

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER PLYMOUTH)
DODGE JEEP, *et al.*,)
)
Plaintiffs,)

ASSOCIATION OF INTERNATIONAL)
AUTOMOBILE MANUFACTURERS,)
)
Plaintiff,)

v.)

GEORGE CROMBIE, *et al.*,)
)
Defendants.)

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

**POST-TRIAL MEMORANDUM OF PLAINTIFFS GREEN MOUNTAIN CHRYSLER
PLYMOUTH DODGE JEEP, *ET AL.***

Stuart A. C. Drake
Andrew B. Clubok
Jeffrey Bossert Clark
Michael E. Scoville
Derek S. Bentsen
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Robert B. Hemley
Matthew B. Byrne
GRAVEL AND SHEA
76 St. Paul Street, 7th Floor
Burlington, VT 05402-0369
(802) 658-0220

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Plaintiffs in Case No. 302, Green Mountain Chrysler Plymouth Dodge Jeep, *et al.* (collectively, “plaintiffs”), have filed under separate cover their proposed findings of fact and conclusions of law for the Court’s consideration. The main purpose of this memorandum is to address issues raised by the Court during trial concerning the scope of waiver proceedings for the greenhouse gas regulation at the U.S. Environmental Protection Agency (“EPA”), and the role of the National Highway Traffic Safety Administration (“NHTSA”) in that process. This memorandum also includes a brief review of the legal issues and the evidence developed at trial, because one of the Court’s most important questions for the parties at the close of trial was whether EPA can consider that evidence and redress any conflict between the greenhouse gas regulation and federal law.

Preliminary Statement

Congress passed the Energy Policy and Conservation Act of 1975 (“EPCA” or “the 1975 Act”) to provide “a comprehensive legislative response” to the most serious energy crisis in U.S. history.¹ Congress directed the automobile industry to double the fuel economy of the nation’s passenger car fleet. But, despite the urgent need for change recognized in the 1975 Act, Congress specified “a series of graduated mileage requirements,” intended to “ensure wide consumer choice,” through a process that allow the industry to avoid undue hardship on the national automobile economy.²

¹ *Center for Auto Safety v. NHTSA*, 847 F.2d 843, 844 (D.C. Cir.) (separate opinion of Wald, J.), *vacated on unrelated grounds*, 856 F.2d 1557 (1988).

² *Center for Auto Safety*, 847 F.2d at 863-64 (separate opinion of Buckley, J.) (quoting S. Rep. No. 179, 94th Cong., 1st Sess. (1975)) (internal quotation marks omitted).

A vigorous debate is now under way in Congress to determine whether to amend the 1975 Act and how to address the issue of climate change. The federal legislative process has broad support, including from the parties who are plaintiffs in these actions.³ Congressional attention is necessary because the automobile industry faces unprecedented economic challenges at the same time that the nation is expecting more from its engineers and planners to improve fuel economy and reduce greenhouse gases.

At a fundamental level, the most important question that this litigation will determine is whether current and future Congresses will be able to maintain control over national energy and environmental policy. In the 1975 Act, Congress made it clear that it wanted improved fuel economy, but that those improvements should not unduly compromise consumer choice or the health of the automobile industry. To ensure the necessary balance, Congress took three important steps. First, Congress itself specified the fuel economy standards for passenger cars, and directed that any increase in those standards by NHTSA be “economically practicable.” Second, Congress ordered NHTSA to set truck fuel economy standards at what NHTSA would find to be the “maximum feasible” level, but defined “maximum feasible” to include economic practicability. 49 U.S.C. §§ 32902(c), 49 U.S.C. § 32902(f). Finally, and most importantly in this context, Congress ensured that the federal government would maintain control over the appropriate balance among the competing interests that it recognized, by generally preempting any state regulation related to fuel economy standards once federal standards were in place. *Id.* § 32919(a).

³ See Testimony of David McCurdy, President and CEO of the Alliance of Automobile Manufacturers, before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Energy and Air Quality (June 7, 2007), *available at* <http://www.autoalliance.org/archives/McCurdyTestimony%20060707.pdf>.

Having spoken with clarity in the 1975 Act, Congress -- and only Congress -- can decide to relinquish the control over fuel economy regulation that it imposed in 1975. The evidence at trial demonstrated that, at least in Vermont and the other states enforcing the same greenhouse gas standards as Vermont the national standard of 27.5 miles per gallon (“mpg”) for passenger cars will soon be a dead letter unless the regulation is invalidated. Following California’s lead, Vermont has set increasingly stringent de facto fuel economy levels for passenger cars that will ultimately require more than a 48 percent increase from the federal level for passenger cars. Vermont, New York and California have decided to ignore federal authority and to strike their own balance among the competing goals that Congress recognized when it gave NHTSA exclusive power to regulate the fuel economy of trucks, and they have set de facto fuel economy standards for trucks that are fundamentally at odds with NHTSA’s standards and approach.

If Vermont and other states are permitted to ignore the preemption provision in EPCA, there will be (i) enormous changes in the passenger car markets in Vermont and other states, (ii) losses in employment in the U.S. auto industry that the country can ill afford, and (iii) increases in traffic safety risks. The testimony demonstrating those effects came from leading independent experts in the field of automotive regulation, from senior executives from the manufacturer plaintiffs and non-party manufacturers, and from Vermont dealers who will be the front line of those companies’ struggle to survive once the state regulations take effect.⁴ Moreover, and despite the good intentions of the legislative body that called for establishment of the greenhouse gas regulation, the evidence has also established that the devastating impacts of the regulation

⁴ The evidence concerning the competitive impacts of the regulation was presented at trial by or on behalf of plaintiffs other than the Alliance of Automobile Manufacturers, which is an organization comprised of several different manufacturers, and which does not take positions on competitive issues within the automobile industry.

provide no environmental gain. The key evidence on the impacts of the regulation is summarized in Part I of this memorandum.

Part II addresses the question of whether there is an alternative forum in which plaintiffs can obtain relief from the devastating impacts of the state greenhouse gas regulations. Since the Court raised this possibility during trial, defendants have submitted two briefs claiming that in the EPA waiver process, the federal government can take steps to modify California regulations, and suggesting that administrative proceedings at EPA and/or NHTSA are where Congress intended for the issues presented here to be resolved. As explained below, those claims have no support in the text, structure or history of EPCA and the Clean Air Act. EPA lacks the authority to determine issues of preemption under EPCA, and there is no mechanism in EPCA that allows NHTSA somehow to adjust the federal fuel economy program based on state standards that supercede the federal program in up to one-third of the U.S. new-vehicle market. In the case of the Vermont regulation, this Court is the only federal authority that can enforce the intent of Congress that enacted EPCA, and ensure that national fuel economy and greenhouse gas policy remains in the hands of Congress.

