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## APPENDIX B. FEDERAL LEGAL ISSUES PRESENTED BY THE PROPOSED ADOPTION OF THE CALIFORNIA MOTOR VEHICLE GREENHOUSE GAS REGULATION

This Appendix to the comments of the Alliance of Automobile Manufacturers on the proposed regulations adopting the California motor vehicle greenhouse gas regulations examines the issues of federal law that the Department of Environmental Protection (“the Department” or “DEP”) should address before it adopts these regulations. As explained below, the California motor vehicle greenhouse gas standards conflict with the following provisions of federal law and are therefore unenforceable:

- ***The Federal Clean Air Act.*** California’s greenhouse gas emission standards are expressly preempted by Section 209(a) of the Clean Air Act (“the CAA”), and will not be entitled to a waiver of preemption under CAA Section 209(b). Because the California greenhouse gas standards are and will remain preempted by CAA Section 209(a), Pennsylvania cannot exercise any authority under CAA Section 177 or state law to enforce the California standards.
- ***The Federal Fuel Economy Program.*** The CO2 standards adopted by California are preempted by the Energy Policy and Conservation Act, 49 U.S.C. § 32901 *et seq.* and the comprehensive regime it establishes for exclusively *federal* regulation of motor vehicle fuel economy. Regulation of motor vehicle CO2 is inextricably “related to” motor vehicle fuel economy and the Corporate Average Fuel Economy (“CAFE”) standards set by the National Highway Traffic Safety Administration. Under 49 U.S.C. § 32919(a), California’s regulations are *expressly* preempted. In addition, any establishment of fuel economy standards by a regulatory body other than NHTSA, and by any standards other than the standards Congress provided for NHTSA, frustrates the congressional objectives and is *impliedly* preempted. The standards adopted by California are indistinguishable from the “CO2 Reduction Method” that CARB adopted as part of the 2001 amendments to the ZEV mandate. The 2001 ZEV mandate was enjoined by a federal court, and the United States filed an amicus brief in the United States Court of Appeals for the Ninth Circuit concluding that the mandate was preempted. Pennsylvania’s proposed CO2 emission standards are similarly preempted.
- ***Federal Foreign Policy and Foreign Affairs Powers.*** The California greenhouse gas standards frustrate the express objectives of United States foreign policy. With respect to global climate change, the United States has recognized the need for a global solution. Over the past two decades, the United States, through statutes, treaties, and executive action, has determined that international commitments represent the only effective way to reduce the global production of CO2 emissions and to share that burden fairly throughout the world. Efforts by individual States or groups of States interfere with national policy in this area, and are therefore preempted by the foreign affairs power and the Supremacy Clause of the U.S. Constitution.
- ***Federal Antitrust Law.*** The California standards require that when one manufacturer owns 10% or more of the shares of another, the two companies may only meet their greenhouse gas obligations by coordinating key strategic decisions. Such coordination

among competitors violates federal antitrust laws. The proposed regulation, in this respect and others, is therefore preempted by the Sherman Antitrust Act. *See, e.g., S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60 (1985).

- **The Dormant Commerce Clause.** The proposed regulation excessively burdens interstate commerce for no local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The asserted reduction in greenhouse gases would be trivial in any event, and on a global level would have no significant impact that would justify its effects on national commerce.

**A. THE FEDERAL CLEAN AIR ACT: The Proposed Greenhouse Gas Emission Standards Are Preempted Under The Clean Air Act.**

Section 209(a) of the Clean Air Act broadly preempts “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.” The Supreme Court has recently interpreted “standard” as meaning any regulatory “criteria” that “relate[s] to the emission characteristics of a vehicle or engine.” *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004). Such regulatory criteria can include provisions that “the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions.” *Id.*

The various “greenhouse gas” emission standards, whether for control of tailpipe CO<sub>2</sub> or mobile air conditioning emissions, are “standards” that “relate to the emission characteristics of a vehicle or engine.” Under Section 209(a) and the Supreme Court’s authoritative decision in *Engine Manufacturers Association*, all of the California standards are therefore preempted by the Clean Air Act.

Section 209 of the Clean Air Act vests exclusive control over “standards relating to the control of emissions from new motor vehicles” in the federal government. *See* 42 U.S.C. § 7543(a). Section 209(b) makes only one exception to this preemptive cornerstone: California, because of prior regulation and unique circumstances, is permitted to adopt and enforce emissions standards, provided that it first obtains a waiver from the Environmental Protection Agency (“EPA”). 42 U.S.C. § 7543(b).

Pennsylvania cannot avoid Section 209(a) preemption by relying upon Section 177. Section 177 permits a state to adopt California emissions standards so long as the standards are identical to the California standards for which a Section 209(b) waiver has been granted. 42 U.S.C. § 7507. Several problems would arise under Section 177. First, Pennsylvania may not adopt any emissions standard -- California promulgated or not -- which has not received a waiver under Section 209(b).<sup>1</sup> As the United States Court of Appeals for the Second Circuit has

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<sup>1</sup> Even if the Department can adopt standards prior to EPA’s waiver, its regulations are unenforceable until such a waiver issues.

recognized, the term “granted” in Section 177 denotes an affirmative act of bestowal. *See Motor Vehicle Mfrs. Ass’n v. N.Y. State Dep’t of Environ. Conservation*, 17 F.3d 521, 532-33 (2d Cir. 1994). There is no such thing as an “automatic waiver” for the purposes of Section 177. *Id.*

Further, as Section 209(b) makes clear, in order to adopt and enforce its own standards, California must obtain a waiver from EPA. 42 U.S.C. § 7543(b). EPA must deny the waiver if the Administrator finds that the proposed emissions standards are not necessary to meet “compelling and extraordinary conditions” in California, or if the proposed standards are not consistent with Section 202(a).

Adoption and enforcement of state greenhouse gas emissions standards under the color of Section 177 would also be inconsistent with the structure of the Clean Air Act. A statute must be read in context and “with a view to [its] place in the overall statutory scheme.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989). Section 177 is embedded within Title I. Titles I and II of the CAA are premised upon state and local efforts to bring traditional air contaminants into compliance with National Ambient Air Quality Standards (“NAAQS”) set by EPA. The criteria pollutants all represent local ambient air pollution problems that can reasonably be addressed on a state level, or at most a regional level. States are primarily responsible for attaining and maintaining NAAQS within their borders. *See CAA § 107(a)*, 42 U.S.C. § 7407(a). In an effort to assist states that were struggling to meet the NAAQS, Congress promulgated Section 177, permitting states to adopt the more restrictive emissions standards of California. *Motor Vehicles Mfrs. Ass’n*, 17 F.3d at 527. In short, Title I and Section 177 in particular, were enacted to provide the local flexibility needed to deal with local air contaminants.

Global climate change is not a local problem, nor is it susceptible of local solutions. As CARB’s Executive Officer has admitted, carbon dioxide disperses globally so that world-wide concentrations are roughly equal. Unlike ground-level ozone or particulate matter, carbon dioxide does not measurably accumulate in localized areas. It would turn Section 177 on its head to construe the locally focused provision to impose a state-by-state solution to a global problem that would have little, if any, impact within Pennsylvania. The adoption of Title VI, for example, confirms that Titles I and II do not reach global problems. Addressing the global problem of stratospheric ozone depletion, Congress created new regulatory authority for EPA. *See Clean Air Act §§ 601-618 (Title VI)*, 42 U.S.C. §§ 7671-7671q.

**1. The Proposed Standards Are Not “Consistent With Section 202(a)” Because EPA Cannot Regulate CO2 Under Section 202(a).**

Section 209(b)(1)(C) of the Clean Air Act only permits a preemption waiver for California if, among other criteria, California’s proposed emission standards are “consistent with section 202(a).” The California standards are inconsistent with Section 202(a) because EPA has concluded that Section 202(a) does not authorize emission standards for CO2 or other greenhouse gases. *See Control Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922 (Sept. 8, 2003). Regulation of CO2 and greenhouse gases under Section 202(a) is contrary to: (1) the ordinary meaning of “pollutant,” which is “contaminant,” (2) the structure of Titles I and II of the Clean Air Act, which target ground-level, localized air contaminants susceptible of effective state and local regulation, (3) the history of the Clean Air Act, in particular Title VI, and (4) the fundamental assumptions, constitutional in nature, of how

Congress delegates regulatory authority. Just as each of these factors weigh heavily against EPA authority, they weigh at least as much (if not considerably more, given the global nature of the problem) against California's, and thus Pennsylvania's, asserted regulatory authority.

Title II of the Clean Air Act authorizes the EPA Administrator to regulate "the emission of any *air pollutant* from ... 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." CAA § 202(a)(1); 42 U.S.C. § 7521(a)(1) (emphasis added). The Act defines "air pollutant" as:

[A]n air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

CAA § 302(g), 42 U.S.C. § 7602(g). The ordinary meaning of "pollution" is the "[c]ontamination of air, soil, or water by the discharge of *harmful* substances." Webster's II New College Dictionary at 855 (1999) (emphasis added). Similarly, the ordinary meaning of "pollutant" is "[s]omething that pollutes, esp. a *waste material* that *contaminates* air, soil, or water." *Id.* (emphasis added). In ordinary parlance, CO<sub>2</sub> is not a "contaminant," a "harmful substance" or a "waste material." As explained by Professor James Huffman in his testimony before the U.S. House of Representatives in 1999 regarding EPA's authority with respect to CO<sub>2</sub>: "We are not concerned here with an isolated, toxic substance which Congress might have overlooked in the construction of its regulatory scheme. To the contrary, we are concerned with *one of the most plentiful compounds in the earth's atmosphere*, the regulation of which will have dramatic and long-reaching effects for all Americans." Joint Hearing of the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the Comm. on Gov't Reform and the Subcomm. on Energy & Env't of the Comm. on Sci., U.S.H.R. (Oct. 6, 1990) (testimony of James Huffman, Professor of Law and Dean of Lewis and Clark Law School), *available at* [http://www.house.gov/science/huffman\\_100699.htm](http://www.house.gov/science/huffman_100699.htm) (emphasis added).

