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# Baby You Can Drive My Car: Rethinking Greenhouse Gas Emissions Preemption in Light of Massachusetts and Green Mountain Chrysler

Andrew Gilfoil

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**BABY YOU CAN DRIVE MY CAR: RETHINKING GREENHOUSE  
GAS EMISSIONS PREEMPTION IN LIGHT OF MASSACHUSETTS  
AND GREEN MOUNTAIN CHRYSLER**

I. INTRODUCTION

Few things are as ubiquitous and necessary in modern American culture as the automobile.<sup>1</sup> It would seem unthinkable looking back over the past hundred years that industrial advancement would reach a point where one car would account globally for every ten people.<sup>2</sup> This trend is even more striking when we consider that as of 2002, North America's car concentration approaches forty-five cars for every one hundred people.<sup>3</sup>

Further alarming is the fact that while estimates vary, general scientific consensus now recognizes that with increased motor vehicle usage comes greater carbon dioxide emissions,<sup>4</sup> a contributing factor significantly responsible for the global warming phenomenon.<sup>5</sup> This phenomenon should

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1. SASI GROUP & MARK NEWMAN, PASSENGER CARS (2006) (“... [T]he car still defines a lifestyle. Americans still buy cars by the millions, whether they are in gridlocked LA or in the middle of Kansas miles from the nearest town.” (quoting Paul Harris)), *available at* [http://www.sasi.group.shef.ac.uk/worldmapper/posters/worldmapper\\_map31\\_ver5.pdf](http://www.sasi.group.shef.ac.uk/worldmapper/posters/worldmapper_map31_ver5.pdf).

2. *Id.* (stating that as of 2002 there 590 million cars in the world, amounting to one for every ten people).

3. *Id.*

4. *See* 42 U.S.C. § 7401(a)(2) (2000) (Congressional findings that “the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.”). *See also* *Massachusetts v. EPA*, 549 U.S. 497, 523–27 (2007) (“Considering just emissions from the transportation sector, which represent less than one-third of this country’s total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China.”); *Motor Vehicle Mfrs. Ass’n v. N.Y. Dept. of Env’tl. Conservation*, 17 F.3d 521 (2d Cir. 1994); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 339 (D. Vt. 2007) (“... [T]he control and reduction of emissions of greenhouse gases are critical to slow the effects of global warming, and that passenger vehicles and light-duty trucks are responsible for some forty percent of the total greenhouse gas pollution in [California].”).

5. *Massachusetts*, 549 U.S. at 504 (“A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.”).

cause further alarm considering the current prevalence and upward trend of automobile usage in the United States.<sup>6</sup>

Increased awareness of the significant environmental, social, and economic problems global warming poses for our nation has provided many states with reason to take a more active role in limiting their own automobile Greenhouse Gas (“GHG”) emissions.<sup>7</sup> States seek this goal in a variety of ways, including regulatory actions, litigation, and membership in regional GHG initiatives.<sup>8</sup> California has been foremost among these states, and has long been considered a leader in enacting aggressive environmental GHG regulations.<sup>9</sup>

In recent years, however, progress achieved by California and other states has faced significant challenges. Automobile manufacturers have recently brought multiple suits throughout the country alleging that state attempts at automobile GHG emissions regulation are preempted by federal environmental legislation.<sup>10</sup> As such, California and other states’ progress will be illusory if automobile manufacturers sway the courts to accept their federal preemption challenges. Recent trial court decisions in California and Vermont, however, seem to offer hope that these state regulatory actions can withstand challenges of federal preemption.<sup>11</sup> Furthermore, the Supreme Court’s recent decision in *Massachusetts v. EPA*,<sup>12</sup> authoritatively recognizing global warming for the first time as a pressing national problem,<sup>13</sup> likely paves the way for future state efforts to actively reduce their own GHG emissions.

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6. See U.S. DEPT. OF TRANSPORTATION, RESEARCH AND INNOVATIVE TECHNOLOGY ADMINISTRATION, NATIONAL TRANSPORTATION STATISTICS Table 1-11 (2008) (showing an increase in total highway registered vehicles between 2004 and 2006 from 243,010,549 to 250,851,833), available at [http://www.bts.gov/publications/national\\_transportation\\_statistics/pdf/entire.pdf](http://www.bts.gov/publications/national_transportation_statistics/pdf/entire.pdf).

7. See J. Jared Snyder, *Global Warming Litigation: State and Citizens v. Federal Government and Industry*, 17 FORDHAM ENVTL. L. REV. 255, 255 (2006).

8. *Id.* at 255–56.

9. Richard Simon & Janet Wilson, *EPA Denies California’s Right to Mandate Emissions*, L.A. TIMES (Dec. 20, 2007) at 2 (stating that “California has frequently chartered the course the country has followed” (quoting William K. Reilly)), available at <http://www.latimes.com/news/printedition/front/la-me-epa20dec20,1,6015795.story>.

10. Of particular note for current discussion are the two recent district court cases coming out of Vermont and California, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) and *Central Valley Chrysler-Jeep v. Goldstone*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). An additional suit, *Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp. 2d 224 (D.R.I. 2008), was recently decided in Rhode Island.

11. See *Green Mountain Chrysler*, 508 F. Supp. 2d at 295. See also *Central Valley*, 529 F. Supp. 2d at 1151.

12. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

13. See Joshua Steinberg, Note, *The Bone-Chilling Effects of Global Warming and the EPA’s Cold-Shoulder Response to Pleas for Help*, A Case Note on *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), 26 TEMP. J. SCI. TECH. & ENVTL. L. 169, 188 (2007).

This note will first discuss the history and content of the Clean Air Act (“CAA”), highlighting the broad and longstanding congressional deference afforded to California to more strictly regulate GHG emissions. Next, the note will discuss the Environmental Policy and Conservation Act (“EPCA”), focusing on how—unlike the CAA—it expressly preempts any state from enacting regulations “relating to fuel economy.”<sup>14</sup> The note then briefly describes California Assembly Bill 1493 (“AB 1493”), the formidable GHG emissions legislation that has led many states to follow its path, and affected current preemption litigation. The note will then move to explore recent environmental jurisprudence that seeks to reconcile the seemingly conflicting statutory mandates of the CAA and EPCA. The fact that virtually all means of regulating GHG motor vehicle emissions relate, in some way, to fuel economy make this conflict significant and readily apparent.<sup>15</sup> Finally, the note will argue that the recent decisions in *Massachusetts*, *Green Mountain Chrysler*, and *Central Valley Chrysler* together represent a marked shift in how the judicial branch views global warming, and have—at least initially—vindicated the rights of states pushing for more stringent GHG emission standards. The author adds that this note assumes the issuance of an EPA waiver for California, as will be discussed below. The CAA preempts any state enforcement of GHG emissions standards unless and until California receives an EPA waiver for the standards they have promulgated.<sup>16</sup>

## II. THE CLEAN AIR ACT—CALIFORNIA’S BROAD GRANT OF CONGRESSIONAL AUTHORITY

In terms of U.S. environmental policy, the 1960s saw an unprecedented national awareness of air pollution and focus on forming a national solution.<sup>17</sup> Indeed, Congress’s 1963 passage of the CAA brought about a much more expansive stance in addressing air pollution on a national scale.<sup>18</sup> The CAA vested authority in the Environmental Protection Agency (“EPA”) to establish standards for air pollutants emitted from new motor vehicles—pollutants that, in the EPA’s judgment, cause or contribute to air pollution likely to endanger

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14. See *infra* Section III.

15. See *Central Valley*, 529 F. Supp. 2d at 1158 (accepting as proven the proposition that regulations requiring substantial reduction of carbon dioxide emissions will necessarily require substantial increases in motor vehicle fuel efficiency).

16. See 42 U.S.C. § 7543(b) (2000).

17. Christopher T. Giovinazzo, Comment, *California’s Global Warming Bill: Will Fuel Economy Preemption Curb California’s Air Pollution Leadership?*, 30 *ECOLOGY L.Q.* 893, 899 (2003).

18. *Central Valley*, 529 F. Supp. 2d at 1164.

public health or welfare.<sup>19</sup> The EPA accomplishes this goal by establishing national ambient air quality standards (“NAAQS”),<sup>20</sup> which set the maximum allowable discharge level for ambient air pollutants considered harmful to public health or welfare.<sup>21</sup> The plan also requires all states to submit a state implementation plan (“SIP”) for EPA approval, highlighting how the state plans to reduce or maintain the concentration of air pollution necessary in order to meet current NAAQS.<sup>22</sup>

Section 209(a) of the CAA preempts all states from adopting automobile emissions regulations, providing that “[n]o State or any political subdivision . . . 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.”<sup>23</sup> It bears mentioning, however, that the original enactment of the CAA contained no preemption provision,<sup>24</sup> an absence that reflects Congress’s understanding that air pollution regulation was a task necessitating cooperative efforts from both the states and the federal government.<sup>25</sup>

Section 209(a) preemption is qualified, however, by a waiver found in subsection (b).<sup>26</sup> A waiver may be granted by the EPA—provided certain criteria are met—for “any state which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to

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19. Section 7521(a)(1) provides, in part, that “[t]he Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this Section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

20. § 7408(a)(1).

21. § 7408(a)(1)(A). See Deborah Keeth, *The California Climate Law: A State’s Cutting-Edge Efforts to Achieve Clean Air*, 30 *ECOLOGY L.Q.* 715, 723 (2003).

22. *Motor Vehicle Mfrs. Ass’n v. N.Y. Dept. of Env’tl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994); Keeth, *supra* note 21, at 723.

23. § 7543(a). See also *Motor Vehicles Mfrs. Ass’n*, 17 F.3d at 526 (“The cornerstone of Title II is Congress’ continued express preemption of state regulation of automobile emissions.”).

24. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 303 (D. Vt. 2007).

25. *Id.* at 303 n.6. See § 7401(a)(3)–(4) (“that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments . . . that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”). See also Giovinazzo, *supra* note 17, at 899 (“Through both the [Air Quality Act] and its successor the Clean Air Act, the federal approach to air pollution control has maintained this high degree of dependence on state cooperation, principally through reliance on state adoption and enforcement of State Implementation Plans. . . .”).

26. § 7543(b).

March 30, 1966.”<sup>27</sup> Since only California had the foresight to regulate new motor vehicle emissions prior to March 30, 1966, it is the only state entitled to waiver consideration by the EPA.<sup>28</sup> California’s long-standing commitment to environmental regulation, coupled with the unique problems that GHG emissions pose for the state’s climate, make that state an appropriate candidate for waiver of federal preemption.<sup>29</sup> Further, excepting California from general preemption represents a compromise between the states’ traditional role in regulating motor vehicle emissions and automobile manufacturers’ desire to avoid the economic disruption that would likely result from having to meet fifty-one separate sets of emissions control requirements.<sup>30</sup>

California thus holds a unique position as a regulatory leader among the states,<sup>31</sup> leading some to suggest that California’s role in environmental regulation should be viewed not as an example of traditional cooperative federalism, but rather as one of “modified federalism.”<sup>32</sup> Under such a view the federal government establishes an innovative connection with an individual state rather than the states collectively, thus creating a relationship that fosters enhanced innovation for that locality.<sup>33</sup>

To grant a waiver, the EPA must find that California’s standards are at least as protective as existing federal standards “in the aggregate.”<sup>34</sup> Further, the EPA may only deny a California waiver application if the regulations California seeks to adopt are “arbitrary and capricious,” if they are not needed

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27. *Motor Vehicles Mfrs. Ass’n*, 17 F.3d at 526 n.2 (citing § 7543(b)(1)).

28. *Id.* at 525.

29. See Keeth, *supra* note 21, at 723 (stating that congressional approval for the exception was appropriate given California’s “unique problems” as well as their pioneering efforts to control motor vehicle air pollution). See also Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 283 (2003) (stating that California’s regulatory leadership has been responsible for catalytic converters, low-emission vehicles, unleaded gasoline and other technologies); Giovinazzo, *supra* note 17, at 900 (“Within this cooperative approach to air pollution, no state was more instrumental to the formulation of national air pollution policy than California.”).

30. *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (discussing the debate “between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements,” and emphasizing the “compromise” that subsection (b) provided).

31. See Michael H. Wall, *The Regional Greenhouse Gas Initiative and California Assembly Bill 1493: Filling the American Greenhouse Gas Regulation Void*, 41 U. RICH. L. REV. 567, 577 (2007) (characterizing California as a “figurehead of progressive environmental legislation . . .”).

32. See Carlson, *supra* note 29, at 284.

33. *Id.* at 285 (arguing that California’s special regulatory role has increased the states’ bureaucratic expertise in mobile source technology, has allowed for innovative policy proposals, and has concentrated innovation geographically by promoting mobile source firms within California).

34. 42 U.S.C. § 7543(b)(1) (2000).

to meet “compelling and extraordinary conditions,” or if the standards and accompanying enforcement procedures the state employs are otherwise inconsistent with section 7521(a) of the CAA.<sup>35</sup> California’s satisfaction of these three requirements obliges the EPA to grant their waiver request.<sup>36</sup> Indeed the House Report accompanying the 1997 CAA amendments demonstrates the wide discretion Congress intended to afford California through this waiver:

The Administrator . . . is not to overturn California’s judgment lightly. Nor is he to substitute his judgment for that of the State. There must be clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State, before [the] EPA may deny a waiver.<sup>37</sup>

Moreover, if such a deferential reading were in doubt, the Court’s recent decision in *Massachusetts* lends more support for a finding that California satisfies the “compelling and extraordinary conditions” waiver prong, leading one analyst to say that:

[T]he global distribution of greenhouse gas emissions may present a novel challenge to California’s ability to obtain a section 209(b) waiver. California’s coastline is threatened by climate change in much the same way as that of other states, precisely Massachusetts’ stated injury in *Massachusetts v. EPA*. Uncertainty regarding the impact of climate change on weather events impedes a determination that California, more than other states, will feel a disproportionate burden due to greenhouse gas emissions from vehicles.<sup>38</sup>

Subsequent CAA amendments further bolstered congressional support and deference for California.<sup>39</sup> To wit, the 1977 CAA amendments provided that the EPA, when reviewing a California waiver application, must consider

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35. *Id.* (“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 7521(a) of this title.”).

36. *Central Valley Chrysler-Jeep v. Goldstone*, 529 F. Supp. 2d 1151, 1171 (E.D. Cal. 2007).

37. Giovinazzo, *supra* note 17, at 903 (citing H.R. REP. NO. 95-294, at 302 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1381).

38. Matthew Visick, *If Not Now, When? The California Global Warming Solutions Act of 2006: California’s Final Steps Toward Comprehensive Mandatory Greenhouse Gas Regulations*, 13 HASTINGS W.-NW. J. ENVTL. & POL’Y 249, 266–67 (2007).

39. Giovinazzo, *supra* note 17, at 901 (“Congress reaffirmed its unique blessing upon California through numerous amendments to the CAA.”).

California's standards "in the aggregate,"<sup>40</sup> a change that provides California increased flexibility by allowing the state to establish the protectiveness of their proposed standards as a package rather than standard-by-standard.<sup>41</sup>

The very same amendments also brought the addition of section 177, a provision allowing other states to adopt California standards once California receives a formal EPA waiver.<sup>42</sup> This so called "piggyback" provision allows other states to implement California's standards if that state's standards "are identical to the California standards for which a waiver has been granted for such model year."<sup>43</sup> In an effort to allay automobile industry timing fears, the waiver further employs a lead time requirement, providing that other states may adopt California's identical standards for which a waiver has been granted if "California and such State adopt such standards at least two years before commencement of such model year."<sup>44</sup> Presently seventeen states have adopted California's GHG motor vehicle emission standards by way of section 177.<sup>45</sup> The aggregate effect of these states amounts to one third of the national passenger vehicle market.<sup>46</sup> Thus, the continuing vitality of California's standards has pressing significance not only for California but for numerous other states and the country as a whole.

Finally, the history of California's previous waiver requests demonstrates the deferential position held by the state.<sup>47</sup> California has made at least ninety-five waiver requests under section 209(b), with about half involving new or

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40. *Id.* at 902. *See also* Motor Vehicle Mfrs. Ass'n v. N.Y. Dept. of Envtl. Conservation, 17 F.3d 521, 525 (2d Cir. 1994).

41. Giovinazzo, *supra* note 17, at 902. *See also* Motor & Equipment Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979) ("The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation. Had Congress wanted to limit California's role to forbid its adoption of any program comparable to the federal scheme in section 207, it could have easily done so. It did not. For a court to do so despite the absence of such an indication would only frustrate the congressional intent.").

42. *Motor Vehicles Mfrs. Ass'n*, 17 F.3d at 525.

43. *Id.* (citing Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 750 (1977)).

44. 42 U.S.C. § 7507(2) (2008).

45. Justin R. Pidot, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues*, GEO. ENVT'L. L. & POL'Y INST., 1, 15 (2006).

46. ARIZONA PIRG EDUCATION FUND, 2007 EPA WAIVER HEARING ON CALIFORNIA STATE MOTOR VEHICLE POLLUTION CONTROL STANDARDS 2 (2007), *available at* <http://www.arizonapirg.org/uploads/2h/rH/2hrHlVnZ25HArXBuB6guJw/Background-On-CAs-EPA-Waiver.pdf>.

47. JAMES E. MCCARTHY & ROBERT MELZ, CRS REPORT FOR CONGRESS: CALIFORNIA'S WAIVER REQUEST TO CONTROL GREENHOUSE GASES UNDER THE CLEAN AIR ACT, CRS-11-12 (2007), *available at* <http://www.ncseonline.org/NLE/CRSreports/07Nov/RL34099.pdf>.

amended standards.<sup>48</sup> Of all such requests, the EPA has granted all in whole or in part.<sup>49</sup> The EPA's record of deference and the CAA amendments discussed above, both evidence Congress's declaration with letting California "blaze its own trail."<sup>50</sup> In sum, the exemption California holds and other states' leadership in regulating GHG emissions has resulted in many technological advances,<sup>51</sup> and California's regulatory role has led other states to follow its lead.<sup>52</sup>

48. *Id.*

49. *Id.* at CRS-12. See also Giovinazzo, *supra* note 17, at 903 ("In practice, California's waiver applications are almost always approved.").

50. Giovinazzo, *supra* note 17, at 903 (citing *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979)).

51. See Carlson, *supra* note 29, at 283 (arguing that California's leadership regulating mobile source pollution was responsible for numerous technological advancements, including the catalytic converter, low-emission vehicles, and unleaded gasoline). See also *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1090 (D.C. Cir. 1996) ("Given the indications before Congress that California's regulatory proposals for nonroad sources were ahead of the EPA's development of its own proposals and the Congressional history of permitting California to enjoy coordinate regulatory authority over mobile sources with the EPA, the decision to identify California as the lead state is comprehensible. California has served for almost 30 years as a "laboratory" for motor vehicle regulation. . . . Its severe air pollution problems, diverse industrial and agricultural base, and variety of climatic and geographical conditions suit it well for a similar role with respect to nonroad sources."); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 398 (D. Vt. 2007) ("Through amendments to the CAA, Congress has essentially designated California as a proving ground for innovation in emissions control regulations.").

