provided by MATV circuitry,” “the slim possibility of an alternative, currently unexercised mode of delivery” could not save the State’s MATV regulation. *Id.* at 63.

Here, as in *N.Y. Cable*, the district court accepted the fact that not even such a “slim possibility” exists: the regulation compels motor vehicle manufacturers to “increase fuel economy to some degree in order to comply” fully with the regulation.

SPA__ (508 F. Supp. 2d at 352). Even accepting that manufacturers can take other steps to “*contribute* to compliance with the regulation,” SPA__ (508 F. Supp. 2d at 369) (emphasis added), manufacturers cannot achieve actual compliance without increasing the fleet average fuel economy of vehicles sold in the State of Vermont. *Id.*; see also *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1175 (“Both parties agree that the proposed California AB 1493 Regulations, if granted preemption of waiver [sic] by EPA, will require substantial improvements in average fuel efficiency performance in passenger cars and light trucks.”) (emphasis added); A-__ (Cackette Dep. 79:4-9 (PX1407)) (testimony of the Chief Deputy Officer of CARB that he was “unaware of any feasible means [for a given manufacturer] to meet the standards of AB 1493 other than by improving the average fuel economy of the vehicles it sells”).

It is therefore irrelevant to express EPCA preemption that Vermont’s regulation also includes provisions under which manufacturers can earn CO₂-equivalent credits. Undisputed evidence established that such supposed alternatives do not provide a feasible path to compliance.

First, even though the regulation covers nitrous oxide and methane, and even though those two greenhouse gases do not bear the same near-perfect relationship to fuel economy, those gases make up less than three percent of the greenhouse gas emissions that motor vehicles release over the course of their lifetimes. A-__ (PX 897). As the district court acknowledged, “carbon dioxide represents the bulk of

greenhouse gas emissions.” SPA-__ (508 F. Supp. 2d. at 351). It was undisputed that even eliminating these other emissions entirely would not enable a manufacturer to comply with the regulation. CO₂ emissions would also have to be reduced, meaning that fuel economy would have to be increased.

Second, the Vermont regulation’s system for obtaining air conditioning credits offers no feasible alternative path to compliance. The district court recognized that “obtaining all available air conditioning credits would not enable a manufacturer to comply with the regulation without improving fuel economy.” SPA-__ (508 F. Supp. 2d at 352). Indeed, Vermont’s own expert witness acknowledged that, even if manufacturers could obtain substantial air conditioning credits, they would still need to improve the average fuel economy of their passenger cars to over 36 mpg by 2012, and over 40 mpg by 2016. A-__ (DX 2688); A-__-__(Trial Tr. 12-A, 110:23-111:17).

Third, while the district court suggested that manufacturers could earn credits by selling flexible fuel vehicles that run either on gasoline or on a blend of gasoline and ethanol known as E85, that conclusion ignored the evidence establishing important legal and practical constraints on making use of such credits. Most important, the regulation would award credits only to the extent that manufacturers prove that a vehicle owner in fact operated a vehicle on E85, with the credits tied to the amount of actual usage of E85. *See* 13 C.C.R. § 1961.1(a)(1)(B)2.a; *see also* A-__-__(Trial Tr. 1-B, 37:15-38:2); A-__-__(Shulock Dep. 99:18-100:13 (PX1411)).

Yet it is undisputed that the necessary infrastructure (*i.e.*, a network of E85 pumping stations offering E85 at competitive prices compared to gasoline) does not exist in Vermont and is unlikely to be developed there in the foreseeable future. A-__ (Trial Tr. 1-B, 35:16-17; 39:19-24).¹⁶

The upshot is that, while alternative fuel credits are available to manufacturers *in theory*, all parties know there is no realistic possibility that any sufficient number of such credits can be earned *in practice* in order to avoid complying with what is effectively a fuel economy mandate.

In sum, because other methods — reducing greenhouse gases other than CO₂, improving air conditioning units, and selling vehicles designed to operate with alternative fuels — do not allow feasible or full compliance with Vermont’s regulation, the district court erred in relying on them to save Vermont’s regulation from express preemption.

¹⁶ The district court also speculated that manufacturers could sell more vehicles designed to run on diesel fuel. But diesel fuel is a carbon-based fuel (the use of which thus bears a direct relationship to carbon-dioxide emissions), not an “alternative fuel” for which any form of credit is available under the regulation. *See* 13 C.C.R. § 1961.1(a)(1).

C. NHTSA’s Considered View That EPCA Expressly Preempts Vermont’s Regulation Was Entitled To Deference.

If there remained any doubt that EPCA preempts the Vermont regulation, it should have been resolved by deference to NHTSA, the agency charged with adopting and enforcing national fuel economy standards pursuant to EPCA. As part of its 2006 formal notice-and-comment rulemaking, NHTSA concluded that state greenhouse gas regulations of motor vehicles like the Vermont regulation at issue here have “a direct and very substantial effect on EPCA’s objectives, placing [them] virtually at the very center of the reach of EPCA’s express pre-emption provision, not at or even near its periphery.” 71 Fed. Reg. at 17,657.

The district court erred in never even acknowledging, let alone giving any weight to, NHTSA’s analysis. Under Supreme Court and this Court’s precedent, NHTSA’s views were entitled to consideration and some weight. *See, e.g., Geier*, 529 U.S. at 883; *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-15 (2d Cir. 2005).¹⁷

¹⁷ In *Geier*, the Supreme Court deferred to NHTSA’s view that a state tort rule governing air bag use was preempted by federal vehicle safety regulations, because NHTSA had “authority to implement the statute; the subject matter is technical; ... the relevant history and background are complex and extensive[;] ... [and] [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.” 529 U.S. at 883 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)).