That Congress used the term "pollutant" in the ordinary sense is reinforced by the various substances that Congress has expressly identified as "pollutants": carbon monoxide, hydrocarbons, oxides of nitrogen and particulate matter. Each of these substances is a "pollutant" in the ordinary sense of the word: a "harmful substance" that "contaminates" the air by causing respiratory or other health problems, or directly affects the clarity of the air.

The structure of Titles I and II of the Clean Air Act confirms that Congress only provided EPA and California, and thus Pennsylvania, regulatory authority over traditional "pollutants." It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Titles I and II of the Clean Air Act are premised upon state and local planning that brings local -- or at most regional -- air contaminants to the level of National Ambient Air Quality Standards ("NAAQS") set by EPA. All of the substances that Congress (and in one instance EPA) has designated as criteria pollutants -- lead, sulfur dioxide, oxides of nitrogen, carbon monoxide, particulate matter, and ozone -- present local ambient air pollution problems that can reasonably be addressed on a state level, or at most a regional level.

Under the Act, states shoulder primary responsibility for attaining and maintaining NAAQS within their borders through state implementation plans (SIPs). See CAA § 107(a), 42 U.S.C. § 7407(a). Each state controls its local emissions in an attempt to reach the ambient levels of pollution delineated in the applicable NAAQS. CAA § 110, 42 U.S.C. § 7410. Each state selects controls “as may be necessary” to achieve attainment in designated nonattainment areas, and controls may differ from state to state and from nonattainment area to nonattainment area. CAA § 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A).

CO<sub>2</sub> and greenhouse gases diffuse throughout the Earth’s atmosphere; they are not localized, and the effectiveness of local controls is at the mercy of the rest of the world. “[A] ton of greenhouse gases emitted in the United States has the same impact as a ton emitted in Malaysia.” Pew Center on Global Climate Change, *Designing a Mandatory Greenhouse Gas Reduction Program for the U.S.* 2 (2003), available at [http://www.pewclimate.org/global-warming-in-depth/all\\_reports/mandatory\\_ghg\\_reduction\\_prgm/index.cfm](http://www.pewclimate.org/global-warming-in-depth/all_reports/mandatory_ghg_reduction_prgm/index.cfm). Given that diffusion of the emissions, if there were a NAAQS for CO<sub>2</sub>, and assuming that the NAAQS called for reductions from current levels, every state would be in non-attainment, with no realistic control over achieving attainment given emissions from throughout the world. Titles I and II of the Clean Air Act do not establish such a Sisyphean regime.

The adoption of Title VI of the Clean Air Act confirms that Titles I and II do not reach CO<sub>2</sub> or greenhouse gases. Addressing the problem of stratospheric ozone depletion, Congress created new regulatory authority for EPA. See CAA §§ 601-618 (Title VI), 42 U.S.C. §§ 7671-7671q. In so doing, Congress recognized the regulatory limits of Titles I and II of the Act. Like greenhouse gases, anthropogenic substances that deplete stratospheric ozone are emitted around the world and are very long-lived. Their depleting effects -- and the consequences of those effects -- occur on a global scale. The problem does not manifest itself in the ambient air, but rather in a depletion of the ozone layer some 26,000 to 52,000 feet above sea level, depending on latitude, and continuing up to approximately 160,000 feet. Reitze, AIR POLLUTION CONTROL LAW 385-86. (2001).

Congress plainly did not assume that the general regulatory provisions of Title I and Title II -- or the definitional language in Section 302(g) -- of the Clean Air Act impliedly delegated authority to EPA, California, or any Section 177 state to address stratospheric ozone depletion. To the contrary, Congress added specific stratospheric ozone protection measures to the Act in the 1977 amendments. CAA §§ 150-159, 42 U.S.C. §§ 7450-7459 (repealed 1990). These provisions provided for the study of stratospheric ozone depletion, recognized the global nature of the issue, and called for negotiation of international agreements to ensure world-wide participation in research and control of stratospheric ozone-depleting substances. *Id.* This language did not result in any meaningful action, however, and was ultimately replaced by Title VI, added as part of the 1990 Clean Air Act amendments. Title VI provides that EPA will coordinate with developing countries to implement the Montreal Protocol, CAA § 617(b), 42 U.S.C. § 7671p(b), and expressly delegates authority to EPA to regulate specified ozone-depleting substances. See CAA §§ 604, 605, 42 U.S.C. §§ 7671c-7671d.

Importantly, Congress did not consider the new Title to spell out existing EPA jurisdiction. Rather, it viewed Title VI as “an *expansion of existing statutory authorities.*” S. Rep. No. 101-228 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3770 (emphasis added). If EPA

had already possessed such regulatory authority under Section 202(a) before passage of Title VI, then Title VI was in large measure superfluous. However, it is “a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). Given that Section 202(a) cannot reasonably be read as authorizing control of emissions that deplete stratospheric ozone, neither can it be read to authorize regulation of greenhouse gases as “pollutants.”

Finally, Congress would not grant EPA, much less any Section 177 state, authority to regulate motor vehicle greenhouse gas emissions, particularly CO<sub>2</sub>, in an oblique manner. If Pennsylvania and California can only justify their legal authority over CO<sub>2</sub> by emphasizing silence in the Clean Air Act or cryptic language concerning emissions or pollutants, then legal authority is plainly lacking. Regulation of CO<sub>2</sub> is an issue of surpassing political, economic and social magnitude. “Congress could not have intended to delegate a decision of such economic and political significance to an agency” -- either the Department, CARB, or EPA -- “in so cryptic a fashion.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). When delegating authority to agencies, Congress does not “hide elephants in mouseholes.” *Am. Trucking Ass’n v. Whitman*, 531 U.S. 457, 468 (2001). Authority over such matters does not reside in the crevices of federal statutes, and it would be incongruous and absurd to assert that even if EPA is barred, a Section 177 state may proceed on its own. If Congress has not authorized EPA’s regulation, then it surely has not authorized Pennsylvania’s, as any reader of the plain text of Section 209(a) and (b) must conclude.

Before Pennsylvania, or any other state can piggy-back upon California’s greenhouse gas regulation, it must identify what source of authority in the Clean Air Act permits its regulation of carbon dioxide and greenhouse gases. The Department should explain whether carbon dioxide and greenhouse gases are “pollutants” under the Clean Air Act subject to regulation by EPA under Section 202(a), and whether EPA could promulgate under Section 202(a) regulations identical to those California proposes.

**2. The Proposed Standards Are Not “Consistent With Section 202(a)” Because EPA Cannot Adopt The MAC Design Standards Under Section 202(a).**

As explained above, proposed Chapter 126’s standards are not “consistent with section 202(a)” because EPA can only regulate traditional “pollutants” (*i.e.*, air contaminants) under Section 202(a). Substances such as HFC-134a are not “pollutants” that EPA can regulate under Section 202(a), so therefore neither may California under Section 209(b)(1)(C), nor Pennsylvania under Section 177. Indeed, EPA regulates emissions that affect stratospheric ozone under Title VI of the Clean Air Act, not Section 202(a). There is, however, an additional problem with Pennsylvania’s adoption of the California proposal regarding MAC. The proposed “A/C Direct Emissions Allowance” and “A/C Indirect Emissions Allowance” are design standards, requiring among other things “multiple o-rings, seal washers, or metal gaskets,” and hoses of “ultra-low permeability barrier or veneer.” EPA cannot promulgate such design standards under Section 202(a). EPA’s authority to issue such design standards arises from Title VI. Given that Section 202(a) does not authorize design standards, neither CARB nor Pennsylvania can promulgate design standards “consistent with section 202(a).”

EPA generally prescribes “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.” Section 202(a)(1) (emphasis added). EPA thus sets a “quantitative” level of emissions, which tracks the Supreme Court’s interpretation of “emission standard” in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 286 (1978), as a quantitative standard. The levels set for motor vehicles are typically expressed in grams per mile, as Congress itself expressed various motor vehicle emission standards in the 1990 amendments found at Section 202(b).

To the extent EPA has authority to set standards *other* than “standards applicable to the emission of any air pollutant,” such as design standards, Congress expressly provided the narrow types of design specifications that were permissible. For example, “the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles.” Section 202(a)(5)(A). After similar consultation, EPA may promulgate “vehicle-based (‘onboard’) systems for the control of vehicle refueling emissions.” Section 202(a)(6). The general authority is to set a numerical, quantitative emission performance standard, and it is only by particular, narrow authority that the Administrator may impose design standards.

The legislative history from the very beginning of the Clean Air Act explains this regulatory structure for motor vehicles. Section 202(a) originated with the 1965 Clean Air Act, Pub. L. N. 89-272 (1965). That first version of Section 202(a) mandated that the Secretary of Health, Education and Welfare “prescribe as soon as practicable standards, applicable to the emission of any kind of substance” from new motor vehicles. The design of control technology was left to manufacturers. The Senate Report accompanying the 1965 law stated that “[t]he Committee . . . believe[s] that the manner of meeting the standards, whether by engine modification or by attaching a device, should be left to the manufacturer’s determination.” Senate Comm. on Public Works, Clean Air Act Amendments and Solid Waste Disposal Act, S. Rep. No. 192, 89th Cong., 1st Sess. 4 (1965).

When Congress amended the Clean Air Act in 1970, it left the key terms of Section 202(a) in the 1965 Act in place. In addressing the authority of the new Environmental Protection Agency, Congress reaffirmed the original understanding that the agency’s task was limited to setting emissions performance standards. As Representative Rogers stated during the floor debate on the fuels additives provisions of Title II:

[W]e did not give authority ... for the Secretary to go in and tell the companies how to make gasoline. We do not tell them how to make an automobile engine. We do not want to get into that and do not want the Federal Government to do it .... We are not going to permit that.