52. At the time of this writing seventeen states have—or have publicly committed to—enacting California's more restrictive GHG emissions standards. The states include: Arizona (Gov. Janet Napolitano, Exec. Order No. 2006-13, 12 Ariz. Admin. Reg. 3389-90 (Sept. 15-16), available at <http://www.azsos.gov/aar/2006/37/governor.pdf>), Colorado (Gov. BILL RITTER, JR., COLORADO CLIMATE ACTION PLAN: A STRATEGY TO ADDRESS GLOBAL WARMING, (2007), available at <http://www.pewclimate.org/docUploads/COClimatePlan.pdf>), Connecticut (2004 Conn. Acts 84, available at <http://www.cga.ct.gov/2004/act/Pa/2004PA-00084-R00SB-00119-PA.htm>), Florida (Gov. Charlie Christ, Exec. Order 07-127, available at <http://www.flclimatechange.us/ewebeditpro/items/O12F15074.pdf>), Massachusetts (Press Release, Mass. Dep't of Env'tl Protection, Massachusetts Enacts Strict New Vehicle Emissions Standards (Jan. 9, 2006), available at [http://www.cleancarscampaign.org/web-content/cleanairact/docs/Mass\\_Dept\\_of\\_Env\\_Protection.pdf](http://www.cleancarscampaign.org/web-content/cleanairact/docs/Mass_Dept_of_Env_Protection.pdf)), Maine (Maine Dep't of Env'tl Protection, New Motor Vehicle Emission Standards, 06-096 ME. CODE R. ch. 127, available at <http://www.maine.gov/dep/air/regulations/docs/chap127final.pdf>), Maryland (Maryland Clean Cars Act of 2007, 2007 Md. Laws ch. 111 (passed as S.B. 103)), available at [http://mlis.state.md.us/2007RS/chapters\\_noln/Ch\\_111\\_sb0103E.pdf](http://mlis.state.md.us/2007RS/chapters_noln/Ch_111_sb0103E.pdf)), New Jersey (N.J. REV. STAT. § 26:2C-8.15-8.17 (2009)), New Mexico (Gov. Bill Richardson, Exec. Order 2006-69, available at [http://www.governor.state.nm.us/press/2006/dec/122806\\_01.pdf](http://www.governor.state.nm.us/press/2006/dec/122806_01.pdf)), New York (Greenhouse Gas Exhaust Emissions Standards, N.Y. COMP. CODES R. & REGS. tit. 6, § 218-8 (2009), available at <http://www.dec.ny.gov/regs/4243.html>), Oregon (Oregon Low Emission Vehicles, OR. ADMIN. R. § 340-257-0010 (2009), available at [http://arcweb.sos.state.or.us/rules/OARs\\_300/OAR\\_340/340\\_257.html](http://arcweb.sos.state.or.us/rules/OARs_300/OAR_340/340_257.html)), Pennsylvania (Pennsylvania Clean Vehicles Program, 25 PA. CODE § 126.401 (2009), available at

III. THE ENVIRONMENTAL POLICY AND CONSERVATION ACT—FEDERALLY MANDATED FUEL ECONOMY STANDARDS AND EXPRESS PREEMPTION OF REGULATIONS ‘RELATED TO FUEL ECONOMY’

Congress enacted the EPCA in 1975, as a comprehensive response to the 1973 energy crisis.<sup>53</sup> Seeking to enhance the supply of fossil fuels through increased production and energy conservation programs, the Act’s main thrust involved the establishment of a system of mandatory corporate average fuel economy (“CAFE”) standards.<sup>54</sup> The EPCA empowers the Department of Transportation (“DOT”) to set federal fuel economy standards for new fleets of passenger automobiles,<sup>55</sup> an authority the Secretary has delegated to the National Highway Traffic Safety Administrator (“NHTSA”).<sup>56</sup> CAFE standards require any new automobile fleet to meet a minimum corporate average fuel economy that must be set at the “maximum feasible average fuel economy level.”<sup>57</sup> In determining this level the NHTSA must consider (1) technological feasibility; (2) economic practicability; (3) the effect of other motor vehicle standards of the government on fuel economy; and (4) the need of the United States to conserve energy.<sup>58</sup>

Unlike the CAA, however, which provides California with the possibility of a waiver of preemption, the EPCA expressly preempts all states from attempting to regulate fuel economy.<sup>59</sup>

The EPCA preemption provision was adopted in order to maintain fuel economy standards throughout the country.<sup>60</sup> Specifically, the provision provides:

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<http://www.pacode.com/secure/data/025/chapter126/subchapDtoc.html>), Rhode Island (Rhode Island’s Low Emission Vehicles Program, 12-031-037 R.I. CODE R. § 37.2.1 (2009), *available at* [http://www.dem.ri.gov/pubs/regs/regs/air/air37\\_07.pdf](http://www.dem.ri.gov/pubs/regs/regs/air/air37_07.pdf)), Utah (Western Climate Initiative, Statement of Regional Goal, tbl. 1 (Aug. 22, 2007), *available at* [http://www.azclimatechange.gov/download/082207\\_statement.pdf](http://www.azclimatechange.gov/download/082207_statement.pdf)), Vermont (12-031-001 VT. CODE R. § 5-1103(a) (2009), *available at* <http://www.anr.state.vt.us/air/docs/apcregs.pdf>), and Washington (WASH. REV. CODE § 70.120A.010 (2009), *available at* <http://apps.leg.wa.gov/RCW/default.aspx?cite=70.120A.010>). *See also* Wall, *supra* note 31 at 577; Carlson, *supra* note 29, at 302 (“The state’s regulatory privileges carry weight beyond the state’s borders: any state with an approved state implementation plan for a non-attainment area may adopt California motor vehicle standards.”).

53. *General Motors Corp. v. Nat’l Highway Traffic Safety Admin.*, 898 F.2d 165, 166–67 (D.C. Cir. 1999).

54. *Id.* at 167. *See* Keeth, *supra* note 21, at 724–25.

55. 49 U.S.C. § 32902(a) (2000). *See also* *Central Valley Chrysler-Jeep v. Goldstone*, 529 F. Supp. 2d 1151, 1165 (E.D. Cal. 2007).

56. *Central Valley*, 529 F. Supp. 2d at 1157 (citing 49 C.F.R. § 1.5(f) (2008)).

57. § 32902(a).

58. § 32902(f). *See also* *Central Valley*, 529 F. Supp. 2d at 1157.

59. § 32919(a). *See also* Visick, *supra* note 38, at 268.

60. *See* Sara A. Colangelo, *The Politics of Preemption: An Application of Preemption Jurisprudence and Policy to California Assembly Bill 1493*, 37 ENVTL. L. 175, 183 (2007)

[W]hen an average fuel economy standard prescribed under the chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation *related to fuel economy standards* or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.<sup>61</sup>

It may come as no surprise that much recent and pending litigation in this area seeks to address the issue of how we reconcile the EPCA's express preemption provision over regulations "related to fuel economy standards" with the CAA's long-standing commitment to allowing California the ability to regulate GHG emissions at a level more stringent than the EPA, provided they receive an EPA waiver.<sup>62</sup> While the states' ability to regulate mobile source air pollution finds ample support within the CAA, only recently have courts begun to grapple with the question of whether and to what extent California's CAA authority to regulate mobile source GHG emissions—and, resultantly, other states' ability to adopt the same—is consistent with EPCA's express waiver provision.<sup>63</sup> However, the Supreme Court's recent decision in *Massachusetts v. EPA*,<sup>64</sup> as well as district court decisions in Vermont and California,<sup>65</sup> all seem to provide considerable flexibility and support for California to more stringently regulate GHG emissions—and for other states to adopt the same regulations by way of the CAA piggyback provision.

#### IV. AB 1493: CALIFORNIA'S PROGRESSIVE GLOBAL WARMING LEGISLATION

Present litigation largely focuses on California AB 1493, a comprehensive piece of legislation passed by the state in 2001 as a broad effort to reduce GHG emissions from motor vehicles.<sup>66</sup> Heralded for its scope, the legislation is widely considered the most significant response to global warming at either the federal or state level.<sup>67</sup> Among its other purposes, AB 1493 requires the

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(stating that the broad language of Section 32919 was employed by Congress to allay industry concerns, thus preventing a "chaotic compliance regime of varying standards . . .").

61. § 32919(a) (emphasis added).

62. Colangelo, *supra* note 60, at 183 (stating that AB 1493 preemption challenges under the EPCA and the CAA illuminate the tension between not subjecting the automobile industry to fifty different state standards and the congressional desire for California to continue its leadership as the nation's laboratory for air pollution control technology).

63. Carlson, *supra* note 29, at 283 ("Despite the fact that California is exempted from the CAA preemption provision codifying California's leadership in regulating mobile source air pollution, it remains an open question whether the courts or the federal government will allow the state to force technological changes designed to reduce mobile source greenhouse gas emissions."). *See also* Giovinazzo, *supra* note 17, at 944.

64. *See Massachusetts v. EPA*, 549 U.S. 497, 558–59 (2007) (Scalia, J., dissenting).

65. *See supra* note 10 and accompanying text.