In *Wachovia*, this Court gave *Chevron* deference to regulations promulgated by the Office of the Comptroller of the Currency, pursuant to its authority under the (footnote continued)

NHTSA’s analysis merited such deference because it is uniquely qualified to assess whether motor vehicle greenhouse gas standards, like those in the Vermont regulation, are “related to fuel economy standards or average fuel economy standards.” NHTSA clearly has broad authority to implement EPCA. 49 C.F.R. § 1.50(f). Fuel economy standards are highly intricate and technical, and the history and background of this field are complex. NHTSA, more than any other authority, including a court, has the best understanding of the technological and economic implications of state greenhouse gas standards for the design of cars and trucks. And the case for deference here is particularly strong, because NHTSA has expressed its view of preemption in the *Federal Register*, as part of notice-and-comment rulemaking. *Compare Geier*, 529 U.S. at 884-85; *id.* at 911-12 (Stevens, J., dissenting).

Nor is there any basis for concern that NHTSA’s broad construction of EPCA’s preemption provision would unsettle decades of California emissions regulations, such as smog regulations, that have not been viewed as preempted by EPCA. NHTSA

National Banking Act, that had the effect of preempting state laws purporting to regulate operating subsidiaries of national banks. This Court explained that the appropriate inquiry when faced with an agency interpretation finding a state law preempted is to determine “the reasonableness of the [agency’s] exercise of its regulatory authority ... through the framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).” *Wachovia*, 414 F.3d at 315.

dispelled that concern by noting that EPCA does not preempt state “standards for emissions other than CO₂ [that] ... only incidentally affect fuel economy standards,” because those emissions, unlike CO₂, “are not directly and inextricably linked to fuel economy.” 71 Fed. Reg. at 17,669. EPCA does preempt a state CO₂ emissions standard like Vermont’s, however, because such a standard “functions as a fuel economy standard, given the direct relationship between a vehicle’s fuel economy and the amount of CO₂ it emits....” *Id.* at 17,670.

The district court’s failure even to consider NHTSA’s views on preemption not only further demonstrates that the district court’s preemption analysis was erroneous, but was independently reversible error.

II. VERMONT’S REGULATION IS ALSO PREEMPTED BECAUSE IT CONFLICTS WITH EPCA’S FEDERAL FUEL ECONOMY PROGRAM.

Even if EPCA’s express preemption provision did not so plainly invalidate the Vermont regulation, the regulation would still be preempted by EPCA because it “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.” *SPGGC*, 505 F.3d at 188 (quoting *United States v. Locke*, 529 U.S. 89, 109 (2000)). Vermont’s rulemaking, like the California rulemaking on which it was based, made no attempt to satisfy the requirements of section 32902 of EPCA that standards be economically practicable or amenable to modification to account for future market conditions. The state standards deprive the industry of the

flexible, nationwide compliance strategy permitted by EPCA; they will force widespread reductions in product lines in the initial years of implementation; and they reinstate the competitive disadvantages of the original CAFE program that NHTSA and Congress rejected in Reformed CAFE.

A. Vermont’s Regulation Ignores The Criteria That Congress Determined Must Be Considered In Establishing Fuel Economy Standards.

The Supreme Court’s decision in *Geier* provides the framework for addressing potential conflicts between state action and federal regulation in this case. In the regulations at issue in *Geier*, NHTSA had given vehicle manufacturers the *option* of installing airbags or providing other types of passive restraints in model year 1987 automobiles. A District of Columbia tort rule would have effectively *required* manufacturers to install airbags. *Geier*, 529 U.S. at 864-65. The Supreme Court held that the District’s rule was preempted because it was inconsistent with NHTSA’s policy judgment that manufacturers should not be required to install airbags in all model year 1987 vehicles. *Id.* at 875. NHTSA’s regulation “deliberately provided vehicle manufacturers with a range of choices among different passive restraint devices,” in order to balance multiple policy objectives: that is, to “lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance.” *Id.*; *see also id.* at 877-82 (elaborating on the six “significant considerations” that influenced NHTSA’s decision).

Like the passive restraint rule in *Geier*, EPCA and the standards promulgated under EPCA reflect a balancing among different policies, including considerations of cost, technology and consumer choice. The 1975 Act specified that, in determining “maximum feasible” fuel economy standards, “the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.” 49 U.S.C. § 32902(f). These criteria, which are to be applied at the national level and are maintained in the 2007 EPCA Amendments, give NHTSA the ability to set future standards at the appropriate level and to modify future standards if needed.