1970 Leg. Hist. at 854 (June 10, 1970). On the Senate side, Senator Nelson, discussing the stringent 90 percent exhaust reduction standards added to Section 202 in 1970, had much the same view about the overall regulatory scheme:

[T]his bill does not dictate technology. The measure simply states that it shall be the national policy to have a clean automobile engine in 5 years. It issues a public

challenge to the automobile industry to devote their vaunted technological and manufacturing resources to the task of meeting this goal.

1970 Leg. Hist. at 379 (Sept. 22, 1970). Senator Nelson was typical of the supporters of the 1970 amendments who put their faith in “technology-forcing” performance standards that did not presume to specify vehicle designs.<sup>1</sup> Consistent with the intent of Congress, EPA and California relied on performance standards. As the D.C. Circuit was able to conclude in 1979, “Congress intended the word ‘standards’ in section 209 to mean quantitative levels of emissions.” *Motor & Equip. Mfrs. Assn. v. EPA*, 627 F.2d 1095, 1112 (D.C. Cir. 1979). EPA had also “consistently ... confin[ed] [standards] to regulations on quantitative levels of emissions.” *Id.* at 1113.<sup>2</sup>

Neither California nor Pennsylvania has yet cited any authority under Section 202(a) by which EPA could promulgate the type of design standards proposed for MAC. Such authority must exist in order for the proposed designed standards to be “consistent with section 202(a),” 42 U.S.C. § 7543(b)(1)(C), or with Section 177, 42 U.S.C. § 7507.

**B. THE FEDERAL FUEL ECONOMY PROGRAM: The Proposed CO2 Emission Standards Are Expressly And Impliedly Preempted By The Federal Fuel Economy Program.**

For more than 25 years, the National Highway Traffic Safety Administration (“NHTSA”) has regulated the fuel economy of automobiles sold in the United States. NHTSA’s authority derives from the Energy Policy and Conservation Act of 1975 (“EPCA” or “the 1975 Act”), as amended, 49 U.S.C. §§ 32901-32919. The federal fuel economy program regulates fuel economy by way of a CO2 test procedure, and the CO2 emissions of the vehicle are then converted to the metric of miles/gallon. The proposed CO2 emission standards are thus every bit as related to fuel economy as the federal fuel economy standards themselves, with the exception that Pennsylvania and California have not gone the last regulatory inch of converting the carbon dioxide emissions to a miles/gallon metric.

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<sup>1</sup> See generally 1970 Leg. Hist. at 385 (Sen. Cooper, Sept. 22, 1970) (“The committee ... proposes to establish emission standards for automobiles based upon requirements related to ambient air quality rather than technological or economic feasibility. Through this mechanism the committee expects to develop maximum incentive to stimulate new technical and economic means of reducing vehicle emissions.”); Senate Comm. on Public Works, S. Rep. No. 1196, 91st Cong., 2d Sess. 24, reprinted in 1970 Leg. Hist. 397, 424 (“The Secretary is expected to press for the development and application of improved technology rather than be limited by that which exists. In other words, standards should be a function of the degree of control required, not the degree of technology available today.”).

<sup>2</sup> CARB’s 1990 zero-emission standard is perfectly consistent with a “quantitative” level of emissions. Vehicles subject to the standard must “produce zero exhaust emission of any criteria pollutant (or precursor pollutant) under any and all possible operational modes and conditions.” 13 C.C.R. § 1962(a).

As explained below, the federal fuel economy program presents a litany of preemption problems, under virtually any theory of federal preemption, for the proposed CO2 emission standards. Pennsylvania should, at the very least: (1) explain how the proposed CO2 standards are not related to fuel economy standards, (2) explain how the proposed regulation of motor vehicle CO2 is consistent with NHTSA's regulation of CO2, (3) explain how the proposed regulation stands any better chance of success in the face of a challenge than did the CO2 emission standards that were part of the 2001 ZEV Amendments that were enjoined by a federal court and opposed by the United States government.

**1. NHTSA Administers A Comprehensive Federal Fuel Economy Program, Including CO2 Emission Standards For Motor Vehicles.**

Beginning with the 1978 model year, Congress provided for fleet-wide average fuel economy standards that would apply to all cars or trucks sold by a manufacturer in a given year, called the "corporate average fuel economy," or "CAFE," standards. Pub. L. No. 94-163, § 301, 89 Stat. 871, 902 (1975). Under EPCA, a manufacturer can produce and sell any combination of vehicles it chooses, provided its fleet-wide average fuel economy meets the applicable CAFE standard. The current CAFE standards are 27.5 miles per gallon ("mpg") for passenger automobiles and 20.7 mpg for light trucks. Manufacturers that fail to comply with the CAFE standards must pay civil penalties. Since 1978, NHTSA has collected more than \$500 million for violations of the CAFE standards.

The corporate averaging approach was critical to the goals of EPCA. Congress sought significant fuel economy increases through "a series of graduated mileage requirements" that would "ensure wide consumer choice by leaving maximum flexibility to the manufacturer" in deciding how to meet the specified CAFE levels. The authors of the 1975 Act emphasized that CAFE standards had to "be carefully drafted" in order to improve fuel economy without "unduly limiting consumer choice." H.R. Rep. No. 340, 94th Cong., 1st Sess. 87 (1975).

When setting or revising CAFE standards, NHTSA must specify "maximum feasible average" standards, and in doing so "consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). The impact of CAFE standards on motor vehicle safety has always been a critical factor in NHTSA's work. The complex rulemakings needed to establish and revise the CAFE standards have produced more than a dozen published decisions in the D.C. Circuit.

NHTSA and EPA regulate motor vehicle fuel economy by way of test procedures that measure a vehicle's CO2 emissions in grams/mile and then convert the findings to the metric of miles/gallon. As an initial matter, NHTSA establishes CAFE standards stated in miles/gallon. The standards for passenger vehicles and light trucks are respectively at 49 C.F.R. §§ 531.5 and 533.5. NHTSA's regulations require measurement of fuel economy by way of "procedures established by the Administrator of the Environmental Protection Agency." 49 C.F.R. §§ 531.6(a) & 533.6(b). EPA's regulations provide exhaust emission standard test procedures for HC, CO, and CO2. *See* 40 C.F.R. § 86.144. Those tests produce a grams/mile finding with respect to CO2. Pursuant to a formula found at 40 C.F.R. § 600.113-93(e), EPA then converts the CO2 emissions to miles/gallon. As is perfectly clear from the regulations, miles/gallon and

CO2 grams/mile are different metrics for measuring fuel consumption. NHTSA's miles/gallon fuel economy standards could just as easily be stated as CO2 grams/mile emission standards, and in fact, that would eliminate converting between the two. The public, however, is more conversant with miles/gallon.

Finally, the public will not be fully informed of the import of the proposed CO2 standards unless it is provided accurate information in the miles/gallon metric. As noted above, NHTSA converts back and forth between CO2 emissions and miles/gallon, and the public is conversant with miles/gallon measurements.

## 2. The Proposed CO2 Standards Are Expressly Preempted Under EPCA Because They Are "Related To" Fuel Economy Standards.

There are three types of preemption—express, conflict and field preemption—but they are not "rigidly distinct." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). EPCA expressly preempts the adoption of a regulation related to fuel economy standards. "[T]he task of statutory construction must in the first instance focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). In recently construing the express preemption of Section 209(a) of the Clean Air Act, the Supreme Court emphasized that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n*, 541 U.S. at 252 (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

EPCA's express preemption clause provides that "*no State ... shall have authority to adopt or enforce any law or regulation related to fuel economy standards*" once the federal regulations are in place. 49 U.S.C. § 32919(a) (emphasis added). The Supreme Court has authoritatively construed such use of the term "standards" to mean "that which 'is established by authority, custom, or general consent, as a model or example; criterion; test.'" *Engine Mfrs. Ass'n*, 541 U.S. at 252-53 (quoting Webster's Second New International Dictionary 2455 (1945)). Thus, any regulation "related to" a fuel economy "model," "criterion" or "test" is expressly preempted by EPCA.

When Congress preempts all laws "related to" a given subject matter, the Supreme Court has treated that formulation as indicating "broad" and "clearly expansive" preemptive intent. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 146-47 (2001) ("We have held that a state law relates to an ERISA plan 'if it has a connection with or reference to such a plan'" (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (same, in discussing Airline Deregulation Act). A "related to" preemption clause reaches state laws having either a "reference to," or a "connection with," the relevant federal regulatory domain. "Reference to" preemption occurs when "a State's law acts immediately and exclusively" upon the preempted field by express reference. *Cal. Div. of Labor Standards Enfcm't. v. Dillingham*, 519 U.S. 316, 325 (1997); *see, e.g., District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992). "Connection with" preemption occurs when there is "direct regulation" of the preempted field, or when a state law "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to" amount to substantive regulation

of the preempted field. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

The federal agency administering EPCA—NHTSA—interprets EPCA’s preemption clause in precisely this manner. In a brief filed in the United States Court of Appeals for the Ninth Circuit, it was the position of the United States that EPCA’s preemption clause “preempts any state statute or regulation ‘if it has a connection with or reference to’ fuel economy standards.” Brief of the United States, *Cent. Valley Chrysler-Plymouth v. Kenny* (9th Cir., filed Oct. 9, 2002) No. 02-16395, at 14 (quoting *Egelhoff*, 532 U.S. at 147). NHTSA later reiterated that interpretation in the Federal Register: “Our statute contains a broad preemption provision making clear the need for a uniform, federal system ... [the United States] has a substantial interest in enforcing the federal fuel economy standards and in ensuring that states adhere to the Congressional directive prohibiting them from adopting or enforcing any law or regulation related to fuel economy or average fuel economy standards.” 67 Fed. Reg. 77,015, 77,025 (Dec. 16, 2002).