66. Giovinazzo, *supra* note 17, at 895.

67. *Id.*

California Air Resources Board (“CARB”) to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles” no later than January 1, 2005.<sup>68</sup> The GHG emissions reductions CARB establishes must be “[c]apable of being successfully accomplished within the time provided . . . taking into account environmental, economic, social, and technological factors,”<sup>69</sup> and must also be “economical to an owner or operator of a vehicle.”<sup>70</sup> In formulating these standards, the CARB also considers the regulations’ impact on automobile industry sales, jobs, and consumers.<sup>71</sup> Although its economic analysis is limited to the state of California, the CARB examines the very same factors that the NHTSA observes in setting a CAFE standard.<sup>72</sup>

#### V. RESOLVING THE APPARENT PREEMPTION CONFLICT BETWEEN CAA AND EPCA

It should be unsurprising that increased global warming awareness has also led to an increase in global warming litigation during the 21st Century.<sup>73</sup> Indeed, one analyst has explained that the increase in global warming litigation reflects increased scientific evidence that global warming is a serious multifaceted problem, a growing public awareness of the global warming issue, and the tendency of public interest groups to enlist the courts as a tool for resolution of public controversies.<sup>74</sup> And while the Supreme Court’s recent *Massachusetts* decision did not specifically address the question of preemption, its recognition of the gravity posed by climate change, as well as

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68. CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2003).

69. § 43018.5(i)(2)(A).

70. § 43018.5(i)(2)(B).

71. § 43018.5(c)(2) (“Consider the impact the regulations may have on the economy of the state, including, but not limited to, all of the following areas:

(A) The creation of jobs within the state.

(B) The creation of new businesses or the elimination of existing businesses within the state.

(C) The expansion of businesses currently doing business within the state.

(D) The ability of businesses in the state to compete with businesses in other states.

(E) The ability of the state to maintain and attract businesses in communities with the most significant exposure to air contaminants, localized air contaminants, or both, including, but not limited to, communities with minority populations or low-income populations, or both.

(F) The automobile workers and affiliated businesses in the state.”).

See also *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 337 (D. Vt. 2007).

72. *Green Mountain Chrysler*, 508 F. Supp. 2d at 338.

73. *Pidot*, *supra* note 45, at 1.

74. *Id.*

the Court's analysis of the interplay between the CAA and EPCA, has persuaded federal district courts recently addressing the preemption question.<sup>75</sup>

A. *Massachusetts v. EPA—Overlapping Statutory Mandates not Mutually Exclusive*

*Massachusetts v. EPA* was brought by a group of citizens, states, and local governments, alleging that in light of well-documented evidence of global warming, the EPA had abdicated its responsibility under the CAA by refusing to regulate greenhouse gases including carbon dioxide.<sup>76</sup> Alternatively, the EPA contended that it lacked authority under the CAA to regulate greenhouse gases.<sup>77</sup> A divided panel of the D.C. Circuit held that the EPA had properly exercised its discretion, while lacking agreement as to whether the parties had standing.<sup>78</sup> Judge Randolph's opinion found that the EPA's substantial discretion, as well as the many policy considerations the agency must consider in reaching a non-regulatory decision, both supported a finding that the EPA properly exercised its discretion.<sup>79</sup>

The Supreme Court granted certiorari on the questions of whether the EPA had authority to regulate GHG emissions from new motor vehicles under section 202(a)(1) of the CAA, and further, whether the EPA may refuse to issue such standards based on policy considerations.<sup>80</sup> As a threshold matter, the Court found that the plaintiffs had standing to challenge EPA's failure to regulate.<sup>81</sup> Article III standing requires a plaintiff to establish (1) "injury in fact"—an invasion of a legally protected concrete and particularized interest, (2) a causal connection between the injury and the complained of conduct, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>82</sup> The Court found that the harms associated with climate change are recognized and serious,<sup>83</sup> and the fact that climate

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75. *See Green Mountain Chrysler*, 508 F. Supp. 2d at 309–10. *See also* *Central Valley Chrysler-Jeep v. Goldstone*, 529 F. Supp. 2d 1151, 1165–66 (E.D. Cal. 2007).

76. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

77. *Id.* at 1450.

78. *Green Mountain Chrysler*, 508 F. Supp. 2d at 308 (citing *Massachusetts v. EPA*, 415 F.3d 50, 58 (D.C. Cir. 2005)).

79. *Id.* *But see Massachusetts*, 415 F.3d at 67–73 (Tatel, J., dissenting) (arguing that EPA ignored the plain statutory language of the CAA without explanation, which defined "air pollutant" so broadly as to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air". . . citing 42 U.S.C. § 7602(g) (2000)).

80. *Green Mountain Chrysler*, 508 F. Supp. 2d at 308.

81. *Massachusetts*, 549 U.S. at 525–27.

82. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

83. *Massachusetts*, 549 U.S. at 521 ("Indeed, the NRC Report itself—which EPA regards as an 'objective and independent assessment of the relevant science,'—identifies a number of

concerns are “widely shared” did not minimize Massachusetts’ interest for purposes of standing.<sup>84</sup>

While the EPA urged that the relief sought by petitioners would not realistically mitigate global climate change,<sup>85</sup> the Court instead found that regulatory challenges should not be dismissed solely because they work incrementally,<sup>86</sup> stressing instead that “agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . [but] instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.”<sup>87</sup> Thus, that a regulatory action might be a tentative first step did not mean it lacked redressability.<sup>88</sup> In sum, the Court held that a plaintiff need not show that a favorable decision will relieve every injury, but only that it would relieve some discrete injury to himself.<sup>89</sup>

On the merits, the Court had little trouble finding that the EPA did not lack the authority to regulate carbon dioxide emissions,<sup>90</sup> noting instead that the CAA’s sweeping definition of “any air pollution agent” foreclosed the EPA’s narrow reading of their regulatory authority.<sup>91</sup> Rather, the expansive definition of “air pollutant” that included “*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air”<sup>92</sup> on its face embraced any

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environmental changes that have already inflicted significant harms, including ‘the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years. . . .’”).

84. *Id.* at 522 (citing *Fed. Election Comm’n v. Atkins*, 524 U.S. 11, 24 (1998)).

85. *Id.* at 524 (“EPA overstates its case.”).

86. *Id.* (stating that acceptance of such a premise would doom most challenges to regulatory action).

87. *Id.* at 525 (“While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.”).

88. *Massachusetts*, 549 U.S. at 523–25.

89. *Id.* at 525–26 (“Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”).

90. *Id.* at 528.

91. *Id.* at 528–29.

92. *Id.* (citing 42 U.S.C. § 7606(g) (2000)).

type of airborne compound, and further underscored congressional intent through repeated use of the word “any.”<sup>93</sup>

The Court was likewise not persuaded by the EPA’s argument that it could not regulate motor vehicle carbon dioxide emissions because doing so would require them to tighten mileage requirements, a statutory mandate the EPA claimed was congressionally assigned to the DOT.<sup>94</sup> That the DOT sets mileage standards, the Court maintained, in no way allowed the EPA to “shirk its environmental responsibilities.”<sup>95</sup> Instead, the EPA’s charge to “protect[] the public’s ‘health’ and ‘welfare,’”<sup>96</sup> and the DOT’s directive to promote energy efficiency,<sup>97</sup> imposed alternative statutory mandates.<sup>98</sup> Even though the two statutory obligations could at times overlap, that mere possibility, the Court found, did not mean the two agencies could not mutually administer their obligations.<sup>99</sup>

The Court similarly addressed the alternative issue of whether, even after establishing statutory authority under the CAA, the EPA could still conclude that GHG emissions regulation would be unwise. The Court found such a conclusion at odds with the statutory text of the CAA,<sup>100</sup> which provided that once the EPA has responded to a rulemaking petition, it may avoid taking further action only by determining that greenhouse gases do not contribute to climate change, or by providing some reasonable explanation for not exercising its discretion.<sup>101</sup> Since the EPA offered nothing more than a “laundry list of reasons not to regulate,”<sup>102</sup> the Court found that it had refused to comply with its clear statutory command.<sup>103</sup>

The Court’s pronouncement in *Massachusetts* was generally regarded as a substantial victory for environmental advocates, and has been recognized as one of the most important environmental decisions in many years.<sup>104</sup> Whether

93. *Massachusetts*, 549 U.S. at 529 n.25 (citing *Dept. of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002)).

94. *Id.* at 530–32.

95. *Id.* at 532.

96. *Id.* (citing § 7521(a)(1)).

97. *Id.* (citing § 6201(5)).

98. *Massachusetts*, 549 U.S. at 532.

99. *Id.* (“EPA has been charged with protecting the public’s ‘health’ and ‘welfare’ . . . a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency.”).

100. *Id.* (“The alternative basis for EPA’s decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text.”).

101. *Id.* at 533 (“ . . . [T]he use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.”).

102. *Id.*

103. *Massachusetts*, 549 U.S. at 534–55.

104. Linda Greenhouse, *Justices Say EPA Has Power to Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007.

the EPA promptly decides to regulate GHG emissions under the CAA—an unlikely scenario—the decision nonetheless has created a common sense discourse regarding global warming.<sup>105</sup> Further, in light of California’s pending waiver request, commentators viewed the Court’s ruling as also placing the state’s request on much firmer ground.<sup>106</sup>

While *Massachusetts* involved the issue of the EPA’s discretion under the CAA rather than federal preemption concerns, the Court’s analysis regarding the relationship between the CAA and the EPCA has been influential to lower courts addressing questions of federal preemption under the EPCA.

#### B. Green Mountain Chrysler—*Judicial Restraint and Separation of Powers*

*Green Mountain Chrysler* was brought by various automotive manufacturers’ groups seeking declaratory and injunctive relief against Vermont’s GHG regulations establishing new automobile emissions limitations.<sup>107</sup> The plaintiffs asserted that Vermont’s regulations were expressly and implicitly preempted both under the EPCA<sup>108</sup> and the CAA,<sup>109</sup> presenting the district court with a question of first impression involving the degree of interplay between these two expansive federal environmental statutes.<sup>110</sup> Chief Judge William Sessions authored the court’s opinion.<sup>111</sup>

At issue in *Green Mountain Chrysler* was a comprehensive set of GHG emissions regulations adopted by California in 2004,<sup>112</sup> which applied to large-volume motor vehicle manufacturers beginning in 2009, and intermediate and small manufacturers in 2016.<sup>113</sup> The regulations required decreasing limits for manufacturers’ fleet average emissions, expressed in terms of grams of carbon dioxide equivalent per mile (gpm).<sup>114</sup> While the regulations did not set fuel economy standards, they did—like EPCA fuel economy standards—measure carbon dioxide emissions.<sup>115</sup> California applied for an EPA waiver for these regulations in 2005, but EPA’s determination had not yet been made prior to

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105. Erica L. Rancilio, Recent Development, *Massachusetts v. EPA*, 21 TUL. ENVTL. L.J. 171, 176 (2007).