Vermont has not claimed and cannot claim to have followed the criteria specified in EPCA when it adopted its greenhouse gas regulation in 2005. Vermont simply copied the California regulation. For its part, California paid no heed to national economic impacts; to the contrary, it candidly acknowledged that, in selecting its greenhouse gas standards, it treated the possible national economic impacts of its regulation as “outside the scope of analysis, which focused on California impact.” A-__ (PX 264 at 273). California also assumed, without ever actually determining, that its standards would not result in vehicle “downsizing” and create safety risks, even

though some of its advisers warned that one way manufacturers might comply would be to downsize their vehicles.¹⁸

The state regulators in California and Vermont also did not consider that their greenhouse gas regulation would reduce jobs for auto workers in other States, even though national job loss is a factor that NHTSA must consider under the “economic practicability” criterion.¹⁹ It was undisputed at trial that, under even the most conservative estimate, the regulation adopted in Vermont and other States enforcing the California standards would result in a loss of about 14,000 jobs in the U.S. automobile industry, independent of other factors. SPA-__ (508 F. Supp. 2d at 389); A-__ (Trial Tr. 6-A at 82:18-22). But the district court dismissed those 14,000 jobs as

¹⁸ A-__ (DX2415 (CARB Peer Review, Comments of Robert F. Sawyer, Ph.D. at 5)); A-__, __ (Shulock Dep. 258:18 - 259:7; 263:2 - 263:20).

¹⁹ For example, NHTSA relaxed the federal passenger car fuel economy standard from 27.5 mpg to 26.5 mpg after considering evidence that the 27.5 mpg standard would result in job losses between 11,500 and 20,000. *See Passenger Automobile Average Fuel Economy Standards for Model Year 1989*, 53 Fed. Reg. 39,275, 39,282 (Oct. 6, 1988); *see also Public Citizen*, 848 F.2d at 264. NHTSA’s relaxation of the standards ensured they would remain at a level that was not so stringent as to cause layoffs or otherwise undermine “economic practicability.” *See, e.g., S. Rep. No. 94-516*, at 154-55 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1995-96 (“[The] difficulties of individual automobile manufacturers ... 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 implications for the national economy and for reduced competition associat[ed] with a severe strain on any manufacturer.”).

not “significant,” in part because the automobile industry is already suffering employment losses. SPA-__ (508 F. Supp. 2d at 389). That was legal error, for the state regulation conflicts with federal fuel economy policy insofar as it fails to take job losses into account.

But this 14,000 figure accounts only for the States that had adopted the state greenhouse gas regulations by spring 2007. Preemption analysis requires consideration of how a challenged state or local regulation would affect a federal program in the aggregate if also adopted by other States. *See Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) (“[I]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress’s carefully calibrated regulatory scheme.”). Under such an analysis, far more than 14,000 workers would lose their jobs. A-__-__(Trial Tr. 6-A at 82:3-83:18); A-__(PX 1014).

Nor did the state regulators provide for future amendment of fuel economy standards to address changing economic circumstances or market conditions, as the federal CAFE program does in taking into account nationwide “economic practicability.” *See, e.g.*, 49 U.S.C. § 32902(c) (conferring such authority upon NHTSA). If upheld, the state greenhouse gas regulations would effectively prevent NHTSA from revising fuel economy standards in the States adopting them, even

where federal regulators deemed such revisions necessary to address future changes in market conditions or unintended consequences.

In short, the state regulators failed to consider the criteria that Congress determined must be considered in order to set fuel economy policy that properly balances competing nationwide interests. It is thus not surprising that Vermont's regulation establishes fuel economy standards that are in sharp conflict with the federal CAFE program.

B. Vermont's Regulation Conflicts With Key Policy Judgments Congress And NHTSA Made In The Federal Fuel Economy Program.

Just as there was no dispute at trial that Vermont's regulation fails to take account of EPCA's standard-setting criteria, it was undisputed that sharp differences exist between the structure of the state greenhouse gas standards and the structure of the federal fuel economy standards. These structural differences have been accentuated by Congress's 2007 EPCA Amendments, adopted after this appeal was filed, and they create a substantial conflict between Vermont's regulation and the federal CAFE program.

1. Vermont's State-Specific Standards Conflict With EPCA's Allowance Of Nationwide Averaging.

Since the inception of federal fuel economy regulation, manufacturers have been required to meet the CAFE standards exclusively on a nationwide basis. Yet Vermont's regulation would impose fuel economy requirements at the state level.

This difference removes the flexibility that Congress intended to give manufacturers in meeting the Nation's fuel economy goals.

Under the federal CAFE program, lower fuel economy levels in one State resulting from the sales mix of vehicles in that State may be averaged with sales of vehicles elsewhere. A manufacturer could comply with EPCA's current 27.5 mpg standard for passenger cars even if its sales fleet in a particular State did not achieve that level, provided that its fleet nationwide achieved that standard.

In contrast, in the Balkanized world created by the state regulations, manufacturers would not be able to offset sales of vehicles that fall short of the greenhouse gas standards in one State against sales of more fuel-efficient vehicles in other States. As manufacturers testified without contradiction at trial, it is especially difficult to manage the fuel economy performance of sales fleets in relatively small States like Vermont. A-__(Trial Tr. 1-A, 142:10-15); A-__(Trial Tr. 3-A, 63:3-64:14). A manufacturer faced with a shortfall in such a State would have no choice but to pay penalties for violating the standards, or curtail the sales of its less fuel-efficient vehicles. The manufacturer would have the added burden of ensuring a compliant fleet mix both at the national level and state-by-state.