The California CO2 emission standards are “related to” the federal standards because they have a direct connection with motor vehicle fuel economy, and because they directly reference the CO2 test procedures used by EPA for purposes of the federal fuel economy program. CO2 is released from any combustion process that includes fossil fuels, and the level of CO2 emitted from a gasoline-powered engine is directly related to its fuel consumption. The federal fuel economy program exemplifies this relationship, as it converts CO2 emissions to miles/gallon to determine compliance with NHTSA’s fuel economy standards. See 40 C.F.R. § 600.113-93(e). While the proposed chapter avoids discussion of this relationship between CO2 and fuel economy, it is an undeniable scientific and practical fact, and CARB’s Executive Officer has previously admitted as much under oath.<sup>3</sup> CARB staff apparently also admitted as

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<sup>3</sup> In federal litigation involving the 2001 ZEV amendments, *Central Valley Chrysler-Plymouth v. CARB*, No. CIV F-02-05017 (filed E.D. Cal., Jan. 3, 2002), CARB’s Executive Officer admitted precisely this relationship between CO2 and fuel economy. See Responses to Plaintiffs’ First Set of Requests for Admissions (filed Aug. 16, 2002) (admissions Nos. 2 & 6) (attached). Furthermore, the Executive Officer was deposed and made the same admissions:

Q: Mr. Kenny, you agree that a car’s emission of carbon dioxide is directly related to its consumption of gasoline. In other words, the more gasoline a car burns the more carbon dioxide it emits, correct?

A: I’m not an engineer, but that is my understanding.

...

Q: As you sit here today, do you know any way that a car could reduce its carbon dioxide emissions without also increasing its fuel economy?

A: No.

(Continued...)

much to the California Department of Finance when the AB 1493 was under consideration. On May 11, 2001, the Department of Finance stated that “the Air Board advises that the easiest and most cost-effective way to reduce carbon dioxide emissions is to make vehicles more fuel efficient.”<sup>4</sup> EPA has made the same observation, stating as recently as September 2003 that “[a]t present, the only practical way to reduce tailpipe emissions of CO<sub>2</sub> is to improve fuel economy.” Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).

Pennsylvania and California implicitly acknowledge the close relationship between fuel economy and the proposed greenhouse gas emissions standards in their cost-savings analysis. According to CARB, any increase in vehicle cost will be “more than offset” by “operating costs savings over the lifetime of the vehicle.” Regulatory Impact Statement at 19.

The proposed standards do not discuss “fuel economy.” However, neither Pennsylvania nor California can deny scientific and practical facts about the relationship between CO<sub>2</sub> and motor vehicle fuel economy. Those facts lead inexorably to express preemption. For example, Pennsylvania cannot maintain that CO<sub>2</sub> standards have an “tenuous, remote, or peripheral” effect upon motor vehicle fuel economy. See *Keystone Chapter, Assoc. Builders and Contractors, Inc. v. Foley*, 37 F.3d 945, 958 (3d Cir. 1994). Even if the Department were to insist that the effect is “remote,” preemption would still be warranted because that purportedly “remote” effect is “acute.” See *Travelers Ins. Co.*, 514 U.S. at 668.

Moreover, the proposed test procedures for CO<sub>2</sub> incorporate the federal test procedure used by EPA to determine compliance with NHTSA’s fuel economy standards. As incorporated by reference in proposed Chapter 126, the proposed test procedures state

the ‘city’ CO<sub>2</sub>-equivalent value calculation shall be measured using the ‘FTP’ [federal test procedure] test cycle (40 CFR, Part 86, Subpart B), as modified in Part II of these test procedures. Greenhouse Gas emissions used for the ‘highway’ CO<sub>2</sub>-equivalent value calculation shall be based on emissions measured using the Highway Test Procedures [the federal highway test procedure].”

This incorporation of the federal test procedures for CO<sub>2</sub> presents a clear “reference to” the federal fuel economy program, and by itself presents an adequate basis for express preemption.

If it is Pennsylvania’s position that regulating tailpipe CO<sub>2</sub> does not relate to fuel economy, then the Department should answer the following questions: (1) Are the statements made under oath by CARB’s Executive Officer in the federal litigation concerning the 2001 ZEV amendments no longer accurate? (2) Is there any practical alternative for reducing motor vehicle CO<sub>2</sub> other than increasing fuel economy? (3) If so, does the Department anticipate that a

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Deposition of Michael Kenny, *Central Valley Chrysler-Plymouth v. CARB*, No. CIV-F-02-50017, at 192:16-20, 194:8-11 (Aug. 20, 2002) (attached).

<sup>4</sup> Department of Finance Bill Analysis of AB 1058 (May 11, 2001).

method unrelated to improved fuel economy will be adopted by manufacturers? (4) Is the Department aware that NHTSA and EPA use CO<sub>2</sub> as a metric for fuel economy within the CAFE program? (5) What is the scope of express preemption under EPCA if carbon dioxide emission standards in any state choosing to adopt California standards are not preempted?

**3. The Proposed CO<sub>2</sub> Emission Standards Are Impliedly Preempted Because They Frustrate Federal Objectives And Intrude Upon NHTSA's Field Of Regulation.**

Even if there were some way in which the California's "CO<sub>2</sub> emission standards" could avoid express preemption under EPCA, implied preemption can still obtain. *See, e.g., Geier v. Am. Honda Co.*, 529 U.S. 861, 874 (2000). As stated earlier, the three types of preemption—express, conflict and field preemption—are not "rigidly distinct." *English*, 496 U.S. at 79 n.5. Any state regulation "which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). Where federal law deliberately permits a certain degree of "flexibility" for a regulated party, it violates the Supremacy Clause for a State to take away that flexibility. *See Fidelity Fed. Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 155 (1982). Further, "[w]hen the federal government completely occupies a given field [or an identifiable portion of it] ..., the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government." *In re TMI Litig. Cases Consol. II*, 940 F.3d 832, 858 (3d Cir. 1991) (quoting *Pac. Gas & Elec. Co. v. State Energy Conservation and Development Comm'n*, 461 U.S. 190, 212-13 (1983)).

The CO<sub>2</sub> standards present numerous conflicts with the objectives and parameters of the federal fuel economy program. As an initial matter, the CO<sub>2</sub> standards are based upon four classifications of vehicles: passenger cars (vehicle designed for personal transportation of up to 12 persons), LDT1s (light-duty trucks with a loaded vehicle weight of 0-3750 pounds), LDT2s (a LEV II light-duty truck with a loaded vehicle weight of 3751 pounds to a gross vehicle weight of 8500 pounds), and MDPVs (medium-duty passenger vehicles with a gross vehicle weight rating of less than 10,000 pounds). The resulting CO<sub>2</sub> standards, with conversions to miles/gallon,<sup>5</sup> are then as follows:

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<sup>5</sup> Presumably the Department does not dispute the conversions to miles/gallon, as NHTSA, EPA and the manufacturers routinely convert CO<sub>2</sub> emissions to miles/gallon as part of the federal fuel economy program. The federal conversion formula is codified at 40 C.F.R. §§ 600.113-93(e).

### The Department's Proposed CO<sub>2</sub>/Fuel Economy Standards

Model Year	Passenger Cars plus LDT1s		LDT2 plus MDPV	
	Grams CO <sub>2</sub> e/mile	Miles/gallon	Grams CO <sub>2</sub> e/mile	Miles/gallon
2009	323	27.4	439	20.2
2010	301	29.4	420	21.1
2011	267	33.2	390	22.7
2012	233	38.0	361	24.5
2013	227	39.0	355	25.0
2014	222	39.9	350	25.3
2015	213	41.6	341	26.0
2016	205	43.2	332	26.7

The federal vehicle categories and respective fuel economy standards are different. First, NHTSA has a fuel economy standard of 27.5 miles/gallon for “passenger automobiles,” 49 C.F.R. § 531.5, and a fuel economy standard in model year 2009 of a minimum of 23.1 miles/gallon for “light duty trucks,” 71 Fed. Reg. 17,566, 17,566 (Apr. 6, 2006). Second, NHTSA’s definition of “passenger automobiles” excludes any vehicle capable of off-highway transportation. 49 C.F.R. § 523.4. Third, NHTSA has changed its historic system for calculating corporate average fuel economy, and beginning in model year 2011 will be using on a mandatory basis a complex continuous mathematical function based on the independent variable of a vehicle’s footprint (its wheelbase and track width multiplied together). Fourth, NHTSA has introduced a transition period lasting from model years 2008 to 2010 in which manufacturers can use the complex continuous function driven by footprint to calculate fuel economy for each of its vehicles, or alternatively continue to use the traditional average fuel economy approach the agency had previously used. The resulting NHTSA fuel economy standards from model years 2008 to 2011 are as follows, with the traditional CAFE standards set out in the column marked “unreformed” (a compliance option ending in model year 2011), and with the new system of CAFE calculation set out in the column marked “reformed” CAFE. Note that unreformed CAFE standards are approximations based on applications of the complex continuous functions to projections of the year-to-year composition of covered manufacturers’ fleets. The table also assumes that the CAFE standards for passenger vehicles will remain unchanged from the present level of 27.5 miles per gallon, since there is currently no NHTSA proposal to change those standards:

### Federal Fuel Economy Standards

Model Year	Passenger Automobiles	Light-Duty Trucks (unreformed)	Light-Duty Trucks (reformed)	Vehicles GVWR 8500+
Miles/gallon				
2008	27.5	22.5	approx. 22.7 (optional)	No standard pursuant to 49 U.S.C. § 32901(a)(3)
2009	27.5	23.1	approx. 23.4 (optional)	“
2010	27.5	23.5	approx. 23.7 (optional)	“
2011	27.5	N/A	approx. 24.0 (mandatory)	approx. 24.0 (mandatory)

As the table demonstrates, there are several obvious discrepancies between the proposed CO<sub>2</sub>/fuel-economy standards and the federal standards. For example, in model year 2009 a “light-duty truck” under the federal standards would be part of a fleet that need only average 23.1 mpg, whereas in Pennsylvania that same light-duty truck, if it is an LDT1, will be part of a fleet that must average 27.4 mpg. An MDPV above 8500 GVWR would not be subject to federal fuel economy regulation in model years 2009 and 2010, but in Pennsylvania, if it is below 10,000 GVWR, it will be part of a fleet that must average 20.2 mpg in model year 2009 and 21.1 in model year 2010. Finally, beginning in model year 2011 (and possibly earlier for manufacturers who choose to switch to the “reformed” CAFE system in model years 2008, 2009, or 2010), the federal system of regulation is changed to a completely different paradigm of fuel economy standards determined by vehicle footprints, while the Pennsylvania system will continue to resemble the older, “unreformed” approach of NHTSA.