106. MCCARTHY & MELZ, *supra* note 47, at CRS-14.

107. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 300 (D. Vt. 2007).

108. See 49 U.S.C. §§ 32901–32919 (2000).

109. §§ 7401–7671.

110. *Green Mountain Chrysler*, 508 F. Supp. 2d at 302.

111. *Id.* at 299.

112. *Id.* at 302.

113. *Id.* at 341.

114. *Id.* at 342 (“For example, the PC/LDT1 category permits new vehicles to emit a fleet average of 323 gpm in model year 2009, decreasing to 205 gpm in model year 2016. The LDT2 category permits a fleet average emission of 439 gpm in 2009, decreasing to 332 gpm in 2016.”).

115. *Green Mountain Chrysler*, 508 F. Supp. 2d at 342

litigation.<sup>116</sup> Vermont subsequently adopted California's 2004 regulations pursuant to the CAA section 177 piggyback provision<sup>117</sup> as it has been doing since 1996.<sup>118</sup>

From the outset Chief Judge Sessions emphasized that the preemption doctrines did not apply,<sup>119</sup> instead framing the case in response to the *Massachusetts* decision.<sup>120</sup> Where the Supreme Court in *Massachusetts* found overlap but no conflict between the EPA's authority to regulate greenhouse gases and NHTSA's authority under the EPCA to promote energy efficiency by setting mileage standards, the question in *Green Mountain Chrysler* asked whether the EPA's authority to issue a waiver for California standards under section 209(b) presented the same "overlap without conflict" scenario.<sup>121</sup> Resolution of this question, the court said, depended on an analysis of congressional intent.<sup>122</sup>

As to congressional intent, the court found no evidence to indicate that the GHG emissions standards were so closely related with fuel economy standards as to be expressly preempted.<sup>123</sup> Congress likewise did not intend for the EPCA's CAFE standards to exclusively occupy the field of fuel economy, since the NHTSA must take into consideration "other federal standards which may affect fuel economy."<sup>124</sup>

Although concluding that the preemption doctrine did not apply, the court nevertheless conducted federal preemption analysis,<sup>125</sup> both because the EPCA's preemption provision appeared literally to forbid enactment of Vermont's regulations, and because their regulations were alleged to actually conflict with the EPCA's fuel economy standards.<sup>126</sup>

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116. *Id.* at 302.

117. *Id.* at 302 n.5 ("Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island and Washington, in addition to Vermont, have adopted California's standards for GHG emissions, pursuant to § 7507.").

118. *Id.* at 338 ("Vermont first adopted California emissions standards for new motor vehicles regulations pursuant to § 177 of the CAA in 1996, when it adopted the LEV program. Vermont adopted California's LEV program because motor vehicles for much of Vermont's air pollution, and the California standards required greater pollution reductions than the federal standards. Vermont has amended the LEV regulations several times in order to remain consistent with California's standards.").

119. *Id.* at 343–44 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) ("The Supremacy Clause is not implicated when federal laws conflict or appear to conflict with one another. In such a case courts have a duty to give effect to both provisions, if possible.").

120. *Green Mountain Chrysler*, 508 F. Supp. 2d at 344.

121. *Id.*

122. *Id.* (citing *N.Y. Tel. Co. v. N.Y. State Dept. of Labor*, 440 U.S. 519, 540 (1979)).

123. *Id.* at 354.

124. *Id.*

125. *Green Mountain Chrysler*, 508 F. Supp. 2d at 350.

126. *Id.*

Speaking first to conflict preemption, the court was not persuaded that plaintiffs had met their burden of proving that the GHG regulations were “sufficiently draconian” as to “essentially usurp NHTSA’s prerogative to set fuel economy standards.”<sup>127</sup> Rather, congressional intent evidenced in multiple CAA amendments had been to designate California as a proving ground for innovative regulations, more often than not over objections from the automobile industry.<sup>128</sup> To be sure, the court conceded that the regulations presented substantial challenges.<sup>129</sup> The court was unconvinced, however, that automakers could not meet these challenges, considering the EPA’s authority and flexibility to address lead time through the waiver process, as well as the industry’s history of compliance with previous technological challenges.<sup>130</sup>

In light of the historical tradition of providing the states with primary responsibility over mobile source air pollution regulation,<sup>131</sup> the court found that the EPCA’s preemption provision may not invalidate Vermont’s regulations absent clear and manifest congressional purpose to do so.<sup>132</sup> In rejecting plaintiffs’ argument that Vermont’s regulation merely represented a “de facto fuel economy standard,” the court instead found that the regulations comprised much more than a “requirement to improve fuel economy, cloaked in the rhetoric of reducing carbon dioxide emissions.”<sup>133</sup> While there was undoubtedly a mathematical relationship between the carbon content of fuel and the carbon released, Vermont’s regulations also measure carbon dioxide equivalents<sup>134</sup> so as to “cover greenhouse gases other than carbon dioxide.”<sup>135</sup> Thus, the inclusion of emissions that do not correlate with fuel economy

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127. *Id.* at 398.

128. *Id.*

129. *Id.* at 399

130. *Green Mountain Chrysler*, 508 F. Supp. 2d at 399. (“ . . . [A]utomakers describe intensive efforts to develop and utilize new technologies to increase fuel efficiency and reduce emissions. American automakers are in the vanguard of utilizing hybrid technology to dramatically improve fuel economy. Clean diesel technology is being offered in a growing number of vehicles. Dramatic improvements to powertrain technologies are under study and may be available in the not-too-distant future. Alternative fuels such as ethanol provide another strategy for reducing GHG emissions. The manufacturers have become fully engaged in developing these technologies to address emissions concerns, and those efforts are front-and-center in the public record. History suggests that the ingenuity of the industry, once put in gear, responds admirably to most technological challenges.”).

131. *Id.* at 350 (“ . . . Congress acknowledged that the regulation of air pollution from mobile sources was traditionally a state responsibility.”).

132. *Id.* at 351 (Congressional purpose is the “ultimate touchstone” of preemption analysis.).

133. *Id.*

134. *Id.* at 352 (Vermont’s regulation defines “carbon dioxide equivalents” to include methane, carbon monoxide and nitrous oxide.).

135. *Green Mountain Chrysler*, 508 F. Supp. 2d at 352.

foreclosed plaintiffs' assertion that the GHG regulation was nothing more than a fuel economy standard.<sup>136</sup>

The court was likewise worried about construing an already broad statutory preemption provision in a way that would—for all practical purposes—eliminate the presumption against preemption.<sup>137</sup> The court found congressional intent instructive on this point in that while the EPCA's objective was undoubtedly to improve automotive efficiency by setting uniform fuel economy standards, the legislation was equally drafted against the backdrop of other regulations affecting emissions standards, namely the CAA.<sup>138</sup> The general language of the preemption clause then, when combined with an absence of any congressional intent as to its limits—and the specific requirement that the EPA take California emissions regulations into consideration—all tipped in favor of Congress not clearly intending to preempt the Vermont regulations.<sup>139</sup> Indeed, this conclusion was even more justified because the state regulation being challenged involved the traditional exercise of state police power.<sup>140</sup>

Many commentators regarded the *Green Mountain Chrysler* decision as a significant victory for states taking an active role in the fight against global warming,<sup>141</sup> leading some analysts to call the decision “[i]ndisputably . . . a major judicial pronouncement on the subject of climate change, and one of the most important, recent environmental law decisions generally.”<sup>142</sup> Additionally, since *Green Mountain Chrysler* was the first decision to validate adoption of the California standards, the result is greatly significant for the numerous other states that have also adopted the state's standards by way of section 177.<sup>143</sup>

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136. *Id.*

137. *Id.* at 353 (“[I]f ‘relate to’ were taken to extend to the furthest reach of its indeterminacy, then for all practical purposes preemption would never run its course,” and this would “read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.” (citing *Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))).

138. *Id.* at 354.

139. *Id.*

140. *Green Mountain Chrysler*, 508 F. Supp. 2d at 356.

141. Tony Perriello & Carolyn Whetzel, *Mobile Sources: Court Backs Vermont Emissions Rules Against Challenge Brought by Auto Industry*, BNA ENVIRONMENT REPORTER (Sept. 14, 2007).

142. Richard M. Frank, *In Depth: A Very Green Environmental Ruling, From the Green State*, ENVIRONMENTAL NEWS NETWORK (Sept. 28, 2007), available at <http://www.enn.com/business/article/23485>.

143. Gabrielle Sigel and Allison A. Sapsford, *Federal Court Upholds California GHG Emissions Standards for New Automobiles*, JENNER & BLOCK: CLIMATE CHANGE UPDATE (Sept. 18, 2007) at 3, available at [http://www.jenner.com/files/tbl\\_s20Publications%5CRelatedDocumentsPDFs1252%5C1829%5CFedCourtUpholdsCalGHG.pdf](http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1829%5CFedCourtUpholdsCalGHG.pdf).