Congress, however, intended to "ensure wide consumer choice [by] leav[ing] maximum flexibility to the manufacturer" to produce a "diverse product mix," by means of national fleet-wide averaging. S. Rep. No. 94-179, at 6 (1975); *cf. Geier*,

529 U.S. at 875 (preempted state tort rule foreclosed manufacturers’ ability to select among different passive restraint systems to account for consumer acceptance and costs).²⁰ Requiring manufacturers to micro-manage fuel economy levels in each State that adopts the state greenhouse gas standards directly conflicts with Congress’s intent to afford manufacturers such flexibility.²¹

2. Vermont’s Unitary Standards Conflict With Reformed CAFE’s Flexibility Toward Individual Manufacturers.

Congress intended that “the fuel economy standards [would] be the product of balancing the benefits of higher fuel economy levels against the difficulties individual manufacturers would face in achieving those levels.” *Center for Auto Safety v.*

²⁰ Moreover, no practical purpose is served by requiring state-specific compliance with the greenhouse gas standards. Insofar as the goal of the greenhouse gas regulation is to reduce CO₂ in the atmosphere, and thus to help address concerns about global warming, it does not matter whether CO₂ reductions are achieved state-by-state or nationally. CO₂ is long-lived in the atmosphere and disperses globally. A pound of CO₂ emitted in Vermont has the same impact on greenhouse gas levels in the biosphere as a pound emitted in Ohio.

²¹ The compliance burden under the state regulations is even greater, for another reason. Unlike the federal CAFE program, the state greenhouse gas regulations combine passenger cars and small trucks (“LDT1s”) into a single fleet that must meet specific standards. A-__ (Trial Tr. 7-A, 27:6-10.) Those small trucks are, on average, less fuel-efficient than passenger cars. The decision to take these small trucks out of the “truck fleet” and include them in the “car fleet” makes the passenger car standards more difficult to meet than the federal CAFE standards for cars. A-__ (Trial Tr. 1-B, 22:15-23:11.)

NHTSA, 793 F.2d 1322, 1338 (D.C. Cir. 1986).²² NHTSA and Congress have both now rejected the original CAFE program’s unitary standards because they were inconsistent with EPCA’s objective of avoiding disparate impacts among individual manufacturers within the industry. Unitary standards require all manufacturers to meet the same fuel economy level and thus impose widely different compliance costs on differently situated manufacturers. Vermont’s regulation, however, relies on unitary standards that would impose the very same disparate impacts that Congress and NHTSA have rejected.

It was undisputed at trial that different manufacturers would face different compliance costs as a result of the Vermont regulation’s unitary approach. Even the defendants’ own expert Mr. Duleep testified that some manufacturers would incur little or no additional expense in order to meet the state greenhouse gas standards,

²² *See also* S. Rep. No. 94-516, at 155 (1975) (although the “maximum feasible” standard “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 implications for the national economy and for reduced competition associat[ed] with a severe strain on any manufacturer”); *see also* 71 Fed. Reg. at 17,580 (“The agency must consider the industry’s ability to improve fuel economy, but with appropriate consideration given to the difficulties of individual manufacturers.”); *Light Truck Average Fuel Economy Standards Model Years 1984 and 1985*, 49 Fed. Reg. 22,516, 22,518 (May 30, 1984) (“[T]he agency is also directed to balance the difficulties individual manufacturers might have in complying with a given standard.”).

while others would incur costs on average of “\$1,500 per vehicle” for passenger cars and smaller trucks and “\$1,450 per vehicle” for full-size trucks. A-__ (Trial Tr. 12-B, 48:24-49:15); SPA-__ (508 F. Supp. 2d at 364). Thus it was undisputed that the Vermont regulation would have a differential impact on different manufacturers, requiring some to price their vehicles as much as \$1,500 more per vehicle on average than their competitors. A-__ (Trial Tr. 15, 89:4-89:21).

To put this cost and price gap in context, none of the three U.S.-based companies could have covered such differentials using their profit margins. General Motors’ average per-vehicle pre-tax profits in North America did not exceed \$208 from 2003 to 2004. A-__ (PX 567 at 197).²³ Ford’s highest per-vehicle pre-tax profit in North America in the same two years was \$189, and the U.S. component of DaimlerChrysler’s highest pre-tax profit per-vehicle over the same period was \$357. A-__ (PX 567 at 197).

The cost disparities created by the state greenhouse gas regulation are far larger than any that NHTSA permitted to exist even under the original CAFE program. Reformed CAFE, as codified by the 2007 EPCA amendments, further mitigates such disparities by adjusting for the mix of vehicles sold by each manufacturer. In

²³ PX 567 is the 2005 edition of the *Harbour Report*, a leading and internationally respected analysis of the automobile industry published every year.

adopting unitary, one-size-fits-all standards, Vermont did not even attempt to “balance[] the benefits of higher fuel economy levels against the difficulties individual manufacturers would face in achieving” them. *Center for Auto Safety*, 793 F.2d at 1388. Imposing a regulatory structure that Congress expressly rejected is necessarily in conflict with EPCA’s objectives. *See Geier*, 529 U.S. at 879.

3. Vermont’s Unrealistic Timetable Forces Product-Line Reductions In Conflict With EPCA’s Protection Of Consumer Choice.

From the start of the CAFE program, Congress gave NHTSA the authority to control the pace of fuel economy increases — for example, by using “a series of graduated mileage requirements” in order to meet the energy conservation goal of EPCA. *Center for Auto Safety*, 847 F.2d at 863-64.²⁴ Such graduated increases allow manufacturers adequate lead time to meet higher standards without curtailing or eliminating the sale of less fuel-efficient vehicle models — so-called “mix-shifting,” which deprives consumers of a wide choice of new models.²⁵ For the same reason, NHTSA repeatedly relaxed fuel economy standards when necessary to avoid forcing

²⁴ *See, e.g.*, 42 Fed. Reg. 33,534, 33,552 (June 30, 1977) (gradually increasing passenger car CAFE standards from model year 1978 to 1985).