The divergence between the federal standards and the Pennsylvania standards presents at least five clear problems of implied preemption:

- (1) NHTSA occupies the “field” of fuel economy regulation, and Pennsylvania cannot supplement NHTSA’s regulation or substitute itself for NHTSA without intruding upon NHTSA’s role within the federal regulatory scheme;
- (2) any regulation of vehicles above 8500 GVWR during model years 2008 to 2010 conflicts with the federal regulatory regime;
- (3) heightened fuel economy standards in Pennsylvania and California (particularly if adopted by other states) will alter the choice of vehicles available to consumers under the federal program;

(4) any regulation of fuel economy without consideration of vehicle safety by NHTSA conflicts with the federal regulatory regime; and

(5) any regulation of fuel economy without consideration of the domestic automobile manufacturing industry conflicts with the federal regulatory regime.-

***NHTSA occupies the field of regulation.*** The scheme of regulation under EPCA is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973). Where Congress has occupied the field, “the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government.” *In re TMI Litig. II*, 940 F.3d at 858. Aside from the express preemption clause, the most obvious reason why Pennsylvania is not permitted to regulate fuel economy is that Pennsylvania is not NHTSA.

That EPCA preempts the field of fuel economy regulation is evident from four critical features of the statute. ***First***, Congress delegated to a federal agency the task of establishing fuel economy standards by balancing several factors that are of surpassing importance to the domestic economy, national energy security, and the personal safety of drivers and passengers. *See* 49 U.S.C. § 32902(f); *see also Public Citizen v. NHTSA*, 848 F.2d 256, 263-65 (D.C. Cir. 1988) (discussing NHTSA’s consideration of domestic “economic practicability”); *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 120 n. 11 (D.C. Cir. 1990) (discussing NHTSA’s consideration of safety). ***Second***, the “corporate average” model of regulating fuel economy maximizes flexibility for manufacturers based upon a national average, but maximum flexibility is only possible if the average is national. ***Third***, EPCA contains a broad express preemption clause, 49 U.S.C. § 32919(a). ***Fourth***, EPCA contains extremely narrow reservations of state authority. States may impose “disclosure” requirements only if those requirements are “identical” to the federal requirements, *id.* § 32919(b), and “[a] State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use,” *id.* § 32919(c). Congress plainly perceived that it was occupying a broad field of regulation if it concluded it had to reserve the States’ power to purchase the vehicles of their choosing.

Because EPCA occupies the field of fuel economy regulation, it is irrelevant as a legal matter whether Pennsylvania’s regulation of fuel economy advances similar purposes as regulation by NHTSA, conflicts with NHTSA’s regulation, or even “improves” upon NHTSA’s regulation. Where Congress has occupied the field, “the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government.” *In re TMI Litig. II*, 940 F.3d at 858. Pennsylvania is asserting a right to act in a field occupied by NHTSA. The CO2 standards are therefore preempted simply because Pennsylvania is not NHTSA.

***Any regulation of vehicles above 8500 GVWR during model years 2008 to 2010 conflicts with the federal regulatory scheme.*** The California regulations include CO2 standards for vehicles up to 10,000 GVWR so long as such vehicles are used for personal transportation. Federal law precludes regulation of vehicles with a GVWR above 6,000, unless specific findings

are made by NHTSA. 49 U.S.C. § 32901(a)(3). NHTSA must conclude that a CAFE standard for such vehicles is “feasible,” and that it “will result in significant conservation or the vehicle is substantially used for the same purpose as a vehicle rated at not more than 6,000 pounds” GVWR. NHTSA has concluded that only some vehicles up to 8500 pounds GVWR may be subject to CAFE. Above 8500 pounds GVWR, there is no CAFE standard for model years 2008 to 2010. Pennsylvania’s regulation of vehicles above 8500 pounds GVWR during model years 2008 to 2010 conflicts with the federal fuel economy program because the necessary findings by NHTSA have not been made, and the only regulatory authority reserved to the States, including Pennsylvania, is found at 49 U.S.C. § 32919(b) and (c).

*The proposed CO2 standards conflict with the federal regulatory scheme because the standards will alter the mix of vehicles available to consumers.* Congress sought significant fuel economy increases through “a series of graduated mileage requirements” that would “ensure wide consumer choice by leaving maximum flexibility to the manufacturer” in deciding how to meet the specified CAFE levels.<sup>6</sup> The authors of the 1975 Act emphasized that CAFE standards had to “be carefully drafted” in order to improve fuel economy without “unduly limiting consumer choice.” H.R. Rep. No. 340, 94th Cong., 1st Sess. 87 (1975). In other words, federal law regulates fuel economy without mandating which engines and propulsion systems consumers must buy or manufacturers must build. Manufacturers and consumers across the nation choose their own engines, so long as a manufacturer’s *nationwide* fleet of cars and trucks meets the applicable corporate average.

Restriction of the market in California and Pennsylvania deprives in-state and out-of-state consumers alike of the choices granted by EPCA and NHTSA’s fuel economy standards. By design, compliance with the CO2 standards will require the sale of different vehicles in Pennsylvania (most likely a fleet mix including more smaller, lighter vehicles) than the market would otherwise demand. That change in Pennsylvania will distort the market elsewhere, as vehicles required for compliance with the proposed standards will be less available to consumers elsewhere. Conversely, Pennsylvania residents will be deprived of vehicles (particularly larger, more powerful vehicles) that will be available to the rest of the country.

*Any regulation of fuel economy without consideration of vehicle safety conflicts with the federal regulatory scheme.* EPCA requires NHTSA’s consideration of the safety consequences of CAFE standards, and if NHTSA’s consideration of safety is inadequate, the standards will be remanded by a court of law. *See Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992). Smaller, lighter vehicles have better fuel economy than larger or heavier vehicles, but also generally afford their occupants less protection in crashes. The National Academy of Sciences (“NAS”) found that “the downweighting and downsizing that occurred in the late 1970’s and early 1980’s, some of which was due to CAFE standards, probably resulted in an additional 1,300 to 2,600 traffic fatalities” in one representative year

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<sup>6</sup> *Center for Auto Safety v. NHTSA* (1988) 847 F.2d 843, 863-64 (D.C. Cir.) (separate opinion of Buckley, J.), *vacated on unrelated grounds*, 856 F.2d 1557 (quoting S. Rep. No. 179, 94th Cong., 1st Sess. (1975)) (internal quotation marks omitted).

(1993), and ten times more injuries. The California standards are at odds with federal safety objectives for fuel economy standards.

*Any regulation of fuel economy without consideration of the domestic automobile manufacturing industry conflicts with the federal regulatory scheme.* NHTSA sets fuel economy standards at the “maximum feasible” level, and EPCA “outlines four general categories of factors to be considered in making that determination.” *Center for Auto Safety v. Peck*, 793 F.2d 1322, 1338 (D.C. Cir. 1986). In considering those factors, the courts and NHTSA have been guided by the Conference Report for EPCA, which instructed:

[T]he Secretary must weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers. Such difficulties, however, should be given appropriate weight in setting the standard in light of the small number of domestic automobile manufacturers that currently exist, and the possible implications for the national economy and for reduced competition associat[ed] with a severe strain on any manufacturer.

*Id.* (quoting No. 516, 94th Cong., 1st Sess. 154-55 (1975), 1975 U.S.C.C.A.N. 1995-96). In consideration of the domestic manufacturers, NHTSA has amended its fuel economy standards in the past, and courts have upheld those amendments as consistent with EPCA’s design. *See id.* (upholding amendment of light truck CAFE standard for model year 1985); *Public Citizen v. NHTSA*, 848 F.2d 256 (D.C. Cir. 1988) (upholding reduction of model year 1986 passenger automobile CAFE standard). Pennsylvania has not provided an analysis of the implications for domestic automobile manufacturers as part of the national economy, and therefore the proposed standards conflict with federal objectives.

**4. California and Pennsylvania Cannot Avoid Preemption By Avoiding Use Of “Fuel Economy” In All Formal Regulatory Documents And Instead Insisting That Only “Emissions” Are Being Regulated.**

Federal preemption under the EPCA cannot be avoided simply because the words “fuel economy” are never uttered (all references instead being to “carbon dioxide standards” or “greenhouse gas emissions”). An assertion that federal standards do not address climate change emissions is inconsistent with the Supreme Court’s treatment of federal preemption. A state cannot “mask” the true “purpose and effect” of a law merely by how it has “described and categorized” that law. *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 13-14 (1983); *see also Aetna Health Inc. v. Davila*, 124 S.Ct. 2488, 2498-2500 (2004); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 106-07 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926). The Supremacy Clause would be a dead letter if a state could avoid federal preemption merely by disavowing any offending intent; or as Pennsylvania appears to be attempting, by scrupulously attesting to a supposedly inoffensive intent.

The best recent example of the Supreme Court’s impatience with such semantic strategies is the Supreme Court’s treatment of the “purchase” restrictions adopted by the South Coast Air

Quality Management District in *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). Unlike the district court and the Ninth Circuit, which credited the distinction offered by the District between preempted “sales” restrictions and non-preempted “purchase” restrictions, the Supreme Court by the lop-sided vote of 8-1 held that “treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer’s right to sell federally approved vehicles is meaningless in the absence of a purchaser’s right to buy them.” *Id.* at 255. Rather than give any weight to the label offered by the District, the Supreme Court assessed the practical effect of the District’s regulation: “[a] command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular 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.” *Id.*

The distinction apparently drawn between preempted “fuel economy standards” and non-preempted “CO2 emission standards” will meet the same fate as the purported non-preempted “purchase” restrictions in *Engine Manufacturers Association*. Pennsylvania’s semantic devotion to “CO2 emission standards” is a distinction without a difference so far as EPCA and the Supreme Court are concerned. The practical effect of the proposed standards is no different than if Pennsylvania were to promulgate a mandate in terms of miles/gallon. The “CO2 emission standards” are not merely “related to” fuel economy standards; they *are* fuel economy standards.