Indeed, this importance is underscored by the fact that it led eighty-nine congressional representatives to write to the EPA, asserting that the opinion should guide the EPA's pending waiver decision.<sup>144</sup> The letter urged the EPA to make its decision "on the merits, in accordance with the law and the facts of this case, which demand you immediately grant California's waiver, allowing California and other states to move forward—ideally in partnership with the federal government."<sup>145</sup>

### C. Central Valley Chrysler-Jeep v. Goldstone

*Central Valley Chrysler-Jeep*, like *Green Mountain Chrysler*, was a declaratory judgment action brought by the Association of International Automobile Manufacturers ("AIAM") seeking judicial pronouncement that the EPCA preempts the CARB regulations that aim to reduce GHG emissions from motor vehicles.<sup>146</sup> The case was stayed in anticipation of the pending *Massachusetts* and *Green Mountain Chrysler* decisions, and the parties submitted supplemental briefings on the impact of those decisions on their case.<sup>147</sup>

From the outset the court found that the implementation of regulations requiring substantial reduction in carbon dioxide necessarily required substantial increases in motor vehicle fuel efficiency.<sup>148</sup> However, AB 1493 regulations also provided offsets in the computation of carbon dioxide emissions for air conditioner improvements and for the ability of vehicles to run on alternative fuel formulations that provide lower net carbon emissions.<sup>149</sup> Thus, the court concluded that compliance with California's AB 1493 regulations could be at least partially achieved through ways not directly proportional to fuel economy mile-per-gallon improvements.<sup>150</sup>

The court moved to briefly summarize the *Massachusetts* and *Green Mountain Chrysler* decisions in an effort to determine whether the decisions represented a change in controlling law sufficient to allow reconsideration of their prior holdings.<sup>151</sup> The court found significant that the Supreme Court had considered and rejected EPA's argument in *Massachusetts* that carbon dioxide

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144. Dustin Till, *Court Upholds State's Right to Regulate GHG Emissions from New Motor Vehicles*, MARTEN LAW GROUP ENVIRONMENTAL NEWS (Sept. 26, 2007), available at <http://www.martenlaw.com/news/?20070926-ghg-emissions>.

145. *Id.*

146. *Central Valley Chrysler-Jeep v. Goldstone*, 529 F. Supp. 2d 1151, 1153–54 (E.D. Cal. 2007).

147. *Id.*

148. *Id.* at 1158.

149. *Id.*

150. *Id.* (finding it undisputed that compliance with AB 1493 can be at least partially accomplished through changes not directly reflected in mile-per-gallon fuel economy increases.).

151. *See Central Valley*, 529 F. Supp. 2d at 1162–65.

regulation was impossible because it would require infringement of a task delegated to the DOT under the EPCA—namely the tightening of mileage standards.<sup>152</sup> Further indicating the similarity of issues and significance between the *Massachusetts* decision and the instant case, the court went on to conclude that:

The court understands that the issue of preemption was not precisely before the Supreme Court because the issues in that case pertained to the authority of one agency of the federal government . . . to regulate carbon dioxide emissions under the Clean Air Act to the possible detriment of [the] DOT's aims and goals in its administration of [the] EPCA's CAFE standards program. While the preemption doctrine does not apply to the interplay between two federal schemes, the inquiry into the conflict between those schemes is similar to preemption analysis because both preemption of state law and preclusion of federal statutory remedies are questions of congressional intent.<sup>153</sup>

In sum, the court found that *Massachusetts* represented a change in controlling law adequate to allow reconsideration of their September Order.<sup>154</sup>

While finding no disagreement with the *Green Mountain Chrysler* conclusion that the preemption doctrine did not apply to the interplay between section 209(b) of the CAA and the EPCA, the court employed a somewhat different analytical approach, instead starting its analysis with the interplay between the regulatory functions of the CAA and the EPCA's mileage-setting authority.<sup>155</sup> This three part analysis involved first asking whether the EPA may promulgate emission control regulations having an effect on fuel economy, further asking whether the EPCA precludes any new EPA-promulgated regulations that would have the incidental effect of requiring greater fuel efficiency, and finally, by answering whether there is any basis for treating a regulation granted by state waiver any differently than a regulation otherwise promulgated by the EPA.<sup>156</sup>

On the first inquiry, the court found that *Massachusetts* directed their threshold inquiry not at the likelihood that California standards would interfere with the EPCA's regulatory scheme, but rather, on the scope of the EPCA's ability to bar regulations aimed at public health and welfare where the regulations impact mileage standards.<sup>157</sup> *Massachusetts* was illustrative on this point.<sup>158</sup> The fact that the CAA specifically mandated that EPA protect the

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152. *Id.* at 1163.

153. *Id.* at 1164 (internal citations omitted).

154. *Id.* at 1164–65.

155. *Id.* at 1165.

156. *Central Valley*, 529 F. Supp. 2d at 1165.

157. *Id.* at 1166.

158. *Id.* at 1167 (“The Supreme Court’s strong statement of EPA’s authority to regulate carbon dioxide emissions informs this court’s conclusion that Congress intended EPA to be able

public health and welfare while the EPCA did not do the same for the DOT, indicated that Congress empowered the EPA to enact GHG controls despite an impact on fuel efficiency.<sup>159</sup>

Finding support for overlapping statutory obligations, the court moved to address the question of what mechanism should resolve inconsistencies between the two regulatory schemes.<sup>160</sup> While the AIAM maintained that the EPA must assure harmonization with the DOT of any new regulations that impinge on existing CAFE standards, the court found no support in the statutory language of the CAA for such a position.<sup>161</sup> Examination of the structure and text of the EPCA and CAA instead evidenced Congress's intent to allocate the EPA with the broader authority—that of regulating vehicle emissions involving the important purpose of insuring public health and welfare.<sup>162</sup> The fact that the EPA must evaluate the risk motor vehicle greenhouse gases pose on public health and welfare—and the mandate to regulate, if such endangerment is found—further bolstered this reading.<sup>163</sup>

The EPCA's language also supported this conclusion.<sup>164</sup> When establishing CAFE standards the Secretary of Transportation must 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."<sup>165</sup> The CAA, alternatively, gives the EPA no corresponding statutory duty to give consideration to the EPCA's regulatory scheme.<sup>166</sup> The court found this asymmetrical allocation indicative of congressional intent that the DOT, through the NHTSA, must conform its CAFE program to the EPA's determination of what regulatory level is necessary to protect public health and welfare.<sup>167</sup>

If any doubt still lingered, the court further noted how the factors the EPA must consider in discharging their duty overlap with the factors the NHTSA must consider in discharging theirs.<sup>168</sup> In preparing emissions reductions, the EPA is instructed to "give appropriate consideration" to factors including the achievable level of emissions reductions through available cost, energy, and

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to promulgate emissions control regulations for the protection of public health and welfare notwithstanding the potential effect of those regulations on average fleet fuel economy standards determined under EPCA.").

159. *Id.*

160. *Id.*

161. *Central Valley*, 529 F. Supp. 2d at 1168.

162. *Id.*

163. *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 530–31 (2007)).

164. *Id.*

165. *Id.* at 1176 (emphasis added) (citing 49 U.S.C. § 32902(f) (2000)).

166. *Central Valley*, 529 F. Supp. 2d at 1168.

167. *Id.*

168. *Id.* at 1169.

safety factors associated with the application of the emissions reduction technology.<sup>169</sup> The comparable EPCA language, again, requires instead that the Secretary “shall consider. . . .”<sup>170</sup> The court read this to indicate that while Congress did not empower the NHTSA to consider the impact mileage standards would have on public health and welfare, they did empower the NHTSA to consider “other motor vehicle standards of the government,”<sup>171</sup> enabling the NHTSA to conform their mileage standards with the reduction the EPA finds necessary for the protection of public health and welfare.<sup>172</sup> The court found any other conclusion nonsensical, finding instead that:

Given the level of impairment of human health and welfare that current climate science indicates may occur if human-generated greenhouse gas emissions continue unabated, it would be the very definition of folly if [the] EPA were precluded from action simply because the level of decrease in greenhouse gas output is incompatible with existing mileage standards under EPCA.<sup>173</sup>

Lastly, the court considered the status of state regulations granted an EPA waiver.<sup>174</sup> Given the conclusion that the EPA may promulgate conflicting regulations so long as they are directed at public health and welfare, the court framed the issue as whether a state regulation granted a CAA waiver should stand in any different stead with respect to inconsistencies it may have with the EPCA fuel efficiency standards.<sup>175</sup> As previously indicated, the EPA is obliged to grant a waiver application for California regulations if the regulations meet the three requirements contained under section 209.<sup>176</sup> California regulations that have been granted an EPA waiver additionally serve as “other laws of the Government” that must be considered by the NHTSA in formulating the EPCA average fleet mileage standards.<sup>177</sup> In *Central Valley*, however, AIAM contended that the extent of consideration the NHTSA must give to California’s regulations amounted only to a determination that it has a *de minimis* effect on fuel efficiency.<sup>178</sup> If the NHTSA found that the California regulations had more than a *de minimis* effect on fuel efficiency, they argued that the regulation should be preempted.<sup>179</sup>

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169. *Id.* at 1171 (citing § 7521(a)(3)(A)(i)).

170. *Id.* at 1168 (emphasis added).

171. *Central Valley*, 529 F. Supp. 2d at 1169.

172. *Id.*

173. *Id.* at 1170.

174. *Id.*

175. *Id.* at 1171.

176. *Central Valley*, 529 F. Supp. 2d at 1171.

177. *Id.* at 1169.

178. *Id.* at 1172.