One other important point should be noted at the outset. The evidence at trial established reductions in consumer choice and employment and the increased safety risks created by the regulation will accomplish nothing from an environmental perspective, other than achieving the appearance of action on global warming. There will be no perceptible change in ambient temperatures even if these regulations were implemented worldwide if one examines the impact using generally understood scientific models. Defendants' top expert on this issue, Dr. James Hansen, testified that simply to predict using a computer model the tiny theoretical change in ambient temperatures if the regulation were implemented world-wide would not be worth the

processing time. On the other hand, by keeping older vehicles on the road longer, the regulation will increase ozone-forming and other toxic emissions from the on-highway fleet in each State that adopts these regulations. This case began with a regulation that was nominally focused on an important environmental concern, but the trial has demonstrated that this regulation -- unlike the earlier rules that California, Vermont and the rest of the nation have long enforced as necessary to have clean air -- has only symbolic positive value.⁵

ARGUMENT

I. Plaintiffs Have Proven That the Vermont Regulation Is a De Facto Fuel Economy Standard and That the Regulation Interferes with the Goals and Purposes of EPCA.

The evidence establishing why the greenhouse gas regulation is preempted by EPCA can be grouped under two major rubrics: the evidence showing that all parties ultimately agree that the greenhouse gas standards are de facto fuel economy standards, and the evidence proving that the regulation will have the impacts on the industry and the public that plaintiffs have alleged since the start of this case in November 2005. The evidence also established that, if the

⁵ In the search for a solution to the issue of climate change that will be more than symbolic, the decision in *Massachusetts v. EPA* assures that the federal government can take the necessary action. Executive Order 13,432, issued on May 14, 2007, directs EPA and NHTSA to work together to “protect[] the environment with respect to greenhouse gas emissions from motor vehicles.” 72 Fed. Reg. 27,717 (May 16, 2007).

Those developments may help address this Court’s questions, at pretrial motions hearings, concerning the ability of the federal government to address the issue of greenhouse gases through a mechanism other than NHTSA’s obligations to do so by virtue of the National Environmental Policy Act. *See Public Citizen v. NHTSA*, 848 F.2d 256, 263 n.27 (D.C. Cir. 1988) (applying NEPA to NHTSA rulemakings and noting that NHTSA had concluded that “‘the need of the Nation to conserve energy’ requires consideration of the ... environmental ... implications of our need for large quantities of petroleum...”). It is now clear that the federal government intends to act on the question of greenhouse gases from motor vehicles, with the support of the automobile industry. *See* note 3 above.

regulations are not invalidated now, manufacturers cannot defer any longer the extraordinary effort that would be needed in order to try to comply with them, assuming they had the resources to invest in such an effort. Finally, the evidence established that even if such efforts were undertaken, it would still be impossible for any of the major manufacturers to comply with the standards in the time allowed, in the absence of severe product restrictions that would involve the disappearance of many models of cars and trucks from the new vehicle market in states like Vermont, California and New York.

A. The Regulation Creates New Fuel Economy Standards in Vermont Because It Compels Reductions in Fleet-Wide Gasoline Consumption.

Unrebutted evidence from numerous witnesses, including admissions by defendants and by the state officials in California who framed the greenhouse gas standards, established that that the only way for fossil fuel-powered vehicles to reduce their carbon dioxide (“CO₂”) emissions would be to burn less fuel. The evidence established that, from the beginning of the regulatory process, it has always been assumed that the fleet-wide greenhouse gas standards would operate as *de facto* fuel economy standards.⁶

Defendants could not and did not make any serious attempt to deny that the basic chemical relationship between carbon dioxide and fuel consumption, combined with the stringency of standards, created a set of new *de facto* fuel economy standards in Vermont. To the contrary, defendants’ principal engineering expert witness (Mr. KG. Duleep) described at length the “implied MPG” levels required by the near-term passenger-car and small-truck standards, the near-term full-size truck standards, and the mid-term car and truck standards.

⁶ See Plaintiffs’ Proposed Findings of Fact and Conclusions of Law (“PFFCL”) ¶¶ 41-61.

Those mid-term car and truck standards, he estimated, would require a 48.7% and a 27% increase in fuel economy respectively from the current baseline levels. (PFFCL ¶ 51.) Another of defendants' expert further explained that one of the distinctive aspects of this particular regulation, in contrast to other emissions standards, is that it would result in reduced fuel consumption for a typical driver. And the officials from CARB who designed the standard acknowledged internally that what they had "effectively" done is to set a 43 mpg fuel economy standard for passenger cars. (*Id.* ¶ 55).

With such evidence in the record, it is unsurprising that defendants chose not to contest the first important fact that plaintiffs sought to prove, which is that the greenhouse gas standards will operate as fuel economy standards by another name. This establishes that the greenhouse gas standards are thus not merely "related to" fuel economy standards, but they are fuel economy standards, by another name or label. 49 U.S.C. § 32919(a). Of course, the label attached to a state regulation has never controlled the issue of federal preemption; if it did, the states, and not Congress, would have control over the scope of federal preemption. *See Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 13-14 (1983); *see also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 89 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Perez v. Campbell*, 402 U.S. 637, 651-52; *Napier v. Atlantic Coast RR Co.* 272 U.S. 605, 612 (1971).

The State's only fact-based defense against express preemption relied on a theoretical possibility, created by the text of the greenhouse gas regulation enacted in California and then adopted in Vermont, that manufacturers could try to comply with the standards using vehicles operating on alternative fuels. At the outset, it is important to note that the officials who set the standard admitted that even they do not foresee any alternative compliance option as a "feasible

and cost-effective” means of compliance. To the contrary, they expect that for upwards of 90% of the regulation the only feasible means of compliance is through use of fuel-economy improving technologies that would lead to the “effective” mpg standard they internally anticipated.⁷

Defendants urge the Court to set aside the admitted practical realities that would result from the challenged regulation. They argue that, to the extent that manufacturers hypothetically would earn some credits from the sale and use of alternative fuel vehicles that could have different per-mile fuel economy levels than gasoline-powered vehicles, the greenhouse gas standards are not related to fuel economy standards. This *non sequitur* ignored the fact that, for any given fossil-fuel-based alternative fuel consumed in an internal combustion engine, there is still a direct mathematical relationship between the amount of fuel consumed and the level of CO₂ that the engine will emit -- a fact illustrated in defendants’ own demonstratives -- and that there is no after-treatment system for CO₂ emissions from any type of internal combustion engine. A fleet of vehicles operated on the ethanol-gasoline blend called “E85” will as surely have a de facto fuel economy standard as a fleet of vehicles operated on gasoline. If such a fleet of E85 vehicles does not have tailpipe CO₂ emissions that are low enough to pass the standards, after receiving the “credit” assigned by the regulation to such vehicles when operated on E85, they will fail the greenhouse gas standards. In that respect, the standards contained in the regulation are no less related to fuel economy standards simply because they include credits for the use of alternative fuels.

⁷ See PFFCL ¶ 59.

More to the point, the evidence also proved that in the real world, the alternative-fuel vehicle provisions of the regulation have no practical meaning. All of the witnesses who testified on this subject, including defendants' designated expert on this issue (Mr. Michael Jackson), agreed that in its current form, the alternative-fuel vehicle provisions do not provide a viable compliance option. The reason is twofold. First, in non-midwestern states such as California, New York, and Vermont, E85 is currently unavailable at all but a tiny handful of fueling stations. While the automobile manufacturers are doing what they can to help facilitate the development of E85 infrastructure, the task is large and the outcome depends on the actions of many interests outside of the automobile manufacturers' control, including fuel providers, consumers, and governments. From today's vantage point, it is highly uncertain whether E85 will ever gain a substantial foothold in states like California, New York, and Vermont. The speculative nature of the E85 "option" makes it completely useless to manufacturers engaged in the effort of trying to develop compliance plans for the future.