²⁵ *See, e.g., Light Truck Average Fuel Economy Standards Model Year 1981*, 44 Fed. Reg. 36,975, 36,980 (June 25, 1979) (EPCA was not intended to require widespread “mix shifting”).

manufacturers to restrict the sale of certain products, which NHTSA deemed inconsistent with EPCA’s “economic practicability” requirement.²⁶

Vermont’s regulation conflicts with Congress’s and NHTSA’s approach because the regulation may well leave manufacturers with no means to comply other than through mix shifting. For example, according to CARB official Steven G. Albu, some manufacturers would need about five or six years to comply with the Vermont model year 2012 standards using new technologies, and others (Chrysler, Ford and GM) would need approximately seven years. A-__ (Albu Dep. 272:15-273:8; 273:11-19; 274:18-275:6; 275:22-276:7).²⁷ If Mr. Albu’s testimony is correct, manufacturers would have had to invest billions to comply with Vermont’s model year 2012 standards long before they knew whether those standards would even receive a waiver

²⁶ In the mid-1980s gasoline prices were low and consumers preferred larger vehicles over those with higher fuel economy. NHTSA deemed it necessary to relax fuel economy standards by 1.5 mpg in order to avoid “product restrictions [that] would result in significant adverse economic impacts and restrict consumer choice to an unreasonable degree.” *Passenger Automobile Average Fuel Economy Standards Model Years 1987-88*, 51 Fed. Reg. 35,594, 35,615 (Oct. 6, 1986); *see also Competitive Enterprise Inst. v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990); *Passenger Automobile Average Fuel Economy Standards Model Year 1986*, 50 Fed. Reg. 40,528 (Oct. 4, 1985); *Light Truck Average Fuel Economy Standards for Model Years 1985-86*, 49 Fed. Reg. 41,250 (Oct. 22, 1984).

²⁷ According to CARB’s regulatory analysis and the deposition testimony, model year 2012 was the first model year in which the state greenhouse gas standards would require all manufacturers to install new technologies in order to reduce fuel consumption across car and truck product lines. A-__ (PX 198 at 16).

of preemption from EPA. And it would have been impossible for Chrysler, Ford and GM to comply with the same standards even if they had started their efforts the moment California promulgated the standards, long before any action by EPA.

Testimony by automobile manufacturers was unanimous that the state standards allow too little lead time for compliance using new technologies.²⁸ If the Vermont regulation were permitted to take effect on the schedule the State adopted in 2005, the only practicable way for some manufacturers to comply with the standards would be to alter the mix of vehicles they sell, withdrawing less fuel-efficient vehicle models from the market in order to raise fleet-wide fuel economy. Such forced product restrictions conflict with EPCA's requirement to consider economic practicability because they reduce consumer choice and impose harms on auto industry workers and dealers. Both of the Vermont dealers who testified at trial, for example, stated that their businesses would suffer severe damage if manufacturers withdrew or restricted products in order to comply with the regulation.²⁹

²⁸ See, e.g., A-__ (Choe Dep. 38:1-39:15; 51:7-9; 217:1-218:7 (PX1419 (Nissan))); A-__ (Ziwica Dep. 115:9-23, 117:15-118:7, 118:25-119:22 (PX1415) (BMW)); A-__ (Love Dep. 127:12; 230:5-231:16 (PX1421) (Toyota)); A-__ (Johnson Dep. 145:20-146:4 (PX1428) (Volkswagen of America)); A-__ (Trial Tr. 1-B, 57:22-61:1 (GM)); A-__ (Trial Tr. 3-A, 57:5-62:4 (DaimlerChrysler)).

²⁹ A-__ (Trial Tr. 2-A, 78:15-24) (testimony of Joseph Tornabene, owner of Joe Tornabene's GMC); A-__ (Trial Tr. 3-A, 110:16-21) (testimony of Ronald Carpenter, (footnote continued)

The district court disregarded these conflicts with the objectives of the federal “economic practicability” requirement. Instead, based upon a lengthy review of various fuel economy technologies, the court opined that the industry as a whole could *eventually* comply with the state greenhouse gas standards by adopting new technologies at what the district court considered “reasonable” costs. SPA-__ (508 F. Supp. 2d at 383). But even if it were possible for the industry to comply with the regulation at some future point, Vermont’s regulation still poses a conflict with the federal program in the meantime because it forces the very mix-shifting that Congress intended manufacturers to be able to avoid. If the manufacturers could not implement new technologies in time to meet Vermont’s standards when the standards first went into effect, then the manufacturers would be forced to mix-shift on a large scale. Moreover, if market conditions changed, and it became apparent that the industry as a whole could *never* comply with the regulation without mix-shifting, the district court’s decision would leave NHTSA powerless to exercise its authority under EPCA to relax the fuel economy standards. *See* 49 U.S.C. § 32902(c).

owner of Green Mountain Chrysler-Plymouth-Dodge and of Green Mountain Ford Mercury).