The Department should be candid regarding the relationship between CO2 and fuel economy. If in fact the Department believes that constant reference to “CO2” instead of “fuel economy” will suffice to avoid federal preemption, then that position should be presented and defended. The Department should also offer any other defenses that it believes are available. The most likely defenses have obvious legal shortcomings:

- ***California’s special authority under Section 209(b) of the Clean Air Act is not a “savings clause” for purposes of EPCA preemption.*** As an initial matter, savings clauses are not portable from one federal statute to another.<sup>7</sup> Further, it is assumed that “Congress is aware of existing law when it passes legislation.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Thus, Congress was aware of California’s authority under Section 209(b) of the Clean Air Act when it passed EPCA in 1976 and broadly preempted every State -- with no exception for California much less any Section 177 state-- from adopting any regulation related to motor vehicle fuel economy standards. Any special exemption from EPCA’s preemption would be premised upon a theory that Congress was ignorant in drafting the text of EPCA’s preemption clause. But Congress was not ignorant,

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<sup>7</sup> See, e.g., *United States v. Locke* (2000) 529 U.S. 89, 105 (rejecting attempt by Washington to use savings clause in Oil Pollution Act as exemption from preemption for “whole subject of maritime oil transport”); *Bank of America v. City and County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 565 (rejecting use of savings clause from Electronic Fund Transfer Act to prevent preemption under the Home Owners’ Loan Act and the National Bank Act).

and there is no reason why Congress would have thought that the emissions regulation it had authorized under Section 209(b) would ever pose a direct conflict with fuel economy regulation. California's regulation of pollutants for over 30 years has posed no such conflict with EPCA because the regulation of traditional pollutants has, at most, rare and incidental impacts upon fuel economy.

- ***NHTSA's consideration of the effect of traditional emissions control measures on fuel economy does not authorize state regulation of CO<sub>2</sub>, i.e., fuel economy.*** To the extent traditional emissions control measures might diminish motor vehicle fuel economy, NHTSA is authorized to take those measures into account in assessing the "feasibility" of its fuel economy standards. See 49 U.S.C. § 32902(f). That provision does not permit Pennsylvania (or EPA, for that matter) to usurp NHTSA's regulation of fuel economy by way of "CO<sub>2</sub> emission standards." The contention that Congress would have passed an entire scheme for fuel economy regulation that could be unraveled by this single provision and overthrown by Pennsylvania, California or EPA under the banner of "CO<sub>2</sub> regulation" is absurd. "Congress could not have intended to delegate a decision of such economic and political significance to an agency" – either the Department, CARB or EPA – "in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). In short, when delegating authority to agencies, Congress does not "hide elephants in mouseholes." *Am. Trucking Ass'n v. Whitman*, 531 U.S. 457, 468 (2001).
- ***Regardless of the relationship between the Clean Air Act and EPCA, Pennsylvania has no Clean Air Act authority to regulate CO<sub>2</sub>.*** As discussed above in Section A., Section 209(b) of the Clean Air Act does not permit either Pennsylvania or California to regulate CO<sub>2</sub>. Thus, it is a moot point whether Pennsylvania might be able to regulate fuel economy were it acting pursuant to Sections 209(b) and 177 of the Clean Air Act.
- ***The Department cannot immunize the proposed regulation from preemption by arguing that manufacturers have compliance "options" other than satisfying the CO<sub>2</sub>/fuel-economy standards.*** EPCA's express preemption clause prohibits Pennsylvania from *adopting* a regulation related to fuel economy standards. A reviewing court will apply the preemption clause as written; it will not seek to measure the frustration of federal objectives when evaluating express preemption. See *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 n. 5 (1983). With respect to implied preemption, the existence of non-fuel-economy options would only be relevant if it were "very doubtful" that manufacturers would comply by means of the preempted CO<sub>2</sub>/fuel-economy method. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 n.25 (1978). Pennsylvania cannot credibly maintain that compliance with the CO<sub>2</sub>/fuel-economy standards is "very doubtful." As EPA has observed "[a]t present, the only practical way to reduce tailpipe emissions of carbon dioxide is to improve fuel economy." Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).

5. **The Proposed “CO2 Emission Standards” Are Legally Indistinguishable From The Preempted “CO2 Reduction Method” In *Central Valley Chrysler-Plymouth v. CARB*.**

Pennsylvania is not regulating on a clean slate. In the 2001 amendments to the Zero Emission Vehicle (“ZEV”) mandate, CARB provided one method of compliance with the ZEV quota that was referred to as the “CO2 Reduction Method.” For a qualifying gasoline-electric hybrid vehicle, the “CO2 Reduction Method” converted miles per gallon to a mass of CO2 released per mile. The CO2 level of the hybrid vehicle was then compared to “class average CO2 production” values specified in the ZEV rule. If the hybrid’s “CO2 savings” exceeded the “class average CO2 production” by a specified amount, the hybrid qualified for compliance credit. *See* 13 C.C.R. § 1962(c)(4)(B)(1) (2001).

General Motors and DaimlerChrysler sued CARB arguing that the 2001 ZEV amendments, including the CO2 Reduction Method, were related to fuel economy and conflicted with NHTSA’s role as the exclusive regulator of fuel economy. A federal court enjoined ARB’s Executive Officer from enforcing the ZEV amendments. *See Central Valley Chrysler-Plymouth v. CARB*, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal., June 11, 2002). The court found an unlawful “purpose” and “practical effect of regulating fuel economy,” and held that other objectives -- such as reducing traditional air pollution or reducing greenhouse gas emissions -- were irrelevant because “[p]reemption cannot be avoided by intertwining preempted requirements with nonpreempted requirements.” *Id.* at \*13.

CARB’s Executive Officer appealed to the Ninth Circuit, and the United States entered the case on the side of the manufacturers. The United States said of CARB’s regulation, including the CO2 Reduction Method: “At bottom, the State asks this Court to ignore the statutory language ... [w]hen state regulations by their terms make compliance by the vehicle manufacturer dependent in whole or in part on a vehicle’s fuel economy, as these regulations do, the terms and purpose of the preemption provision are implicated directly.” Brief of the United States, *Central Valley Chrysler-Plymouth v. Kenny*, No. 02-16395 (9th Cir., filed Oct. 9, 2002). NHTSA later reiterated the scope of federal law and concluded that EPCA preempts state greenhouse gas regulations. *See* 71 Fed. Reg. at 17,654-17,670.

As has already been noted, in the course of the litigation CARB’s Executive Officer admitted under oath that CO2 is not a localized pollutant similar to any of the criteria pollutants, and that there is a direct relationship between CO2 emissions and fuel economy. The Executive Officer’s brief on appeal in the Ninth Circuit also formally conceded that “California could not ... enact a statute that simply set CAFE standards at a different level than the federal government.” Appellant’s Opening Brief at 34, *Central Valley Chrysler-Plymouth v. Kenny*, No. 02-16395 (9th Cir., filed Aug. 21, 2002). The CO2 standards are nothing other than California’s revision to the federal CAFE standards. They cannot be adopted or enforced by Pennsylvania pursuant to Section 177 or any other authority.

**C. FEDERAL FOREIGN POLICY: The Proposed Regulations Are Preempted Because They Conflict With The U.S. Government's Efforts To Reduce Global Warming Through Diplomatic Initiatives.**

Because greenhouse gas emissions pose a global problem, the United States has recognized the need for a global solution. Over the past two decades, the United States, through statutes, treaties, and executive action, has determined that international commitments represent the only effective way to reduce the global production of CO2 emissions and to share that burden fairly throughout the world. But Pennsylvania has overlooked the fact that unilateral efforts by states to reduce motor vehicle carbon dioxide emissions will frustrate established foreign policy. Moreover, Pennsylvania cannot identify a single positive source of federal authority that permits such regulation. The foreign affairs power and the Supremacy Clause of the U.S. Constitution therefore preempt the proposed regulations.

**1. The Constitution Prohibits A State From Taking Measures That Interfere With The Foreign Policy Of The United States.**

The U.S. Supreme Court recently voided a California statute on the ground that it interfered with the President's authority to conduct the nation's foreign affairs. In *American Insurance Association v. Garamendi*, 593 U.S. 396 (2003), the Court recognized that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nation's that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.'" *Id.* at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381-82 n.16 (2000) ("The peace of the WHOLE ought not to be left at the disposal of the PART.") (quoting *The Federalist* No. 80, at 535-36 (J. Cooke ed. 1961) (A. Hamilton)).

The California law in question required insurers to disclose the details of any Holocaust-era policies sold in Europe, so as to facilitate victims' ability to recover on policies confiscated during that era. Because the President had negotiated executive agreements to promote the voluntary disclosure and settlement of Holocaust-era claims, the Supreme Court held that California's attempt to force insurance companies to disclose the policies, on pain of regulatory sanctions, constituted a clear conflict with federal foreign policy and therefore was unconstitutional. See *Garamendi*, 593 U.S. at 427 ("[T]he evidence here is more than sufficient to demonstrate that the state Act stands in the way of the President's diplomatic objectives.") (quotation and original alterations omitted). The U.S. Supreme Court therefore recognized that a state may not enact a regulation that interferes with the Executive Branch's conduct of foreign policy.

That preemptive force is even stronger when the President's foreign policy has legislative sanction. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Court held that federal law preempted a Massachusetts law that attempted to promote human rights in Burma by prohibiting state contractors from doing business in that country. In reaching this conclusion, the Court relied upon the existence of a federal law that also sought to promote human rights by, *inter alia*, granting the President the authority to impose sanctions and directing the President "to work to develop 'a comprehensive, multilateral strategy to bring democracy to and improve

human rights practices and the quality of life in Burma.” *Id.* at 369 (quoting § 570(c)). The Court held that Massachusetts could not take unilateral action to promote human rights, where Congress had directed that the President have the flexibility to proceed multilaterally. In the face of this established federal policy, Massachusetts had no power to “impos[e] a different, state system of economic pressure” even though it sought to achieve the same result. *See id.* at 376.