The second problem is that, even if one assumes that E85 becomes available in substantial quantities at some future time, credits may only be earned if a manufacturer demonstrates that the alternative-fuel vehicles have actually been operated on the alternative fuel. There is no practical way for automobile companies to ensure that consumers will be able conveniently to purchase the alternative fuels at prices less than gasoline. That is the major reason why, in the statements by the automobile senior executives placed into evidence by defendants, the chief refrain is that the government must take steps to ensure that alternative fuels are readily available and can compete with gasoline.⁸

⁸ See, e.g., DX 2510 (noting that Ford had agreed to make half of its fleet flex-fuel vehicles by 2012 "provided there are sufficient amounts of ethanol and enough retail facilities to support
(Continued...)

Most of the trial testimony on alternative fuels focused on the E85 provision in the regulation. Mr. Jackson acknowledged that, among other necessary changes to the regulation, the states would have to mandate the sale of E85 in sufficient quantities to permit vehicle manufacturers to rely on the credit-generating features of the regulation.⁹ Mr. Jackson also stated that, in his opinion, the current regulation would have to be amended in order to increase the level of credit allowed for the usage of some types of E85 (specifically, E85 based on feedstocks other than corn).¹⁰ Defendants also pointed to federal proposals to increase the availability of E85 and other alternative fuels. But this Court must take the regulation as it is currently written, and cannot assess the viability of compliance based upon how it might be revised if California decides to take Mr. Jackson's advice, or if the federal government decides to mandate the sale of an alternative fuel in the future.

The only other type of alternative-fuel vehicle discussed in the trial at any length was the so-called "plug-in hybrid," a gasoline-electric vehicle designed to operate part of the time on electricity taken from the power grid, and stored in batteries. Plaintiffs' expert (Mr. Tom Austin) testified without contradiction by defendants that the regulations would require a manufacturer to sell plug-in hybrids in unrealistically high volumes in order for those vehicles to have a significant role in complying with the standards.¹¹ No witness suggested this was likely, in view of the high cost of plug-in hybrids and unresolved issues involving the electric traction batteries

consumers operating their vehicles on E85"); DX 2513 (GM will half its vehicles "biofuel-capable by 2012 -- provided there is ample availability and distribution of E-85").

⁹ See PFFCL ¶ 85.

¹⁰ See PFFCL ¶ 82.

¹¹ See PFFCL ¶ 91-98.

needed for such vehicles. To the contrary, state officials, such as Mr. Tom Cackette, a senior engineer at the California Air Resources Board (“CARB”) and Mr. Thomas Moyer of the Vermont Department of Environmental Conservation, acknowledged that plug-in hybrids are not expected to be a feasible compliance option.¹² The upshot of the testimony concerning alternative fuels was that, as the regulatory agencies predicted at the time when the standards were first adopted, the vehicle manufacturers would have to comply with the regulation by reducing the fuel consumption of their gasoline-powered fleets.

At the end of the day, the State’s reliance on the alternative-fuel vehicle provisions of the regulation assumes that the inclusion of an unworkable alternative compliance path in the regulation, alongside a method of compliance that it concedes will create *de facto* fuel economy standards in Vermont somehow saves the regulation from preemption. Likewise, defendants argue that the inclusion of a provision that theoretically would allow credit-trading amongst manufacturers somehow helps to overcome the fact that regulation is a *de facto* fuel economy standard, even though no state official has performed any analysis to suggest that credit trading would actually occur in the real world,¹³ and given the stringency of the standards and the competitive issues raised by the regulation, it is highly unlikely that any such “credit trading” would ever occur. Finally, defendants assert that because the *de facto* fuel economy standard potentially can be reduced (from approximately 43 mpg for passenger cars and small light-duty trucks to approximately 40.5 mpg) through credits earned by improving air conditioning through non-preempted requirements that the regulation is somehow saved from preemption.

¹² See PFFCL ¶ 95.

¹³ See PFFCL ¶ 206.

Such defenses should fare no better than a defense that relies upon the mere use of a label other “fuel economy.”¹⁴ The intent of Congress to bar the states from the regulation of fuel economy should not be evaded by illusory compliance options, any more than by a well-chosen label, because such a tactic would also leave the states free to decide the scope of preemption. *Cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 n.25 (1978) (if the state allows two compliance methods, and the likely method intrudes into a field reserved for federal regulation, the state’s action is preempted); *see also United States v. Massachusetts*, 440 F. Supp. 2d 24, 46 (D. Mass. 2006) (“If a regulation in effect compels ... compliance and ...invade[s] preempted fields,” the presence of non-preempted does not save the regulation from preemption) (citing *Ray*). As defendants’ expert (and now CARB board member) Dr. Daniel Sperling candidly summed it up at trial, “the greenhouse gas standard includes [a] *fuel economy standard*, but also deals with air conditioners, fuels and alternative fuels.” Sperling, Tr. Vol. 12-A, 77:19-78:1. The evidence at trial thus confirmed that, as plaintiffs contend, the greenhouse gas regulation is related to fuel economy standards and is therefore expressly preempted.¹⁵

B. The Evidence Established that, Even if the Costs of Compliance Were Much Lower Than Any Reliable Estimate, and More Lead-Time Was Allowed For Compliance, The Regulation Would Still Interfere With the Goals and Purposes of EPCA.

Plaintiffs will not review here the overwhelming evidence that came directly from the manufacturers, through trial testimony of the plaintiffs and deposition testimony from other manufacturers, demonstrating that it would be impossible to comply with the regulation in the

¹⁴ Regarding CARB’s efforts to purge the term “fuel economy” from the rulemaking process -- what one witness called “the dreaded two words” -- see PFFCL ¶ 59.

¹⁵ Defendants also argue that these standards are saved from express preemption because they are California standards, for which EPA may grant a waiver of Clean Air Act preemption.

lead-time allowed, even if the manufacturers could call on far greater resources than they currently possess. If the industry maintained its historical rate of increase in the average fuel efficiency of passenger cars, and if all such gains were required to be “spent” upon fuel economy improvements, the earliest that any of the eight largest manufacturers could comply without product restrictions and/or significant weight reduction would be 2023. Even if that rate could somehow be doubled (and sustained every year by every manufacturer), the two manufacturer plaintiffs could not comply until 2029 (General Motors) and 2032 (DaimlerChrysler).¹⁶

The manufacturer-plaintiffs’ independent expert on compliance issues, Mr. Austin, explained that if any of the states who have adopted the regulation are permitted to enforce the current deadlines, there would be significant product restrictions because lead-time would be inadequate. Defendants’ expert on the compliance issues, Mr. Duleep, appears to disagree, but he admitted that he had not even tried to examine the manufacturer compliance plans that contradicted his views, and his analysis was based on methods and assumptions that the Court cannot treat as reliable. Whatever the Court may think of Mr. Duleep’s methods, it should be clear that his views on lead-time are as far from the mainstream as his basic analytical methods. Indeed, even the CARB staff member who wrote the regulation admitted at his deposition that, at the time the regulation was adopted in 2005, he knew that compliance would already be impossible in the time allowed and that now it is even more out of reach.¹⁷

For purposes of preemption analysis, the significance of the evidence on the cost and infeasibility of compliance within the time frame allowed by the regulation is not that it shows

¹⁶ See Appendix B.