C. NHTSA’s Considered View That EPCA Impliedly Preempts Vermont’s Regulation Was Entitled To Deference.

NHTSA stated in formal notice-and-comment rulemaking that the state regulations both “frustrate the objectives of Congress in establishing the CAFE program,” and “conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA.” 71 Fed. Reg. at 17,667. The district court entirely disregarded NHTSA’s judgment on this score, just as it disregarded NHTSA’s considered view that EPCA expressly preempts the state greenhouse gas standards. For the reasons given above in Part I.C, this was reversible error.

III. THE DISTRICT COURT ERRED IN HOLDING THAT EPCA CANNOT PREEMPT STATE GREENHOUSE GAS REGULATIONS THAT RECEIVE A WAIVER FROM CAA PREEMPTION.

The district court held that if EPA approves a state greenhouse gas regulation under section 209(b) of the CAA, then the state regulation takes on “the same stature as a federal regulation” for purposes of EPCA and is saved from express or implied preemption under EPCA. SPA__ (508 F. Supp. 2d at 347). The district court’s holding cannot be squared with the text of either statute, or with the historical interplay between the two. Congress has expressed no intent to federalize a state greenhouse gas regulation; section 209(b) of the CAA clearly saves state emissions standards only from CAA preemption; and no provision of EPCA saves a state greenhouse gas regulation from the broad sweep of EPCA’s “related to” preemption

provision, as the district court erroneously believed. Even if anything in the CAA or EPCA could save a state greenhouse gas regulation from EPCA’s express preemption provision, that would not “bar the ordinary working of conflict preemption principles.” *Geier*, 529 U.S. at 869; *see also Sprint Spectrum*, 283 F.3d at 415 . The district court therefore was obliged to conduct a preemption analysis, and under that analysis, as explained above in Parts I and II, Vermont’s regulation is both expressly and impliedly preempted.

A. Congress Has Not “Federalized” State Greenhouse Gas Regulations.

The district court suggested that, once EPA approves a state emissions standard under section 209(b) of the CAA, that standard has the stature of a federal regulation.³⁰ This is clearly incorrect. It is well established that if Congress intends to accord a state law the status of a federal law (or allow an agency like EPA to do so), it must state its intentions clearly. *See, e.g., Indep. Cmty. Bankers Ass’n v. Bd. of Governors*, 820 F.2d 428, 436-37 (D.C. Cir. 1987) (recognizing that, although Congress “has the power to assimilate state law,” “[s]uch decisions require an unequivocal congressional expression” because “some [state] restrictions would in all

³⁰ The district court reviewing the California greenhouse gas regulation aptly observed that the Vermont district court “never actually offers a legal foundation for the conclusion that a state regulation granted waiver under section 209 is essentially a federal regulation . . .” *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1165.

likelihood conflict with [other] existing federal laws”); *Nat’l Abortion Fed’n v. Ashcroft*, No. 03 CIV 8695, 2004 WL 555701, at *4 (S.D.N.Y. Mar. 19, 2004) (ruling that HIPAA’s anti-pre-emption provision does not federalize state law). Congress made no such plain statement here, and thus neither section 209(b) of the CAA nor section 32902(f) of EPCA converts an EPA-approved state emissions standard into federal law. *See Indep. Cmty. Bankers Ass’n*, 820 F.2d at 436-37.

B. An EPA Waiver From CAA Preemption Would Not Immunize Vermont’s Regulation From EPCA Preemption.

The district court also believed that section 209(b) “waives federal pre-emption” under *EPCA*. SPA-___(508 F. Supp. 2d at 343-44). But the district court reached this conclusion only by ignoring the plain language of section 209(b). Section 209(a) of the CAA broadly preempts state emissions standards, and section 209(b) authorizes EPA to “waive application of *this section*” of the CAA for California emissions standards that meet specified criteria. 42 U.S.C. § 7543(a), (b) (emphasis added). By its own terms, therefore, section 209(b) waives only CAA preemption. *See Motor & Equip. Mfrs. Ass’n, Inc. v. EPA*, 627 F.2d 1095, 1107 (D.C. Cir. 1979) (“[T]his section” has “no conceivable meaning other than to refer to subsection (a).”). It does nothing more than return California and other States like Vermont that adopt

California’s standards to the position in which they would have been absent section 209(a).³¹

Nor is this unusual or surprising. Waiver of preemption under one federal statute generally does not eliminate the possibility of preemption under other federal statutes. *See, e.g., United States v. Locke*, 529 U.S. 89, 106 (2000) (holding that savings clauses in Title I of the Oil Pollution Act, which expressly limited their effect to “this Act, the Act of March 3, 1851, ... or section 9509 of [the Internal Revenue Code],” were not intended to save state laws from preemption by the Ports and Waterways Safety Act); *Int’l Paper v. Ouellette*, 479 U.S. at 493 (holding that savings clause in the Clean Water Act stating that “nothing in this section” pre-empts state law “does not purport to preclude pre-emption of state law by other provisions of the Act”).³² Likewise, nothing in section 209(b) purports to insulate EPA-approved emissions standards from preemption under EPCA.

³¹ Although section 209(b) permits EPA to waive preemption under the CAA only for California standards, section 177 of the CAA permits other States to adopt standards identical to California’s standards. 42 U.S.C. § 7507. Consistent with section 209(b), section 177 provides that States may adopt such standards “[n]otwithstanding” the CAA’s express preemption provision. It is therefore clear that section 177 does not expand the authority of States to adopt California regulations that could not pass muster under section 209 (b).