These cases clearly hold that the Constitution prohibits a State from enacting regulations that interfere with the federal government’s conduct of foreign policy. As the Court recognized, “[t]he conflicts are not rendered irrelevant by the State’s argument that there is no real conflict between the statutes because they share the same goals,” or because some regulated parties “may comply with both sets of restrictions.” *Id.* at 379. The Constitution provides exclusive authority to the federal government to deal with global problems and conduct international diplomacy. The State may not undermine the “President’s capacity ... for effective diplomacy” by taking unilateral action to address such a problem. *Id.* at 381.

**2. Pennsylvania’s Proposal Would Interfere With Established Federal Efforts To Combat Climate Change Through Multilateral International Agreements.**

Pennsylvania’s regulations constitute precisely such unilateral action, because they seek to reduce greenhouse gas emissions unilaterally in conflict with the expressed foreign policy of the United States. As the U.S. Environmental Protection Agency recently recognized, “Unavoidably, climate change raises important foreign policy issues, and it is the President’s prerogative to address them.” 68 Fed. Reg. 52,931 (Sept. 8, 2003).

For the past 20 years, the United States has worked with its allies abroad in an effort to develop a comprehensive, multilateral plan to reduce manmade CO<sub>2</sub> emissions. These efforts have repeatedly been sanctioned by Acts of Congress. In the Global Climate Protection Act of 1987, for instance, Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change. *See* 22 U.S.C. § 2651 note. Pursuant to that law, the Environmental Protection Agency and the State Department sent a report to Congress in the early 1990’s, stressing the global nature of the climate change problem calling for “international consensus” and a “comprehensive” approach to “addressing potential climate change.”

President George H.W. Bush took the first step towards developing that international consensus by signing the United Nations Framework Convention on Climate Change (the “UNFCCC”), which was ratified by the Senate in 1992. Sen. Exec. Rep. No. 102-55, 102d Cong., 2d Sess. (1992), at 9. The UNFCCC recognized that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.” The treaty established a framework for international cooperation in an effort to “stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” UNFCCC, art 2. Through the UNFCCC, the parties undertook to review their own national policies on greenhouse gases and to work together to negotiate future, binding commitments by which the nations of the world would agree to reduce greenhouse gas emissions.

The United States and other members of the UNFCCC worked to develop this multilateral framework through the Kyoto Protocols to the UNFCCC. While the Kyoto Protocol was being negotiated in 1997, the Senate adopted by a 95-0 vote the Byrd-Hagel Resolution, which stated that the United States should not sign any protocol that would mandate new commitments to reduce U.S. greenhouse gas emissions unless the Protocol also mandated new commitments from developing countries as well. *See* S. Res. 98, S. Rep. No. 105-54. Because the final draft of the Protocols provided only for reductions in emissions from developed countries, President Clinton did not submit the Kyoto treaty to the Senate for ratification.

In subsequent statutes, Congress continued to express its opposition to any measure that would require the United States to reduce greenhouse gases, absent an international agreement involving both developed and developing countries. On several occasions, Congress attached riders to federal appropriation bills to prohibit the Executive Branch from using funds “to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol” without the ratification of that treaty by the Senate. *See, e.g.*, Pub. L. 105-276, 232.

President George W. Bush has since stated that he agrees with Congress’s view of the Kyoto Protocols. Rather than calling for the adoption of the Kyoto framework, he will seek to promote new technology and encourage voluntary measures to reduce CO2 emissions. At the same time, he will work to negotiate a truly multilateral treaty that will include commitments from all of the leading producers of greenhouse gases.

In the face of current diplomatic overtures, the Executive Branch has stated authoritatively that the United States should not take unilateral commitments to reduce greenhouse gases. As the U.S. Environmental Protection Agency has recently explained, such unilateral commitments could weaken the President’s diplomatic efforts:

Unilateral EPA regulation of motor vehicle GHG emissions could ... weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. Considering the large populations and growing economies of some developing countries, increases in their GHG emissions could quickly overwhelm the effects of GHG reduction measures in developed countries. Unavoidably, climate change raises important foreign policy issues, and it is the President’s prerogative to address them.

68 Fed. Reg. 52,931 (Sept. 8, 2003). As the EPA recognized, the United States faced the same problem with regard to stratospheric ozone depletion. Early U.S. controls on emissions were not matched by reductions in other nations, and indeed, over time, the U.S. reductions were overmatched by increases in other countries. *See id.* The issue ultimately was resolved by an international agreement to limit the use of such chemicals under the Montreal Protocol on Substances that Deplete Stratospheric Ozone. *See id.*

Pennsylvania’s regulation of CO2 conflicts with clearly established federal policy to seek multilateral reductions of greenhouse gas emissions. The United States has committed itself to pursuing international cooperation by signing on to the UNFCCC, and since then, Congress has on several occasions enacted laws directing the President to obtain a multilateral agreement

before committing the United States to any mandatory reduction of CO2 emissions. Unilateral regulation could “weaken U.S. efforts” in this regard, *see id.*, and therefore Pennsylvania may not adopt regulations that “stand[] in the way of the President’s diplomatic objectives.” *Garamendi*, 539 U.S. at 427. Pennsylvania is proposing that the United States relinquish a valuable “bargaining chip” in multilateral negotiations by committing to reductions, at least in Pennsylvania, *ex ante*. *See Crosby*, 530 U.S. at 377. “Quite simply, if the [the proposed regulations are] enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.” *Id.* The Congress and the President have squarely rejected any such policy or strategy. Because the CO2 regulations conflict with existing federal foreign policy in this field, and diminish the President’s “economic and diplomatic leverage,” they are unconstitutional and preempted under the Supremacy Clause and foreign affairs provisions of the U.S. Constitution.

**D. FEDERAL ANTITRUST LAW: California’s Sections 1900(b)(9) and 1900(b)(13) Are Preempted by the Federal Antitrust Laws Because They Would Require Unlawful Cooperation by Competitors in the California Automobile Market.**

Sections 1900(b)(9) and 1900(b)(13) of California’s regulation cannot be enforced by Pennsylvania because they promote anticompetitive conduct that would violate the federal antitrust laws. According to this subsection, where one automaker owns 10% or more of the shares of another, the two companies may only meet their greenhouse gas obligations by coordinating key strategic decisions. The proposed rule therefore would appear to require competitors to engage in conduct that violates federal antitrust laws. Because Pennsylvania has no power to authorize violations of the federal antitrust laws, this proposed regulation is preempted by the Sherman Antitrust Act and cannot be enforced. *See, e.g., S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60 (1985).

Section 1900(b)(9) of the California rule provides that for purpose of applying the greenhouse gas requirements:

the annual sales from different firms shall be aggregated in the following situations: (1) vehicles produced by two or more firms, each one of which either has a greater than 10% equity ownership in another or is more than 10% owned by another; or (2) vehicles produced by any two or more firms if a third party has equity ownership of greater than 10% in each firm.

Section 1900(b)(13) of the California rule provides that for purpose of applying the greenhouse gas requirements:

Except as provided in the next paragraph, beginning with the 2009 model year, the annual sales from different firms shall be aggregated in the following situations: (1) vehicles produced by two or more firms, one of which is 10% or greater part owned by another; or (2) vehicles produced by any two or more firms if a third party has equity ownership of 10% or more in each of the firms; or (3) vehicles produced by two or more firms having a common corporate officer(s) who is (are) responsible for the overall direction of the companies; or (4) vehicles imported or distributed by all firms where the vehicles are

manufactured by the same entity and the importer or distributor is an authorized agent of the entity.

Identical provisions are also contained in Subparts B, C, and S, Part 86, Title 40, Code of Federal Regulations adopted as “California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles” Part I, Section B, under the definitions of “Intermediate Volume Manufacturer” and “Small Volume Manufacturer.”

Proposed Chapter 126 therefore deems two or more separate companies to be a single company in measuring the obligations under the new regulations. Under the rule, a single company cannot meet the greenhouse gas requirements simply by determining the number of different models of cars it sells in Pennsylvania, the fuel efficiency of those models, and the total average fuel efficiency of its Pennsylvania fleet. Rather, that company must share this information with potential competitors and coordinate product and marketing decisions, so long as one of the competitors has a 10% interest in the other.

The contemplated coordination would appear to be contrary to federal antitrust law. The exchange of production and supply information may supply “an attractive basis for cooperative, even if unexpressed ‘harmony’ with respect to future prices.” *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398 (1921)). The antitrust laws therefore discourage competitors from exchanging supply information, and they squarely prohibit any agreements to restrict output. Moreover, “[i]nformation exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.” *Todd v. Exxon*, 275 F.3d 191, 198 (2d Cir. 2001).

The fact that proposed Chapter 126’s aggregation sections apply only where a manufacturer owns a 10% interest in the competitor would not be enough to save the companies from antitrust scrutiny. Two or more corporations are capable of violating the antitrust laws unless there is economic unity between the two firms. See *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773-74 (1984). While a parent corporation and its subsidiary may lawfully coordinate their business decisions, in the absence of economic unity the fact that two competitors share some common economic interests will be insufficient to immunize otherwise anticompetitive conduct. *Siegel Transfer*, 54 F.3d 1132. CARB’s Sections 1900(b)(9) and 1900(b)(13) may treat these automakers as one economic unit upon satisfying the 10 percent threshold, but the federal antitrust laws recognizes those companies to be separate competitors prohibited from entering into anticompetitive agreements.