¹⁷ PFFCL ¶ 36.

that the regulation will be financially injurious to some or all of the automobile manufacturers. Indeed, NHTSA's latest amendments to the federal fuel economy standards have been estimated by NHTSA to cost approximately \$8.3 billion, and over the life of the federal fuel economy program, NHTSA has collected more than \$500 million in fines for noncompliance with its standards.¹⁸ The significance in this proceeding of the high costs and infeasibility of compliance is that it demonstrates the severe impact the regulation will have on all of the interests that Congress sought to protect under EPCA by requiring that standards be "economically practicable."

1. Impacts on Employment in the Automobile Industry

Defendants do not appear to dispute the point that, based on both the legislative history of EPCA, and NHTSA's work under the 1975 Act, the criterion of "economic practicability" requires careful attention to impacts on employment in the automobile industry in the United States. Plaintiffs called to trial one of the world's foremost experts in automotive manufacturing, Mr. Ron Harbour. Without contradiction by any defense witness, Mr. Harbour proved that implementation of the regulation will lead to significant job losses in the national automotive industry even if one accepts the low end of the range in estimated reductions in new vehicle sales. Using estimates that Mr. Harbour considers more plausible, those job losses could range as high as 200,000, while using "ultra conservative" assumptions so "that they really couldn't be

¹⁸ See Light Truck Average Fuel Economy Standards Model Years 2005-2007, 68 Fed. Reg. 16868, 16885 (Apr. 7, 2003); Average Fuel Economy Standards for Light Trucks Model Years 2008-201, 71 Fed. Reg. 17566, 17569 (Apr. 6, 2006); CAFE Overview, *available at* <http://www.nhtsa.dot.gov/cars/rules/cale/overview.htm>.

challenged,” the estimated losses will be at least 65,000.¹⁹ For its part, CARB took the position in the California rulemaking that it could not even consider such job losses, because they would occur outside California. Defendants have not cited any administrative precedent in which NHTSA has ever allowed a federal fuel economy standard to impose such job losses on auto workers. To the contrary, whenever enforcement of a given federal fuel economy standard has portended a level of job losses that is near the lowest end of the estimates prepared by Mr. Harbour in this case, NHTSA has relaxed the federal standards, and one of the chief objects of “reformed CAFE” for light trucks has been to try to help preserve the U.S. industry.²⁰

2. Impacts on the Market and Consumers

Another very important group of people within the EPCA framework are consumers. Mr. Austin testified that implementation of the regulation would cause “enormous” changes in the passenger car market in any state that enforced the greenhouse gas regulations.²¹ Under Mr. Austin’s analysis -- which the manufacturers themselves consider optimistic -- the regulation creates competitive imbalances.²² By forcing all manufacturers to meet the same passenger car standards, regardless of differences in their model mix, the regulation will drive some manufacturers out of the passenger car market. Such a result plainly conflicts with the federal program to regulate fuel economy, which has long been administered in a way intended to ensure that the standards do not force elimination of product lines: “NHTSA clearly understands that

¹⁹ See PFFCL ¶ 284, 297.

²⁰ See PFFCL ¶ 21.

²¹ See PFFCL ¶ 270.

²² See PFFCL ¶ 204.

Congress instructed it to administer the CAFE program so as not to induce product restrictions.” *Competitive Enterprise Inst. v. NHTSA*, 910 F.2d 107, 125 (D.C. Cir. 1990) (D. Ginsburg, concurring).

Importantly, Mr. Austin’s testimony demonstrated that the disparate impact of the regulation depended upon structure of the greenhouse gas standards, which use a “one size fits all” approach. As Mr. Austin testified, without contradiction from defendants, more lead-time will not address the structural imbalances created in the passenger car market if the regulation still requires all manufacturers to meet the same standards -- an approach that, as he testified, NHTSA now disfavors at the federal level.²³

Equally important, Mr. Austin also testified without any rebuttal by defendants that his bottom-line conclusion would not change if he used Mr. Duleep’s low “mark-up” factors to fully recover compliance costs, or even if he assumed (along with Mr. Duleep) that some manufacturers would have near-zero compliance costs, while the average cost of compliance would only be about \$1,500 per vehicle (which was Mr. Duleep’s primary cost estimate).²⁴ The key point is that as long as the difference in overall compliance costs between the high-cost firms (like Nissan, Ford, GM and Chrysler) and the lower-cost firms (like Honda and Hyundai) exceeds the average per-vehicle profits for the higher-cost firms, those higher cost firms must take steps to reduce their compliance costs -- and this can only be done by concentrating their

²³ See PFFCL ¶ 268.

²⁴ See PFFCL ¶ 287.

resources in the market segments in which they can complete (full-size trucks) and abandoning the passenger-car markets.²⁵

As Mr. Austin's analysis indicates, the average profits of the higher-cost companies are therefore important in assessing how the industry will respond to the regulation. Mr. Austin has testified that even with Mr. Duleep's cost assumptions, profits are still insufficient to cover compliance costs -- and Mr. Duleep apparently never looked at any profit information himself. Defendants did not try to cross-examine Mr. Austin on the profit information he was using. The end result is that even if one accepts Mr. Duleep's cost estimates, the high-cost manufacturers cannot remain competitive in the passenger car market in Vermont and the other states enforcing the greenhouse gas standards. There may be some dispute about the size of the gap between the compliance costs of the high-cost manufacturers and the lower-cost manufacturers, but Mr. Austin testified without any challenge that the per-vehicle profits of the high-cost manufacturers could not cover even the small gap that would exist if he used Mr. Duleep's cost estimates.²⁶ Product line withdrawals in the passenger car market are the only way the higher-cost companies can survive. The record thus establishes, under any range of assumptions about the cost of the

²⁵ See PFFCL ¶ 268.

²⁶ Mr. Duleep testified that average costs would be about \$1,500, or perhaps somewhat less, and that Honda and Toyota would probably have near-zero costs. (Tr., 12-B, 47:3-5, 49:2 -56:21.) Unless one assumes that Honda and Toyota will decide to sell credits to their competitors -- which is an assumption contradicted by manufacturer testimony -- this would mean that some companies would have compliance costs far in excess of \$1,500. The testimony on the open record from Mr. Austin demonstrated that the average per-vehicle profits of Ford, GM and DaimlerChrysler will not approach that amount. See PFFCL ¶ 318.

regulation, the regulation will have a huge impact on consumers in Vermont and on dealers like the dealer-plaintiffs, Messrs. Carpenter and Tournabene.²⁷

II. The Evidence Entitles Plaintiffs To the Judgment They Have Sought

The remaining question is whether the Court should do what defendants urge and simply ignore all of the evidence presented during trial and assume that the EPA's waiver process will somehow resolve all outstanding issues or that NHTSA will simply adjust to the states' efforts to supplant its role in setting fuel economy standards. First, as explained in section A below, there is simply no mechanism under the Clean Air Act for EPA to consider in a direct fashion whether evidence like that presented here establishes a conflict with EPCA; indeed, the legal representatives of California and of at least one defendant-intervenor in this case (NRDC) is now on record as adamantly opposing EPA's ability to consider the issue of EPCA preemption. In

²⁷ The evidence on the other major impact of the regulation -- the traffic safety risks that arise from more driving, due to the "rebound effect" -- was completely one-sided.