³² *See also Bank of Am. v. City & 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.* (footnote continued)

The district court suggested that the Supreme Court’s decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), somehow altered this analysis, but that is incorrect. In *Massachusetts*, the Supreme Court held that EPA has authority under section 202(a) of the CAA to adopt federal regulations restricting motor vehicle emissions of greenhouse gases (including CO₂), if EPA finds that those gases meet the criteria for regulation in the statute. The Court recognized that such a construction of section 202(a) might allow EPA to intrude on NHTSA’s authority to promulgate fuel economy standards under EPCA, but it suggested that the two federal agencies could cooperate to “avoid inconsistency.” *Id.* at 1462. The district court opined that this case presents “the same situation” of “overlap without conflict” between “EPA’s authority to issue a waiver under section 209(b) of the CAA for a California greenhouse gas emissions standard” and NHTSA’s authority under EPCA. SPA-__ (508 F.Supp.2d at 344).

The district court’s attempted analogy, however, is unavailing. This case does not present a challenge to EPA’s waiver authority, which by its own terms is limited to a waiver of preemption under the CAA (and nothing in *Massachusetts v. EPA* suggests otherwise). This case presents a challenge to a *state* regulation of greenhouse

Texaco, Inc., 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 (footnote continued)

gas motor vehicle emissions that Congress has not accorded the stature of a federal regulation, and it is therefore irrelevant whether EPA and NHTSA may cooperate in promulgating *federal* greenhouse gas or fuel economy regulations. Indeed, *Massachusetts v. EPA* itself recognized that “in some circumstances the exercise of [a State’s] police powers to reduce in-state motor-vehicle emissions might well be pre-empted.” 127 S. Ct. at 1454. Nothing in *Massachusetts v. EPA*’s brief reference to *federal* interagency cooperation suggested that EPA’s deference to a *state* regulation could cut NHTSA out of the loop with respect to setting national fuel economy policy.

C. EPCA’s Requirement That NHTSA Consider “Other Motor Vehicle Standards Of The Government” Does Not Save Vermont’s Regulation From EPCA Preemption.

Based on its erroneous conclusion that this case presents a potential conflict between two federal regulatory regimes, the district court believed that it was required to construe EPCA to avoid a conflict with section 209(b) of the CAA. SPA__ (508 F. Supp. 2d at 333-34). It thus turned for support to EPCA’s requirement that, in setting fuel economy standards, NHTSA “shall consider,” among other factors, “other motor vehicle standards of the Government.” 49 U.S.C. § 32902(f). The district court suggested that all EPA-approved state greenhouse gas regulations become “other motor vehicle standards of the Government” that NHTSA shall “consider.” And the

of the RCRA.”) (emphasis omitted).

court reasoned further that, if Congress requires NHTSA to treat every EPA-approved emissions standard as a government standard under § 32902(f), then Congress must have intended to save those standards from preemption. SPA-__ (508 F. Supp. 2d at 347).

As discussed above in Part III.A, there is no basis for the district court's determination that a state emissions standard has "the force of a federal regulation" and this case, accordingly, does not present a potential conflict between two federal regulatory regimes. But there also is no basis either for the district court's determination that any EPA-approved vehicle emissions regulation is an "other motor vehicle standard[] of the Government" that NHTSA shall "consider," or for the district court's suggestion that section 32902(f) operates as a savings clause.

To begin with, in requiring consideration of "other motor vehicle standards of the government," Congress did not require NHTSA to consider *every* EPA-approved state emissions standard. To be sure, Congress expected NHTSA to consider state regulations that would indirectly make it more difficult to achieve higher fuel economy levels.³³ For example, Congress knew that because catalytic converters add

³³ Under section 32902(f), for example, NHTSA conducts "an analysis of the unavoidable adverse effects on fuel economy of compliance with emission, safety, noise, or damageability standards" that are not themselves regulations of fuel economy. *Nonpassenger Automobile Average Fuel Economy Standards Model Years* (footnote continued)

weight to a vehicle, emissions regulations that would result in the use of catalytic converters made it more difficult for motor vehicle manufacturers to achieve higher average fuel economy standards. *See* H.R. Rep. No. 94-340, at 87.³⁴ Congress therefore directed that NHTSA, when considering what fuel economy standards are feasible, take into account emissions standards that have the indirect effect of imposing a fuel economy penalty. *See* 71 Fed. Reg. at 17,643 (interpreting the “other motor vehicle standards” clause as requiring NHTSA to “consider potential fuel economy *losses* due to more stringent emissions requirements when [it] determine[s] maximum feasible fuel economy levels”) (emphasis added).

But the fact that NHTSA has considered “decades of EPA-issued and approved regulations” that have tangential, negative effects on fuel economy does not mean that NHTSA must consider EPA-approved state regulations like Vermont’s that directly

1980-81, 42 Fed. Reg. 63,184, 63,188 (Dec. 15, 1977); *see also* 71 Fed. Reg. at 17,566 (“This statutory factor [49 U.S.C. § 32902(f)] constitutes an express recognition that fuel economy standards should not be set without due consideration given to the effects of efforts to address other regulatory concerns, such as motor vehicle safety and emissions. The primary influence of many of these regulations is the addition of weight to the vehicle, with the commensurate reduction in fuel economy.”).