Proposed Chapter 126 encourages the exchange of supply information, the coordination of supply decisions, and the coordination of product designs. The regulation forces two or more otherwise competing manufacturers to make joint decisions on these matters in order to comply with their greenhouse gas and low emission vehicle obligations. The rule therefore induces conduct that may violate the Sherman Act. Because the Sherman Act preempts any conflicting state regulation, the proposed incorporation of Sections 1900(b)(9) and 1900(b)(13) should not be approved. As the California Supreme Court has held, where “the policies underlying the Sherman Act are clearly violated” by a state ordinance, “the policies underlying the Sherman Act

must prevail” and the state regulation is invalid. *Rice v. Alcoholic Beverages Control Appeals Board*, 579 P.2d 476, 494-95 (Cal. 1978).

**E. THE FEDERAL COMMERCE CLAUSE: If the Proposed Rule Were Implemented, the Burden on Interstate Commerce So Far Exceeds Any Putative Benefits that the Proposed Rule Would Violate the Dormant Commerce Clause.**

The proposed regulation is invalid under the Dormant Commerce Clause of the U.S. Constitution if it “excessively” burdens interstate commerce in “relation to [its] putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under *Pike*, “the practical effect of [a law] must be evaluated not only by considering the consequences of the statute itself, but also by considering ... what effect would arise if not one, but many or *every*, [jurisdiction] adopted similar legislation.” See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O’Connor, J., concurring).

The burdens on interstate commerce flow naturally from the proposed regulatory design. As an initial matter, compliance in Pennsylvania will require a different mix of vehicles less responsive to consumer demand than manufacturers would otherwise produce. In order to sell those vehicles in Pennsylvania, and thereby comply with the proposed regulation, manufacturers will have no choice but to offer deep discounts to Pennsylvania purchasers. Those discounts to Pennsylvania residents will require higher prices throughout the remainder of the national market. Moreover, as discussed above, the vehicles that necessarily must be sold in Pennsylvania will be less available to the rest of the country.

The distorting effect is then compounded if, as the Executive Officer encourages, California’s regulatory scheme spreads to other jurisdictions. See Staff Report at ix. In that case, as more States seek to privilege their own residents at the expense of the rest of the country, the burden on the States not following California increases.

These burdens on interstate commerce are not justified by any credible local benefits. Whatever degree of fuel conservation (i.e., carbon dioxide reduction) is achieved in Pennsylvania (as well as California and other Section 177 states) would either be offset within the national CAFE system, or would be trivialized by the increase in emissions from developing countries. CARB’s Executive Officer does not deny the *de minimis* nature of any putative benefits, and neither can Pennsylvania, but instead attempts to justify proceeding with the proposed rule as essentially costless and of symbolic value. See Staff Report at viii-ix. In so arguing, the Executive Officer and Pennsylvania overlook the burdens on interstate commerce outside of California and Pennsylvania. Given those burdens and the lack of any local benefit, if the California regulations falter under the Dormant Commerce Clause.

**Conclusion**

For the reasons explained above, enforcement of the California regulations in Pennsylvania would be inconsistent with federal law.

**APPENDIX B**  
**EXHIBITS**

1 **BILL LOCKYER**, Attorney General  
of the State of California  
2 **JOHN DAVIDSON**,  
Supervising Deputy Attorney General  
3 **ANITA E. RUUD**, (State Bar No. 72482)  
**GAVIN G. McCABE**, (State Bar No. 130864)  
4 **MARK W. POOLE**, (State Bar No. 194520)  
Deputy Attorneys General  
5 455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
6 Telephone: (415) 703-5582  
Facsimile: (415) 703-5480

7 Attorneys for Defendant Michael P. Kenny  
8

9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11 FRESNO DIVISION

12  
13 **CENTRAL VALLEY CHRYSLER-**  
**PLYMOUTH, INC., DAIMLERCHRYSLER**  
14 **CORP., FRONTIER DODGE, INC., GENERAL**  
**MOTORS CORP., HALLOWELL**  
15 **CHEVROLET COMPANY, INC., KELLER**  
**MOTORS, INC., KITAHARA PONTIAC-GMC-**  
16 **BUICK, INC., SURROZ MOTORS, INC., AND**  
**TOM FIELDS MOTORS, INC.**  
17  
18 Plaintiffs,  
19  
20 v.  
21 **MICHAEL P. KENNY, in his official capacity as**  
**Executive Officer of the California Air Resources**  
**Board,**  
22 Defendant.

Case No. CIV F-02-05017 REC SMS  
**RESPONSES TO PLAINTIFFS'**  
**FIRST SET OF REQUESTS FOR**  
**ADMISSIONS**  
Honorable Robert E. Coyle

23 PROPOUNDING PARTY: Plaintiffs Central Valley Chrysler-Plymouth, Inc., DaimlerChrysler  
24 Corp., Frontier Dodge, Inc., General Motors Corp., Hallowell  
25 Chevrolet Company, Inc., Keller Motors, Inc., Kitahara Pontiac-  
GMC-Buick, Inc., Surroz Motors, Inc., and Tom Fields Motors, Inc.  
26 RESPONDING PARTY: Defendant Michael P. Kenny, in his Official Capacity as Executive  
Officer of the California Air Resources Board  
27 SET NUMBER: One

28 ///



1           REQUEST FOR ADMISSION NO. 2. Admit that carbon dioxide is released from  
2 any combustion process that includes fossil fuels, such as the operation of a gasoline-powered  
3 vehicle, the burning of coal or natural gas in a power plant, or the operation of an industrial kiln.

4           RESPONSE TO REQUEST NO. 2. Admit.

5           REQUEST FOR ADMISSION NO. 3. Admit that the scientific literature shows that  
6 carbon dioxide disperses throughout the atmosphere, so that CO2 concentrations are roughly the  
7 same across the globe.

8           RESPONSE TO REQUEST NO. 3. Admit.

9           REQUEST FOR ADMISSION NO. 4. Admit that, unlike ground-level ozone and its  
10 precursors, or carbon monoxide and particulate matter, CO2 does not measurably accumulate in  
11 localized areas.

12          RESPONSE TO REQUEST NO. 4. Admit.

13          REQUEST FOR ADMISSION NO. 5. Admit that, until the events giving rise to this  
14 litigation, neither CARB nor any other State agency in California had tried to take any action that  
15 was intended to regulate CO2 emissions from motor vehicles.

16          RESPONSE TO REQUEST NO. 5. Following a reasonable inquiry, defendant  
17 lacks sufficient information and belief to admit or deny the matter stated in the request.

18          REQUEST FOR ADMISSION NO. 6. Admit that the level of carbon dioxide emitted  
19 from a gasoline-powered engine is generally related to its fuel consumption (the higher the level  
20 of a vehicle's fuel consumption, the greater tends to be its production of carbon dioxide).

21          RESPONSE TO REQUEST NO. 6. Admit.

22          REQUEST FOR ADMISSION NO. 7. Admit that motor vehicle fuel economy is  
23 regulated at the national level by the National Highway Traffic Safety Administration  
24 ("NHTSA"), a federal agency within the U.S. Department of Transportation.

25          RESPONSE TO REQUEST NO. 7. Admit.

26          REQUEST FOR ADMISSION NO. 8. Admit that NHTSA has established fuel  
27 economy standards for all new automobiles weighing less than 10,000 pounds GVWR and sold  
28 in the United States.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

--o0o--

CENTRAL VALLEY )  
CHRYSLER-PLYMOUTH, INC., et al., )  
 )  
Plaintiff(s), )  
 )  
vs. )  
 )  
CALIFORNIA AIR RESOURCES )  
BOARD, et al., )  
 )  
Defendant(s). )

No. CIV-F-02-50017 REC SMS

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BE IT REMEMBERED that on Friday, the 13th day of  
September, 2002, commencing at the hour of 12:30 p.m. thereof,  
at the offices of The Diepenbrock Law Firm, 400 Capitol Mall,  
Suite 1800, Sacramento, California, before me, Katherine L.  
Cardozo, a duly licensed shorthand reporter in and for the  
State of California, there personally appeared

MICHAEL KENNY

called as a witness herein, who being by me first duly sworn,  
was examined and testified as follows:

1 MS. RUUD: Again, calls for speculation.

2 THE WITNESS: I don't know, but I'm uncomfortable with  
3 essentially saying that is the only way of achieving the  
4 result.

5 Q BY MR. CLUBOK: Then I'm -- let's just keep it within  
6 your knowledge.

7 A Okay.

8 Q As you sit here today, do you know of anyway that a car  
9 could reduce its carbon dioxide emissions without also  
10 increasing its fuel economy?

11 A No.

12 Q And in your role as executive officer for the Air  
13 Resources Board, you've had the occasion to look into lots and  
14 lots of different kinds of automobile technologies, correct?

15 A Yes.

16 Q And in your role as executive officer for the Air  
17 Resources Board, you've had the opportunity and the  
18 responsibility for considering how all kinds of different  
19 technologies affect the operations of vehicles, correct?

20 A We have looked into a number of technologies as they  
21 affect the emissions of precursors to ozone and to precursors  
22 to particulate matter.

23 Q What are precursors to ozone?

24 A Hydrocarbon, knocks.

25 Q Hydrocarbon and knocks?

1 A Nothing that I can think of at the moment.

2 Q Have you ever heard of the phrase "criteria pollutant"?

3 A Yes.

4 Q What does that mean to you?

5 A The criteria pollutant is one of the eight pollutants  
6 that has been established with hourly standards in the State of  
7 California.

8 Q I'm sorry, with what standards?

9 A Hourly standards generally, or 24 hour standards. They  
10 have essentially levels at which those standards have been  
11 considered to be healthful or unhealthful on an hourly or a  
12 24-hour basis.

13 Q Does CARB have the ability to regulate criteria  
14 pollutants?

15 A CARB identifies the criteria pollutants and establishes  
16 the standards for them.

17 Q And what are the criteria pollutants that have been  
18 established by CARB?

19 A Let's see if I can remember all eight. Ozone, sulfur  
20 dioxide, particulate matter, total suspended particulates.

21 Q Say that one again.

22 A Total suspended particulates TSP. I don't think it's  
23 utilized anymore. There's a toxic methochloride. Carbon  
24 monoxide. I'm missing one or two.

25 Q I've got six there.