The Court also received expert testimony on the impact of the regulation on traffic safety risks, from Dr. Laurentius Marais, whose methodology accounted for changes in vehicle occupant protection developed in consultation with Mr. Robert Shelton, a former Executive Director of NHTSA. Dr. Marais testified, again without serious contradiction and with no direct rebuttal from defendants, that the regulation would have the unintended effect of increasing travel and congestion, and thus highway accidents, serious injuries and fatalities. *See* PFFCL ¶ 318.

Dr. Scott Eliason was scheduled to testify for defendants on the safety issue. After Dr. Marais anticipated and addressed Dr. Eliason's views in his own testimony, defendants withdrew Dr. Eliason from their witness list. Meanwhile, defendants offered Dr. Greene to argue that the regulation would not lead to down-weighting (an issue never considered by the officials who adopted the regulation). But Dr. Greene conceded that his view is in a small minority and is contradicted by the National Academy of Science's conclusions that down-weighting leads directly to further safety risks. PFFCL ¶ 332.

Both parties also offered testimony on the environmental impacts of the regulation. *See* PFFCL ¶ 333 - 357.

addition, even if EPA were to consider the evidence and found that the regulation will reduce competition, cost jobs, create traffic safety risks, while providing no concrete environmental benefit, EPA's current interpretation of its powers under the Clean Air Act would not permit it to deny a waiver of Clean Air Act preemption, and certainly would not allow it to modify the greenhouse gas regulation on an ad hoc basis. Similarly, as explained in Section B below, there is no practical means for NHTSA to adjust the federal fuel economy standards to account for the impacts of the greenhouse gas standards -- which means that federal courts like this one are the only forums where, as a practical matter, the question of EPCA preemption can be decided and the preemptive intent of Congress can be vindicated.

A. EPA Cannot Consider or Decide the Issues of Preemption Presented under the Energy Policy and Conservation Act, and Has Interpreted the Clean Air Act to Preclude It from Denying A Waiver To Address Issues of Economic Practicability.

Because the Court has made it clear that it wants full briefing on the issue, plaintiffs respond in detail to the Court's questions about EPA's ability to address the issues of EPCA preemption and economic practicability raised by the trial evidence in this case.

1. Section 209(b) Limits EPA's Action to a Waiver of Clean Air Act Preemption.

In section 209(a) of the Clean Air Act, Congress generally preempted state regulation of motor vehicle emissions:

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

42 U.S.C. § 7543(a). For reasons explained in Appendix B to the Plaintiffs' Pre-Trial Brief (Doc. No. 364-3), in section 209(b) Congress allowed EPA to waive preemption under the Clean Air Act for California regulations meeting specifically prescribed criteria:

(b) Waiver. (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

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

42 U.S.C. § 7543(b) (emphasis added); *see* Doc. No. 364-3 at B5-B7.

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

2. EPA Has Interpreted Section 209(b) to Preclude Consideration of Issues of Long-Run Cost and Consumer Burdens.

The federal government's review of California motor vehicle emissions regulations extends back almost 40 years, to the period when the Clean Air Act was administered by the Department of Health, Education and Welfare. Prior to the current proceeding, each of the regulations adopted by California for which a waiver of federal preemption was sought pertained to the control of smog-forming air pollutants, and other substances that create impurities in the

ambient air and that are harmful to breathe. In the case of the pollutants that California had traditionally sought to regulate, EPA has applied a highly deferential standard of review. Consistent with the limited review performed with respect to those earlier waiver requests, the Agency has in the past employed procedures that, while suited to the purposes of limited review, would be inadequate for other purposes, such as the setting of federal emissions standards under section 202(a) of the Clean Air Act, or for a comprehensive review of the full economic and environmental impacts of a given set of state regulations on the nation as a whole.

The limited scope of EPA's review of California's traditional type of emissions regulations was established early in the history of the Agency's work under section 209(b) of the Clean Air Act. One of the most significant early decisions approved the California exhaust emission standards and related requirements for the control of hydrocarbons, oxides of nitrogen and carbon dioxide for the 1977 model year. *See* 40 Fed. Reg. 23102 (May 28, 1975) (the "1977 Standards" decision). Substantial questions existed about the feasibility of compliance with the relevant standards and the impact of the standards on vehicle operating costs for consumers. As Administrator Train indicated in his decision, the waiver docket contained evidence that California vehicle dealers believed that "their business[es] would suffer substantially as a result of the waiver," and that the new rule would restrict product offerings and cause some customers to "forego a purchase entirely and retain their older models." *Id* at 23105. EPA concluded that such evidence was insufficient to establish grounds for denial of the waiver request. The Administrator wrote:

"[E]ven on th[e] issue of technological feasibility I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the Federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to 'catch up' to some degree with newly promulgated standards. Such an approach

to automotive emission control might be attended with costs, in the shape of a reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency, under the statutory scheme outlined above I believe I am required to give very substantial deference to California's judgment on that score."

1977 Standards at 23103-04 (emphasis added). It was sufficient for EPA's purposes, according to the *1977 Standards* decision, for the Agency to determine that there would be a high probability "that at least one model of one manufacturer's product line for each class of vehicle [subject to the California regulation] will be certified to the California standards." *Id.* Even before the *1977 Standards* decision, the Agency had determined that it lacked authority to consider the potential long-term burdens imposed by a given set of California standards for criteria or precursor pollutants. As Administrator Ruckelshaus had written in one 1971 waiver decision:

"It is California's position that the statute does not permit me to take into account the extent of the burden placed on the residents of California or on regulated interests, unless the California requirement fails to provide an adequate period of lead time for compliance. I agree."

36 Fed. Reg. 17,458 (Aug. 31, 1971).

The only occasions on which EPA either denied waiver requests for standards for criteria or precursor pollutants, or took action that effectively required California to agree to modifications of those standards as a condition of approval, involved situations in which delays in the regulatory process in California or in EPA's review of waiver requests had made it logistically impossible for the automobile industry to release vehicles meeting a given set of California standards in time for the start of a new model year. As the administrative doctrine developed, considerations of feasibility and lead-time were relevant only in a very limited sense,

to ensure that California had allowed sufficient lead-time for the industry to conduct the necessary vehicle certification tests and to construct the necessary test facilities.²⁸

Likewise, considerations of long-run costs have never been relevant to EPA's review of California's regulations to control criteria and precursor pollutants, in part based on EPA's judgment that the industry could pass through compliance costs to consumers. As framed by Administrator Reilly in one of the first significant waiver decisions in the 1990s, the issue of long-term compliance costs was a matter of policy that Congress intended to consign to CARB:

“Although neither the industry nor CARB has expressly acknowledged it, manufacturers can recover the costs of this program by passing the costs on to the vehicle purchasers. The fact that CARB has made a judgment that the emission reduction (and consequent public health) benefits resulting from the LEV program will eventually be borne by California citizens in the form of higher vehicle prices is precisely the type of ‘controversial’ public policy decision that Congress believed should be made by California.”²⁹

The approach taken by EPA in those early waiver decisions concerning controls on criteria or precursor pollutants was generally approved by the U.S. Court of Appeals for the District of Columbia Circuit, in a 1979 decision reviewing the Administrator's approval of some California vehicle emission enforcement procedures. *Motor and Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA*”). There, the Court of Appeals agreed with EPA that its review

²⁸ See, e.g., 40 Fed. Reg. 30,311 (July 18, 1975) (denying waiver request for new evaporative emissions standards in model year 1977 because industry's test facilities would not be adequate for testing in time for model year 1977, and approving same standards for model year 1978 and later vehicles); 38 Fed. Reg. 30,136 (Nov. 1, 1973) (denying waiver request for model year 1975 standards because it was too late, by November 1973, to build and accumulate mileage on data and durability vehicles needed to demonstrate compliance in time for start of the 1975 model year).