³⁴ As that House Report noted, “[t]he 1975 California standards, which require a further reduction in emissions [of non-carbon-dioxide gases] of about 1/3 from the 49-State standards, appear to result in a 5.7 percent fuel penalty relative to automobiles subject to the 49-State standards — though this penalty varies widely from manufacturer to manufacturer.” H.R. Rep. No. 94-340, at 87.

regulate fuel economy — the subject matter at the core of NHTSA’s own regulatory authority. To the contrary, nothing in section 32902(f) of EPCA suggests that Congress intended NHTSA to consider *any* EPA-approved emissions standards that directly “relate to” fuel economy standards within the meaning of EPCA’s preemption provision. Rather, as NHTSA itself has explained, the phrase “other motor vehicle standards of the Government” encompasses only standards that are *not* “related to fuel economy standards” and that do not conflict with EPCA’s goals.

Moreover, as NHTSA correctly observed, 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 17,669. Thus, in setting fuel economy standards, NHTSA has stated that it considers “State emissions standards that only incidentally or tangentially affect fuel economy ... [including] the existing emissions standards for CO, HC, NO_x and particulates.” *Id.* By contrast, NHTSA does not consider “State standards that cannot be adopted and enforced because there has been no waiver for California [under section 209(b)],” or “State emissions standards *that are expressly or impliedly pre-empted under EPCA*, regardless of whether or not they have received such a waiver.” *Id.* (emphasis added). The district court’s more expansive interpretation of “other motor vehicle standards of the Government” would “leave [NHTSA’s] role in administering the CAFE program open to a substantial risk of abrogation.” *Id.* Indeed, the district court’s reasoning would

remove from the scope of EPCA’s preemption clause even a state emissions regulation that *explicitly* set fuel economy standards, so long as EPA issued a waiver for such a regulation under section 209(b) of the CAA — a result that would nullify EPCA’s preemption clause. That cannot be the law, and NHTSA’s reasonable interpretation of section 32902(f) is entitled to deference.

But even if the district court were correct that every EPA-approved state regulation is an “other motor vehicle standard[] of the Government,” there is still no basis for the district court’s conclusion that section 32902(f) has the effect of saving Vermont’s regulation from preemption. Section 32902(f) states only that NHTSA must “*consider* ... other motor vehicle standards of the Government” when setting average fuel economy standards (emphasis added), not that it shall be bound by or obliged to follow them. *Cf. United States v. Cohen*, 99 F.3d 69, 71 (2d Cir. 1996) (per curiam) (“The fact that a court must consider the policy statements, of course, does not mean that it is bound by them.”).

There is, moreover, no need to construe section 32902(f) as an implied savings clause, because Congress explicitly provided a savings clause in EPCA. Immediately following EPCA’s express preemption provision in section 32919(a), sections 32919(b) and (c) set forth a limited set of exceptions to EPCA’s preemption provision. Those exceptions allow States and local governments to adopt and enforce labeling standards for fuel economy that are identical to the federal standards and to set fuel

economy standards for vehicles obtained for their own use. 49 U.S.C. § 32919(b) & (c). If Congress wished to add a similar exception for all state motor vehicle standards for which EPA had granted a CAA waiver, it could have done so either in 1975 or when it recently amended EPCA.³⁵ Congress did not do so in either instance. The “natural implication” of a savings clause is that state actions not covered by the savings clause “are not saved” from preemption. *Gade*, 505 U.S. at 100. That implication follows from a court’s “duty to give effect, if possible, to every clause and word of a statute.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted); *cf. Geier*, 529 U.S. at 868 (interpreting express preemption clause so that the savings clause would have content). Thus, as NHTSA concluded, section 32902(f) “is neither a saving clause nor a waiver provision,” 71 Fed. Reg. at 17,669, and the district court erred in holding otherwise.

* * * * *

³⁵ In fact, Congress considered, but never adopted, language that would have provided for a much *narrower* preemption clause than the one enacted. *See* S. Rep. No. 94-179, at 45 (1975) (preempting only regulations “inconsistent” with EPCA); 121 Cong. Rec. 2794, 2796-97 (Feb. 7, 1975) (allowing Secretary of Transportation to grant waivers upon finding certain conditions satisfied); H.R. Rep. No. 94-340, at 274 (1975) (precluding States from adopting or enforcing laws that “relate[] 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”).

In the end, the district court's flawed analysis of section 209(b) puts NHTSA in an untenable position relative to state greenhouse gas regulations like Vermont's. Where a state regulation is truly tangential to fuel economy, NHTSA can evaluate its effects and decide whether it is necessary to make minor adjustments in its fuel economy standards to accommodate it. In contrast, where a state regulation purports to occupy the very territory that Congress directed NHTSA to regulate — and to override the national standards that Congress and NHTSA are trying to set — there is no meaningful way for NHTSA to adjust its standard-setting process to harmonize its fuel economy standards with such a regulation. For NHTSA to yield to such state standards would be an abdication of its statutory obligation to set nationwide fuel economy standards.

CONCLUSION

The judgment of the district court should be reversed as a matter of law because the Vermont regulation is both expressly and impliedly preempted by EPCA and is not saved by the waiver provision of the CAA.

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CERTIFICATE OF COMPLIANCE

By order dated February 20, 2007, this Court granted Plaintiffs-Appellants' motion for leave to file an oversized brief of 24,000 words. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the text of this brief was prepared in Times New Roman 14 point font, and according to Microsoft Word's word count feature, consists of 16,743 words, excluding its tables of contents and authorities and certificates of compliance and service.

Kathleen M. Sullivan

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

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that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used _____

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(Your Signature) _____

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