179. *Id.*

The court found *Green Mountain Chrysler* convincing on this issue, calling it “[t]he most thorough and persuasive analysis of the issue so far as the court has found.”<sup>180</sup> There the court looked to the EPCA section 502(d), which provided that any manufacturer could apply to the DOT for modification of a CAFE standard if it could show the existence of a “federal standards fuel economy reduction,” defined as including the EPA-approved California emissions standards.<sup>181</sup> The court in *Central Valley* found this language persuasive to indicate that when the EPCA was adopted in 1975, Congress “unequivocally stated that federal standards included EPA-approved California emissions standards.”<sup>182</sup> Additionally, as discussed in *Green Mountain Chrysler*, the EPCA’s legislative history supports the conclusion that regulations promulgated by California and granted waiver status under section 209 are “other motor vehicle standards” that the NHTSA must consider in setting fuel economy standards.<sup>183</sup> In sum, *Central Valley* held that just as in *Massachusetts*, where the EPA’s CAA duty to regulate GHG emissions overlapped with but did not conflict with the DOT’s duty to set fuel efficiency standards. Likewise California’s AB 1493 efforts to regulate GHG emissions through the CAA waiver overlap, but do not conflict with the DOT’s responsibility under the EPCA.<sup>184</sup>

The *Central Valley* decision was regarded by commentators as further judicial affirmation in favor of state regulation, representing a “judicial recognition of global warming as more than just a political issue.”<sup>185</sup>

#### VI. ANALYSIS—A MARKED SHIFT IN JUDICIAL TREATMENT OF THE GLOBAL WARMING ISSUE

At a fundamental level, *Massachusetts* has been regarded by commentators as helping to create a common-sense discourse about global warming.<sup>186</sup> Indeed, some have opined that the Court’s decision will have the effect of requiring an Executive Branch, specifically the Bush administration, that has repeatedly denied a causal connection between human activity and global warming to abandon its unilateral position.<sup>187</sup> Others have further argued that the Court’s decision has the significance of vindicating “the individuals,

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180. *Id.*

181. *Central Valley*, 529 F. Supp. 2d at 1172–73 (citing *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 346 (D. Vt. 2007)).

182. *Id.* at 1173.

183. *Id.* (quoting *Green Mountain Chrysler*, 508 F. Supp. 2d at 345).

184. *Id.* at 1174.

185. Cheryl Miller, *Federal Ruling Boosts California’s Efforts to Curb Auto Emissions*, THE RECORDER (Dec. 13, 2007), available at <http://www.law.com/jsp/article.jsp?id=1197496455518>.

186. Rancilio, *supra* note 105, at 177.

187. *Id.* at 177–78.

industries, organizations, and state and local governments that have been pushing for global warming regulation all along.”<sup>188</sup>

Yet, while these conclusions are certainly true, the *Massachusetts* decision also seems to reflect an interpretive shift by the Court, and one that has the potential for more hospitable judicial assessment of future preemption challenges. While the Court has previously utilized an analysis looking solely to the plain meaning of statutory language to decipher congressional intent, *Massachusetts* appears to shift the emphasis instead to the purpose behind regulatory enactments. By looking instead to the legislative history and purpose behind environmental legislation such as the CAA and EPCA, state attempts such as those at issue in *Green Mountain Chrysler* and *Central Valley* arguably stand a better chance of success on appeal.

A. *Reconsidering Engine Manufacturers and “Plain Meaning” as Dispositive of Congressional Intent*

Perhaps analogy provides the most apt way to demonstrate this seeming judicial shift from plain meaning to more thorough statutory analysis (and more hospitable view of state regulatory attempts). Prior to the Supreme Court’s *Massachusetts* decision, its last foray into CAA preemption was in *Engine Manufacturers Association v. South Coast Quality Management District*.<sup>189</sup> In *Engine Manufacturers*, the Court, in an opinion authored by Justice Scalia, held that California fleet rules prohibiting the purchase of vehicles not meeting stringent emissions standards were preempted under the CAA.<sup>190</sup> At issue was the scope of the word “standard” in section 209(a) of the CAA, which provides that: “[n]o [s]tate 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.”<sup>191</sup> The district court granted summary judgment for South Coast, holding that the fleet rules were not “standards” within the meaning of section 209(a), because they regulated only the purchase of vehicles otherwise available for sale in California.<sup>192</sup> Where fleet rules did not compel manufacturers to meet a new emissions limit, but rather affected the purchase of vehicles, the district court held that such a regulation was not a “standard.”<sup>193</sup>

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188. *Id.* at 178.

189. *Engine Mfrs. Ass’n v. S. Coast Quality Mgmt. Dist.*, 541 U.S. 246 (2004)

190. *Id.* at 258.

191. 42 U.S.C. § 7543(a) (2000).

192. *Engine Mfrs.*, 541 U.S. at 251.

193. *Id.* at 251–52.

The Supreme Court instead found that the preemptive effect of section 209(a) was not limited to sales restrictions.<sup>194</sup> Justice Scalia began by finding that the ordinary meaning of congressional language normally expresses legislative purpose.<sup>195</sup> Looking to Webster's Second New International Dictionary, Justice Scalia defined "standard" as "that which is established by authority, custom, or general consent, as a model or example; criterion; test."<sup>196</sup> Applying this definition to section 209(a), the majority found that the criteria referred to in section 209 related to the emission characteristics of a vehicle, an interpretation consistent with the use of "standard" throughout the CAA.<sup>197</sup>

Similarly, the majority found that the district court's distinction between purchase restrictions and sale restrictions confused standards with the means for enforcing standards.<sup>198</sup> Section 202 of the CAA, the Court found, set a standard, where later sections 203–206 provided methods to enforce such a standard.<sup>199</sup> Use of the term in other portions of the CAA thus demonstrated that Congress contemplated the enforcement of emission standards through purchase requirements.<sup>200</sup> The Court again found support for this reading through the use of the word "standard" in another portion of the CAA.<sup>201</sup> Indeed, section 246 of the CAA required state-adopted and federally-approved "restrictions on the purchase of fleet vehicles *to meet clean-air standards*."<sup>202</sup> From this statutory analysis the Court concluded that Congress contemplated emissions standard enforcement through purchase requirements.<sup>203</sup>

Finally, the majority maintained that allowing purchase restrictions would in effect undermine and undo the carefully calibrated regulatory scheme envisioned by Congress,<sup>204</sup> reasoning that although the fleet rules covered only certain purchasers (and thus do not eliminate all demand for covered vehicles), allowing one state to enact rules would lead others to do the same.<sup>205</sup> In declining to read into section 209(a) a purchase/sale distinction absent from the text or structure of the CAA, the Court found that "[a] command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular

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194. *Id.* at 253.

195. *Id.* at 252.

196. *Id.* at 252–53 (citing WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2455 (1945) (internal citations omitted)).

197. *Engine Mfrs.*, 541 U.S. at 253.

198. *Id.* at 253.

199. *Id.*

200. *Id.* at 254.

201. *See id.*

202. *Engine Mfrs.*, 541 U.S. at 254.

203. *Id.*

204. *Id.* at 255.

205. *Id.*

emission characteristics is as much an ‘attempt to enforce’ a ‘standard’ as a command, accompanied by sanctions, that a certain percentage of a manufacturer’s sales volume must consist of such vehicles.”<sup>206</sup>

Justice Souter, the only dissenting justice, authored an opinion challenging the majority for failing to recognize the presumption against preemption, as well as the legislative history and purpose behind the CAA.<sup>207</sup> He began by articulating the practical consequence of the Court’s holding, noting that it “prohibits one of the most polluted regions in the United States from requiring private fleet operators to buy clean engines that are readily available on the commercial market.”<sup>208</sup> Justice Souter further questioned the majority for not adhering to the presumption that where Congress legislates in a field traditionally occupied by the states, a federal act can supersede the state’s historic police powers only by demonstrating clear and manifest congressional purpose to do so.<sup>209</sup> He thus argued that the presumption should be applied, given the CAA’s recognition that “the prevention and control of air pollution at its source is the primary responsibility of States and local governments.”<sup>210</sup>

Justice Souter similarly found that the legislative history behind the preemption provision demonstrated that Congress’s purpose was to stop states from imposing regulatory requirements directly limiting what manufacturers could sell.<sup>211</sup> In light of such purpose, section 209(a) had no preemptive application to the fleet rules.<sup>212</sup> Further, while recognizing that a law prohibiting any purchase of any vehicle failing to meet new state-specific emissions criteria would have the same effect as direct manufacturer regulation—and would thus be preempted under section 209(a)—Justice Souter found that such was not the case here given that the fleet rules required purchase of cleaner engines *only* if they were already commercially available.<sup>213</sup>

Reaction to the *Engine Manufacturers* decision painted the case as internally inconsistent and as a departure from traditional methods of statutory

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206. *Id.*

207. *Engine Mfrs.*, 541 U.S. at 259–66 (Souter, J., dissenting).

208. *Id.* at 259.

209. *Id.* at 260 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

210. *Id.* at 260 n.2 (quoting 42 U.S.C. § 7401(a)(3) (2000)).

211. *Id.* at 261 (“Congress was not responding to concerns about varying regional appetites for whatever vehicle models the manufacturers did produce; it was addressing the industry’s fear that States would bar manufacturers from selling engines that failed to meet specifications that might be different in each State.”).

212. *Engine Mfrs.*, 541 U.S. at 262 (Souter, J., dissenting) (arguing that the “standards” preempted under 209(a) are production mandates placed on manufacturers directly as a condition of sale and that 209(a) does not reach regulations that govern buyer’s choice between commercially available options).