²⁹ Waiver of Federal Preemption, California Low-Emission Vehicles, U.S. EPA at 170 (Jan. 7, 1992).

of California enforcement procedures under section 209 was “modest in scope,” and that the EPA Administrator “has no broad and impressive authority to modify California regulations.” 627 F.2d at 1119. The *MEMA* court also suggested that the costs of compliance with a California standard might be relevant and sufficiently excessive to warrant denial of a waiver only if they would “doubl[e] or tripl[e] the cost of motor vehicles to purchasers.” *Id.* at 1118.

EPA’s substantive review of California’s criteria and precursor pollutant regulations has remained narrow in the years since the *MEMA* decision. For example, when provided with uncontested evidence that the costs of some vehicles required by a California regulation would in fact double or triple the cost of a vehicle, EPA has simply declined to act on the relevant part of the waiver request, rather than disapprove the request and thus require California to undertake revisions.³⁰ In addition, in EPA’s 1996 review of the California onboard diagnostics requirements, an Assistant Administrator (acting on delegated authority) held that consideration of the potential anti-competitive impacts of the California regulation, which an aftermarket parts association considered relevant under section 207 of the Clean Air Act, would be “beyond the scope of my review in the context of a section 209(b) waiver decision.”³¹

3. EPA Lacks Authority under a Currently Controlling D.C. Circuit Decision to Consider The Issue of EPCA Preemption.

The Court of Appeals in *MEMA* also held that EPA was not required, or empowered, to consider whether a California waiver request conforms with any provision of law other than section 209(b). One issue in *MEMA* was whether the CARB regulations reviewed by EPA had

³⁰ 71 Fed. Reg. 78190 (Dec. 28, 2006). EPA’s action in this regard is now the subject of a petition for review in the D.C. Circuit. See *Alliance of Auto. Mfrs. v. EPA*, No. 07-1056 (D.C. Cir.).

³¹ Decision Document Supporting 61 Fed. Reg. 53,371 (Oct. 11, 1996) at 66.

to be evaluated for potential anticompetitive effects under the Sherman Antitrust Act. EPA declined to do so, and some petitioners challenged that aspect of EPA's decision. As the *MEMA* court wrote:

“The Administrator contends that he addressed all questions the statute requires him to address, and that the constitutional and antitrust implications of the CARB regulations are beyond the scope of his review in a waiver proceeding. We essentially agree with the Administrator's position.”

627 F.2d at 1111. Plaintiffs cannot gainsay the position of the Court of Appeals. It is also important to consider the position that California and other parties have taken in the current waiver proceeding, and in particular at the two public hearings that EPA has now conducted to consider the waiver request for the greenhouse gas regulations. Prior to those hearings, in the waiver application filed with EPA at the start of the review process, the CARB Executive Officer advised EPA that California believed that EPA “cannot apply any additional criteria” other than those specifically enumerated in section 209(b), “such as potential conflicts with other law ... in evaluating California's waiver requests.”³² The CARB Executive Officer stated that

³² Support Document for California Request for EPA Waiver at 10 (Doc. # 404-2). California's position in its 2005 waiver request is consistent with the approach it took in a 2002 waiver request that involved a version of the California zero-emission vehicle standards that contained an explicit fuel economy provision. As Dr. Alan Lloyd, then the Chairman of CARB, stated in a letter to EPA:

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

Letter from Alan Lloyd (CARB) to EPA Administrator Christine Todd Whitman (May 21, 2002) (Doc. No. 366-2).

considerations of consistency with EPCA “are both outside the scope of the Administrator’s review here as discussed in the text, and are irrelevant for the consistency analysis.”³³

Were California’s position in any doubt, at the waiver hearing in Sacramento on May 30, 2007, the Attorney General of California told the EPA hearing panel that under the *MEMA* decision, “you are not allowed to consider issues like preemption from another statute.”³⁴ Likewise, at the May 22 hearing on the waiver request, the Natural Resources Defense Council, took the same position on the ability of EPA to consider the issue of EPCA preemption:

EPA also asked whether there was relevance to the waiver decision from the Energy Policy and Conservation Act. And our response is, the EPCA provisions are not relevant under this waiver decision. The waiver decision must be made solely on criteria that are in Section 209(b).

Transcript of EPA Hearing on CARB Request for Waiver of Preemption at 189 (May 22, 2007). Notably, NRDC also urged EPA to grant the waiver request, dismissed concerns about the feasibility and cost of compliance, and indicated that it planned to join California in suing EPA if the waiver request was not approved soon.³⁵ To much the same effect, defendant-intervenor Conservation Law Foundation reminded EPA of the text of the *MEMA* decision that, in defendant-intervenor’s view, made the role of EPA “largely ministerial.”³⁶

³³ *Id.* at 10 n.11.

³⁴ Transcript of May 30, 2007, EPA Hearing on CARB Request for Waiver of Preemption, EPA Docket No. EPA-HQ-AR2006-0173 (maintained electronically) at 14.

³⁵ Transcript of May 22, 2007, EPA Hearing on CARB Request for Waiver of Preemption, EPA Docket No. EPA-HQ-AR2006-0173 (“May 22 EPA Tr.”) at 190.

³⁶ May 22 EPA Tr. at 229.

4. EPA Cannot Modify A California Regulation in the Waiver Review Process.

As noted above, under the Clean Air Act, EPA “has no ‘broad and impressive’ authority to modify California regulations.” *MEMA*, 627 F.2d at 1119. A Clean Air Act waiver under section 209(b) is premised on a determination that California has made a reasonable determination that its standards “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.” *Id.* § 7543(b).³⁷ Once California has made this “protectiveness finding,” and unless that finding is shown to be arbitrary and capricious, *see id.* at 42 U.S.C. § 7543(b)(1)(A), the state standard is “presumed to satisfy the waiver requirements.” *MEMA*, 627 F.2d at 1121. With that presumption in place, the EPA Administrator must either grant or deny the waiver request, based on the specific factors listed in section 209(b).

Despite the seemingly clear statutory structure, the defendants in this case have suggested during and after trial have tried to assert that EPA is empowered to “issue a waiver that effectively changes the timing or contents of the state’s standards.”³⁸ EPA possesses no such authority.³⁹ Rather, (i) EPA is required to grant the waiver if California makes the protectiveness finding and the Administrator does not make one of the three findings or (ii) the request for a

³⁷ Prior to 1977, the state standards had to be more stringent than the Federal standards in every respect and thus a California car by definition complied with the Federal standards and could be sold nationwide. In 1977, Congress allowed for waivers to be granted if the state standard was as protective “in the aggregate” as the Federal standards, so that California could have a more stringent standard for NOx and a less stringent standard for CO. *See Ford Motor Co. v. EPA*, 606 F.2d 1293, 389-90 (D.C. Cir. 1979). “As a result of that alteration the once unexceptional practice of distributing California cars nationwide was rendered unlawful for the simple reason that such cars will no longer comply with federal standards.” *Id.* at 393.