213. *Id.* at 262–63.

interpretation.<sup>214</sup> Indeed, by finding the plain meaning of “standard” unambiguous—and thus categorically preemptive—the Court in effect invalidated fleet rules that were otherwise in agreement with the purpose of the CAA’s section 209(a) preemption provision, and in harmony with the primary goal behind the CAA.<sup>215</sup>

*B. Squaring Engine Manufacturers with Massachusetts*

Comparing Justice Scalia’s *Engine Manufacturers* decision with the majority decision in *Massachusetts* illustrates not only an interpretive analysis more consistent with the underlying purpose of the CAA, but further shows how a majority of the Court has shifted toward a more thorough statutory analysis (and incidentally a more hospitable view toward environmental preemption questions). While not addressing the question of preemption, *Massachusetts* did require the Court to examine the statutory text of the CAA to determine whether the EPA had authority under the Act to regulate carbon dioxide emissions from automobiles.<sup>216</sup> The language at issue provided that:

[T]he EPA administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . .<sup>217</sup>

As stated above, the Court found initial support for a broad view of the EPA’s authority in the CAA’s expansive definition of “any air pollutant.”<sup>218</sup> Significantly, though, the Court went further than the statutory text in challenging the EPA’s position that post-enactment congressional actions functioned as tantamount to congressional commands to refrain from regulation.<sup>219</sup> That later Congresses abstained from enacting binding emissions limitations to address global warming did nothing to inform congressional intent regarding the CAA amendments.<sup>220</sup> Instead, the Court found that various congressional efforts to promote inter-agency climate change collaboration and research supported and complemented the textual mandate to regulate “any air pollutant” determined to endanger public welfare.<sup>221</sup>

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214. See Michael Gadeberg, *Presumptuous Preemption: How “Plain Meaning” Trumped Congressional Intent in Engine Manufacturers Association v. South Coast Air Quality Management District*, 32 *ECOLOGICAL L.Q.* 453, 474 (2005).

215. *Id.* at 478.

216. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

217. *Id.* at 506.

218. See *supra* Section V.A.

219. *Massachusetts*, 549 U.S. at 529.

220. *Id.* at 529–30.

221. *Id.* at 530.

In analyzing the EPA's argument that regulation of automobile emissions would require it to encroach on the DOT's statutory mandate, the Court likewise looked beyond the text of section 202(a)(1) to the underlying purpose behind the CAA.<sup>222</sup> Finding that the CAA charged the EPA with protecting the public health and welfare, the Court concluded that overlap in the DOT's mandate in no way licensed the EPA to "shirk its environmental responsibilities."<sup>223</sup> Examination of congressional history likewise aided the conclusion that "[w]hile the Congresses that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the CAA obsolete."<sup>224</sup>

Justice Scalia's dissent in *Massachusetts* further demonstrates the way in which the majority has shifted away from the *Engine Manufacturers* plain meaning construction toward an inquiry utilizing legislative history and congressional purpose. Addressing the EPA's authority, Justice Scalia takes issue with the majority's determination that carbon dioxide qualifies as an "air pollutant" under section 202(a)(1).<sup>225</sup> While agreeing that greenhouse gases fit within the second half of the CAA definition, he disagrees with the majority for failing to acknowledge the first half of the definition, requiring it first be an "air pollution agent or combination of such agents."<sup>226</sup> The EPA instead argued that a substance "does not meet the CAA definition of air pollutant simply because it is a physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. It must also be an air pollution agent."<sup>227</sup> On this equally plausible statutory reading, Justice Scalia urged application of *Chevron* deference to the EPA in light of this textual ambiguity, and criticized the majority for failing to explain why such deference was not due.<sup>228</sup>

Further, Justice Scalia looked to Webster's New International Dictionary for confirmation that the EPA's interpretation of "air pollution" was reasonable.<sup>229</sup> There he found "pollute" defined as "[t]o make or render impure or unclean," and "air" defined as: (1) "[t]he invisible, odorless, and tasteless mixture of gases which surrounds the earth"; (2) "[t]he body of the

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222. *Id.* at 532.

223. *Id.*

224. *Massachusetts*, 549 U.S. at 532.

225. *Id.* at 555 (Scalia, J., dissenting).

226. *Id.* at 556.

227. *Id.* at 557–58 (internal citations omitted).

228. *Id.* at 558 ("[O]nce again, in the face of textual ambiguity, the Court's application of *Chevron* deference to EPA's interpretation of the word 'including' is nowhere to be found. Evidently, the Court defers only to those reasonable interpretations it favors.").

229. *Massachusetts*, 549 U.S. at 559, (Scalia, J., dissenting).

earth's atmosphere; esp., the part of it near the earth, as distinguished from the upper rarefied part"; (3) "[a] portion of air or of the air considered with respect to physical characteristics or as affecting the senses."<sup>230</sup> Given this definition, Justice Scalia found the EPA's interpretation of air pollution to include impurities in the ambient air "at ground level or near the surface of the earth" entirely consistent with the terms natural meaning.<sup>231</sup> As in *Engine Manufacturers*, Justice Scalia's analysis saw no need to move beyond the plain language of section 202(a)(1), and offered no examination of the legislative history surrounding the CAA provision. Justice Stevens addressed this criticism in the majority opinion, when he stated that:

Justice Scalia maintains that because greenhouse gases permeate the world's atmosphere rather than a limited area near the earth's surface, [the] EPA's exclusion of greenhouse gases from the category of air pollution "agent[s]" is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* . . . [The] EPA's distinction, however, finds no support in the text of the statute, which uses the phrase "the ambient air" without distinguishing between atmospheric layers. Moreover, it is a plainly unreasonable reading of a sweeping statutory provision designed to capture any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. Justice Scalia does not (and cannot) explain why Congress would define "air pollutant" so carefully and so broadly, yet confer on [the] EPA the authority to narrow that definition whenever expedient by asserting that a particular substance is not an "agent." At any rate, no party to this dispute contests that greenhouse gases both "ente[r] the ambient air" and tend to warm the atmosphere. They are therefore unquestionably "agent[s]" of air pollution.<sup>232</sup>

Seemingly then, Justice Scalia's failure to look beyond the plain meaning of statutory language in *Massachusetts*, as in *Engine Manufacturers*, resulted again in an outcome at odds with the primary purpose behind the CAA.<sup>233</sup> Of importance for current discussion, however, is the fact that while Justice Scalia's *Engine Manufacturers* decision was on behalf of a majority of eight justices, his dissent in *Massachusetts* now only garners the support of his three most conservative colleagues.

Indeed, Justice Souter's dissenting opinion in *Engine Manufacturers* articulates the interpretive analysis that Justice Stevens' majority opinion employs in *Massachusetts*. In challenging the majority's preemption holding

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230. *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1910 (2d ed. 1949)).

231. *Id.* at 560.

232. *Id.* at 529 n.26 (internal citations omitted).

233. 42 U.S.C. § 7401(b)(1) (2000) (stating that the CAA was drafted with the purpose of protecting and enhancing the quality of the Nation's air resources so as to promote the public health and welfare as well as the productive capacity of its population.). See Gadeberg, *supra* note 214, at 478.

in *Engine Manufacturers*, Justice Souter looked beyond the plain language of section 209(a) to find that the presumption against preemption was evident from CAA section 101 language stating that “air pollution control at its source is the primary responsibility of the States and local governments.”<sup>234</sup>

Furthermore, where the majority stopped at the plain meaning of “standard” viewed in light of a dictionary definition, Justice Souter examined legislative history to determine that Congress’s purpose in passing the preemption provision was meant only to stop state attempts at imposing regulatory requirements that directly limited what manufacturers were able to sell.<sup>235</sup>

## VII. CONCLUSION

Judicial resolution of the statutory conflict between the CAA and EPCA will have great importance in the coming years as more and more states continue to recognize the significant dilemma that climate change poses globally, and as they seek to take an active role in limiting their own GHG emissions. The Supreme Court decision in *Massachusetts* seems to indicate a shift in the Court’s view regarding environmental regulatory preemption, a new judicial awareness of the real threat global warming poses, a more thorough statutory analysis, and likely a more hospitable outcome for CARB and other state litigants seeking to defend their regulatory attempts against industry preemption challenges. While it remains unclear whether the Court will employ the presumption against preemption in future litigation, the *Massachusetts* Court’s endorsement of piecemeal regulatory efforts to combat global warming, coupled with the thorough justification for non-conflicting overlap provided by *Green Mountain Chrysler* and *Central Valley*, present a persuasive foundation for the Court to side with states’ rights.

## \*AUTHOR’S NOTE

Since the writing of this note the EPA has, for the first time, denied outright California’s waiver request to regulate GHG automobile emissions.<sup>236</sup> The EPA administrator Stephen Johnson maintains that an energy bill recently signed by President Bush represents a “clear national solution” more preferable than the “confusing patchwork of state rules” he alleges the current regulatory system provides.<sup>237</sup> As of January 2, 2008, California has brought suit against

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234. *Engine Mfrs. Ass’n v. S. Coast Quality Mgmt. Dist.*, 541 U.S. 246, 260 (2004) (Souter, J., dissenting).

235. *Id.* at 261–62 (discussing hearings leading up to 1967 amendments, where Congress was addressing the automobile industry’s fears that different States would bar manufacturers from selling engines that failed to meet specifications that could be different in each state).

236. Simon & Wilson, *supra* note 9, at 1.

237. *Id.*

the EPA, challenging the agency's waiver denial.<sup>238</sup> California maintains that the agency "had no legal or technical justification for blocking the new standards."<sup>239</sup> This latest development typifies the tempestuous relationship between an administration obstinate about federal regulatory control and those states pushing for more responsible greenhouse gas regulation.

ANDREW GILFOIL\*

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238. Felicity Barringer, *California Sues E.P.A. Over Denial of Waiver*, N.Y. TIMES (Jan. 3, 2008), available at <http://www.nytimes.com/2008/01/03/us/03suit.html?partner=rssnyt&emc=rss>.

\* 239. *Id.*

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