³⁸ Defs. & Def-Ints’ Memo on EPA Waiver Authority at 1 (Doc. No. 378-1, filed Apr. 23, 2007).

waiver must be denied if the Administrator does make one of the findings. Those are the only two options.

The one predicate for the waiver process is that California must have adopted some set of standards and made a protectiveness finding. 42 U.S.C. § 7543(b). Indeed, court after court has noted the obvious fact that section 209(b) “requires California to make its own protectiveness determination prior to applying for a waiver.” *Ford Motor Co.*, 606 F.2d at 396; *Ass’n of Int’l Auto. Mfrs. v. Comm’r, Mass. Dep’t of Envtl. Conservation*, 208 F.3d 1, 3 (1st Cir. 2000); *Motor & Equipment Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998); *Motor Vehicles Mfrs. Ass’n v. N.Y. Dep’t of Envtl. Conservation*, 17 F.3d 521, 526 (2d Cir. 1994); *MEMA*, 627 F.2d at 1121; *see also* 57 Fed. Reg. 909, 911 (Jan. 9, 1991) (noting that CARB had failed to make two protectiveness findings and reopening comment period).⁴⁰ California must develop specific standards, make a protectiveness finding for those specific standards, and then seek a waiver from the EPA.

EPA lacks the power to modify a waiver request filed by CARB for numerous reasons. First and foremost, before EPA may grant a waiver, Clean Air Act section 209(b) requires California to make a protectiveness finding. *See* 42 U.S.C. § 7543(b)(1) (“The Administrator shall ... waive application of this section to any State ... if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”). EPA is not free to make California’s protectiveness

⁴⁰ The same point has been noted by this Court and by the California defendants in the *Central Valley* case. *See* Memorandum Opinion and Order at 4 (Doc. # 165, Nov. 30, 2006) (noting that CARB “must first” make its protectiveness finding); Def. & Def-Ints’ Memo of Points & Authorities in Support of Motion for Judgment on the Pleadings at 9, in *Central Valley Chrysler-Plymouth Dodge Jeep*, No. 04-6663 (E.D. Cal. June 1, 2006) (“Before submitting a waiver request under section 209(b), California first must [make the protectiveness determination].”).

determination on behalf of the State. Instead, if EPA cannot approve a waiver request as proposed and formulated, it has no choice but to deny the waiver and send the matter back to the State for it to decide, whether, and if so, how to modify its regulations, and then for the State to make a new protectiveness determination, resubmitting the matter to EPA, and starting the waiver application process before EPA anew.

Second, EPA lacks the power to directly modify state law because it has not clearly been delegated that power in the Clean Air Act. Section 209(b) states only that EPA “shall ... waive” section 209(a) preemption if California makes a protectiveness determination, and states that “[n]o such waiver shall be granted” if the Administrator makes one of three findings. Section 209(b) is devoid of other options for EPA. A grant of direct power to EPA to modify state law that it should presume to be duly enacted (in the absence of evidence to the contrary) would be remarkable. “[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (internal quotation marks omitted)). There is no clear statement of a power delegated by Congress to EPA of a unilateral power on the Agency’s part to modify state law that seeks a waiver. The grant of a waiver by EPA, its only relevant statutory power, leaves state law as it found it. *See Chrysler Corp. v. EPA*, 591 F.2d 958, 961 (D.C. Cir. 1979) (“Federal preemption of state law displaces state authority. The decision not to preempt simply allows both federal and state authorities to regulate emission controls.”).⁴¹

⁴¹ As noted above in plaintiff’s pretrial brief, a bill in the House of Representatives in 1967 wanted the Secretary of Health, Education, and Welfare to set separate standards for California
(Continued...)

Third, even if Congress had delegated to EPA the power to directly modify California law in the course of making a waiver decision, such a provision of law would be unconstitutional because it would commandeer state law and state agents to federal purposes. Before California ever seeks a waiver, CARB must follow the processes duly enacted by the California Legislature and the Board's practices, to adopt regulations embodying its new automobile standards. It is the outcome of those processes that alone determine the content of state law. EPA is free to grant or deny a waiver of preemption, which has the effect of allowing California law to operate or barring it from operating. But EPA does not have an option to unilaterally modify California law without California's concurrence and observance of the required preliminary procedures. If EPA possessed that power, it would be fashioning, pursuant to its federal law authority, law that state officers would be obliged to carry out. This is constitutionally impermissible. *See Printz v. United States*, 521 U.S. 898 (1997) (portion of the Brady Act that required state officers to implement a federal regulatory program violated the Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992) (striking down provision requiring the States to take title to radioactive waste as part of a federal statutory regime, and stating that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.").

Fourth, EPA cannot attempt to do indirectly that which it may not do directly -- *i.e.*, by disapproving a waiver proffered by California, but stating how such a waiver could be modified to satisfy EPA's legal or factual concerns. "The Constitution nullifies sophisticated as well as

directly (not to allow California to set its own standards and then approach the Secretary for a waiver of preemption). Such an approach would have had the advantage of allowing the same enforcement authority and procedures to be applied to the two different types of regulation -- that establishing the federal and California cars. *See* H.R. Rep. No. 90-728, at 21-22 (1967) (Doc. No. 366-3). But that version of the Air Quality Act of 1967 never passed. *See* Appendix B to Plaintiffs' Pre-Trial Brief (Doc. No. 364-3).

simple-minded modes of infringing on constitutional protections.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (internal quotation marks omitted). *See also Murray v. Charleston*, 96 U.S. (6 Otto) 432 (1877) (State could not evade Contracts Clause by using the power to tax instead of the power to regulate); *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (“The Commission may not, however, when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is, in unconditional form, already in the public convenience and necessity”); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir.1978) (the Commission may not achieve indirectly through conditioning power of Federal Power Act what it is otherwise prohibited from achieving directly.”); *cf. Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960) (‘once want of power to do this directly were established, the existence of power to achieve the same end indirectly through the conditioning power might well be doubted’).

Finally, EPA could not grant a waiver until the public has exercised its right to be notified and to participate in an open hearing concerning the waiver application. This public right to notice and comment is destroyed if EPA can modify a California waiver application and grant it without further process. EPA in that case would effectively be granting a waiver application (as modified by the Agency) that the public had never had the right to comment upon.⁴² EPA cannot presume to know the outcome of the public hearing and comment process,

⁴² As the D.C. Circuit stated in *Exportal Ltda v. United States*:

This right to participate in the rulemaking process can be meaningfully exercised, however, only if the public can understand proposed rules as meaning what they appear to say. Moreover, if permitted to adopt unforeseen interpretations, agencies could constructively amend their regulations while evading their duty to engage in notice and comment procedures.

(Continued...)

and hence is not at liberty to provide guidance to California about whether a particular form of California standards would or would not be able to secure waiver without running the gauntlet of public notice and comment. This is especially true in light of the Agency's traditional interpretation of section 209(b) as imposing a burden of proof on waiver opponents, as approved in the *MEMA* case. To pre-announce, as it were, a form of California standards that would be granted a preemption waiver is to prejudge the question of whether future waiver opponents could, or could not, meet their assigned burden of proof.⁴³

B. NHTSA Has No Defined Role in the EPA Waiver Process And No Ability To Modify Federal Fuel Economy Standards To Avoid The Economic Impracticability of the State Greenhouse Gas Standards.

Another issue raised at the end of trial was whether, by virtue of *Massachusetts v. EPA* or for other reasons, NHTSA would have role in the EPA waiver process, so as to ensure that the goals and purposes of EPCA could be protected in that process. To date, defendants appear to have interpreted this question as another opening for them to brief their theory that California

902 F.2d 45, 50 (D.C. Cir. 1990). *See also Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) ("certainly an agency cannot be permitted to evade the requirements of notice and comment by using an adjudication as a vehicle for resolving an issue which does not affect the interests of the parties. Here ... this aspect of the doctrine could therefore be changed only after interested persons were provided with notice and an opportunity to comment."). *Cf. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (agencies cannot be permitted to evade notice-and-comment processes by amending rules in the guise of reinterpreting them).

⁴³ Defendants have cited one, and only one, EPA decision in which EPA denied a waiver for standards proffered by California and then told California that it would grant a waiver for a different set of standards. *See* 38 Fed. Reg. 30.136 (No. 1, 1973). In that instance, the waiver process had been delayed by intervening litigation, and time was too short to permit the necessary testing of prototype vehicle models for the start of the relevant model year; EPA did not try to reform the California standards to address issues of long-term cost or feasibility, or consumer choice. Equally important, EPA's action predates the *MEMA* decision, and was not litigated.

greenhouse gas standards cannot possibly be preempted by EPCA because NHTSA should treat those standards as “other standards of the Government” under 49 U.S.C. § 32902(f).⁴⁴ Plaintiffs address that argument on its doctrinal merits elsewhere.

Two practical points should be noted here. First, given the clarity of the law on the question of whether EPA can deny a waiver based on NHTSA grounds, it is hard to see how NHTSA’s formal or informal participation in the waiver process could affect the outcome of EPA’s work under section 209(b). The Supreme Court’s decision in *Massachusetts v. EPA* instructs the federal agencies to work together in order to “avoid inconsistency” in the administration of the Clean Air Act and EPCA. 127 S.Ct. at 1462 But section 209(b) is quite clear on the scope of EPA’s authority in a waiver proceeding and that authority does not extend to denial of a waiver on EPCA grounds, such as economic impracticability.⁴⁵ The only forum in which the Supreme Court’s dictum to “avoid inconsistency” can be made effective, in dealing with a state regulation that is inconsistent with federal law, is a federal court like this one.

Second, the specific content of the greenhouse gas regulation at issue in this case means that it would be impossible for NHTSA simply to take the standards in that regulation as a given, for purposes of Vermont and the other states enforcing those standards, and make changes of its

⁴⁴ See Defs’ and Def-Ints’ Supp Memo on the Respective Roles of EPA and NHTSA (Doc. No. 464, filed May 29, 2007).

⁴⁵ It is also clear that under current EPA interpretations of the Clean Air Act waiver review process, EPA’s work does not require formal coordination with other departments in the Executive Branch. See Letter from J. Becker (Alliance of Automobile Manufacturers) to S. Johnson (EPA Administrator), June 5, 2007, at 13 n. 18 (attached hereto as Exhibit A). The Alliance has suggested to EPA that it revisit that position, and make an exception to permit NHTSA to consult with EPA in the current waiver review process. *Id.* The Alliance has also asked EPA to address the same issues about the scope of the waiver review process that the Court has asked the parties to address. *Id.* at 2-6, 11-13.

own to the federal standards in order to offset the effects of the state standards on the federal program. NHTSA has no power to relieve manufacturers of the duty to meet the fleet-average CO₂-equivalent standards in Vermont and other states with the same standards, and so vehicle models that do not meet those standards will start to disappear from the showrooms and dealer lots. For consumers and the motoring public in Vermont and the other states that would enforce the greenhouse gas standards, the choice among the full national range of new vehicle models would still have been lost, and the unintended safety consequences of the rebound effect will still occur. If unconstrained by statute, NHTSA could in theory relax the national fuel economy standards so that manufacturers could sell their more fuel-intensive vehicles in states not enforcing the California greenhouse gas standards, and thus try to avoid the losses of jobs at factories and in the supply and distribution chains. But EPCA -- which is also intended to give consumers in all states a wide choice of fuel-efficient vehicles -- does not permit to NHTSA write standards that would set an effective mpg standard in the non-California states at a low level; it requires NHTSA to set "maximum feasible" standards nationwide. And even if NHTSA could somehow relax its standards, there is no reason to believe that market in those other states would achieve a fleet mix that would keep the production of the industry's less fuel-efficient vehicles at the same level as would occur in the absence of the state regulation.⁴⁶

⁴⁶ The nationwide balance for fuel economy is obviously skewed by the balkanization of the market in the manner of this regulation. This is obvious even by applying overly generous and simplifying assumptions such as the affected states are a singular market of about 1/3 of the nation at a 43.7 mpg level for passenger cars (rather than each separate markets) and by ignoring the impact of the coupling of LDT1s with passenger cars on the necessary fuel economy level for passenger cars. Calculating the harmonic average: it is obvious that the market is skewed and results in a de facto lower fuel economy level in the non-adopting states:

$$1/27.5 = .333*(1/43.7) + .667*(1/x)$$

(Continued...)

Moreover, the Supreme Court has implicitly rejected such an escape route from conflict preemption in another case involving the national regulation of the automobile. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court considered whether a tort rule in the District of Columbia that would “have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet” conflicted with a federal safety standard that only required some sort of passive restraint on 10% of the national fleet. *Id.* at 880. Although manufacturers could have complied with the federal regulation by equipping 10% of their fleet with air bags, and diverting those cars to the “District-of-Columbia-related portion” of their fleet, the Court did not hesitate to find that such a tort rule conflicted with the federal standard that permitted flexible nationwide compliance options for manufacturers. *Id.* at 881; *see also Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 53 (1st Cir. 1999) (considering effects of multiple jurisdictions in conflict preemption analysis); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 398, n. 8 (1983) (rejecting the argument that a Tennessee bank tax that discriminated against federal obligations might be de minimis because if every State enacted comparable provisions, the Federal Government would sustain significantly higher borrowing costs).

Solving for x , it becomes evident that the effective fuel economy standard in unaffected states is 23.21 mpg. This would obviously be even lower if it accounted for the fact that passenger cars had to achieve a higher fuel economy level to account for the inclusion of LDT1s.

Conclusion

Plaintiffs have proven that the Vermont greenhouse gas regulation is preempted. There is no other forum in which the issue of preemption under EPCA can be considered and decided in the same manner as this Court. Accordingly, the Court should grant judgment in plaintiffs' favor, based on the evidence produced at trial and under the legal principles summarized in plaintiffs' proposed findings of fact and conclusions of law.

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Respectfully submitted,

Stuart A. C. Drake
Andrew B. Clubok
Jeffery Bossert Clark
Michael E. Scoville
Derek S. Bentsen

KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

/s/ Stuart Drake
Robert B. Hemley
Matthew B. Byrne

GRAVEL AND SHEA
76 St. Paul Street, 7th Floor
Burlington, VT 05402-0369
(802) 658-0220