

When the Darkness Consumes the Light . . .

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INTRODUCTION

On July 22, 2002, after months of debate in the California legislature, California became the first state in the country to pass legislation directing its environmental protection agency to promulgate regulations establishing standards for greenhouse gas (“GHG”) emissions from new motor vehicles.¹ The California Legislature noted the following:

Projected future climate change may affect California in a variety of ways. Public health can suffer due to greater temperature extremes

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¹ Act of July 22, 2002, ch. 200, 2002 Cal. Legis. Serv. 95 (West) (codified at CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2008)).

and more frequent extreme weather events, increases in transmission of infectious disease, and increases in air pollution. California's agriculture industry is especially vulnerable to altered temperature and rainfall patterns, and new pest problems. Climate change can adversely affect California's forest ecosystems and the Sierra snowpack that functions as the state's largest reservoir. Sea level rise and storm surges could lead to flooding of low-lying property, loss of coastal wetlands, erosion of cliffs and beaches, saltwater contamination of drinking water, and damage to roads, causeways, and bridges.²

But, as the old adage goes, no good deed goes unpunished. In the months and years ahead, California found itself defending its new legislation and subsequently promulgating regulations as it diligently sought the requisite Clean Air Act waivers from the United States Environmental Protection Agency. California ultimately lost the battle but went on to appeal the denial. Simultaneously, California (and other states that adopted the regulations) defended the regulations against lawsuits from automobile manufacturers, automobile dealerships, and other preemption advocates. The challengers demanded federal courts enjoin California from implementing and enforcing the regulations on multiple grounds of preemption, winning those actions but then preparing to defend them on appeal.

The following discussion presents the story of California Assembly Bill 1493 ("AB 1493"). Section I acquaints the reader with the background of the AB 1493 regulations, as well as, the beginnings of the many preemption challenges against which California must defend. Section II then presents the arguments for and against Clean Air Act, Energy Policy and Conservation Act, and foreign policy preemption. Section III concludes the discussion with the author's summary of how and why each of the preemption challenges fails, ultimately asserting that the Federal Court of Appeals for the Ninth Circuit should find for California and facilitate timely implementation of California's AB 1493 standards.³

I. CALIFORNIA ASSEMBLY BILL 1493

This innovative and aggressive legislation, AB 1493, directed that "[n]o later than January 1, 2005, the [California Air Resource Board ("CARB")] shall develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."⁴ CARB defined GHGs as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, which are six widely-recognized such substances.⁵ In setting standards

² CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, REGULATIONS TO CONTROL GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES, FINAL STATEMENT OF REASONS 6-7 (2005), <http://www.arb.ca.gov/regact/grnhsgas/fsor.pdf> [hereinafter FINAL STATEMENT OF REASONS]; see § 1, 2002 Cal. Legis. Serv. at 95 (noting purpose of California legislature in enacting AB 1493, including importance of addition and benefit to State).

³ Even if the Ninth Circuit finds in California's favor in the two filed appeals, the Alliance of Automobile Manufacturers ("Alliance") and the Environmental Protection Agency ("EPA") will likely appeal to the U.S. Supreme Court. While the entire process may take years, there is always the possibility that the Alliance and EPA will not appeal, and the Ninth Circuit opinions will rule the day.

⁴ CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2008).

⁵ *Id.* § 42801.1(h).

that aim to achieve the maximum feasible and cost-effective reduction of GHGs, AB 1493 further directed that CARB⁶ must consider technological feasibility, creation of new jobs or new businesses, elimination of existing business, expansion of and competitive capacity of existing business throughout the state, ability to maintain and attract businesses in communities with the most exposure to air contaminants, and economic effects on automobile workers and affiliated businesses.⁷ CARB was also directed to provide automakers with “flexibility, to the maximum extent feasible consistent with this section,”⁸ including but not limited to “authorization . . . to use alternative methods of compliance.”⁹

Following enactment of the legislation, CARB immediately went to work on drafting regulations. Across the next two years, the CARB staff conducted numerous workshops, symposiums, and meetings at multiple locations throughout California. The public events covered a breadth of topics including current and projected levels of automobile emissions, recommended reduction technologies, potential economic impacts on consumers and businesses, general environmental impact, and environmental justice concerns.¹⁰ In its analysis of pertinent considerations directed by the California legislature, CARB relied primarily on a study conducted by the nationally recognized Northeast States Center for a Clean Air Future (“NESCCAF”) that used a simulation model incorporating automobile emissions, emissions reduction technology, and associated cost analyses.¹¹

On August 6, 2004, CARB released its proposed regulation order¹² and published a notice for a public hearing.¹³ CARB adopted the regulations on September 24,

⁶ The California Air Resource Board (“CARB”) is the division within the California Environmental Protection Agency (“CEPA”) that deals specifically with air pollution issues.

⁷ § 43018.5(c)(1)-(2)(F).

⁸ *Id.* § 43018.5(c)(3).

⁹ *Id.*

¹⁰ See California Air Resources Board, Climate Change for Mobile Sources, <http://www.arb.ca.gov/cc/ccms/workshops.htm> (last visited Jan. 6, 2009) (listing each of the public forums and associated documents). The following is a list of the public and board/staff presentations, workshops, symposiums, and meetings held throughout the research and draft process: Board Meeting (Sept. 26, 2002); Public Workshop in Sacramento, CA (Dec. 3, 2002); International Vehicle Technology Symposium in Sacramento, CA (Mar. 11-13, 2003); Climate Change Emissions Regulatory (“CCER”) Workshop: Standards and Economics in Sacramento, CA (Sept. 18, 2003); CCER Workshop: Alternative Compliance Strategies in Sacramento, CA (Oct. 14, 2003); Board update on CCER Progress in Sacramento, CA (Nov. 20, 2003); CCER Workshop: Environmental Justice Concerns in Sacramento, CA (Feb. 18, 2004); Technology Assessment Workshop on CCER and Light-Duty Vehicles in Sacramento, CA (Apr. 20, 2004); Environmental Justice Workshop in Oakland, CA (July 6, 2004); Regulatory Workshop, in Sacramento, CA (July 7, 2004); Environmental Justice Workshop in Fresno, CA (July 8, 2004); Environmental Justice Workshop in Pacoima, CA (July 13, 2004). *Id.*

¹¹ FINAL STATEMENT OF REASONS, *supra* note 2, at 7.

¹² CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR RULEMAKING, PUBLIC HEARING TO CONSIDER ADOPTION OF REGULATIONS TO CONTROL GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES A-1 (2004), <http://www.arb.ca.gov/regact/grnhsgas/isor.pdf> [hereinafter INITIAL STATEMENT OF REASONS].

¹³ See CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, NOTICE OF PUBLIC HEARING TO CONSIDER ADOPTION OF REGULATIONS TO CONTROL GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES (2004), <http://www.arb.ca.gov/regact/grnhsgas/notice.pdf> (displaying notice of public hearing to discuss adopting new emissions control regulations). A forty five day window for comments was opened and the public hearing was set to start September 23, 2004. *Id.* Following the two day hearing (September 23-24, 2004), CARB considered the testimony from the hearing and the offered written comments from the forty-five day comment period, and then modified some text of the proposed regulation and drafted

2004, noting four recommended modifications from the hearings that needed further attention.¹⁴ After approximately eleven months of drafting modifications, compiling additional supporting documentation, and engaging the public in multiple notice and comment sessions and open hearings,¹⁵ on August 5, 2005, CARB completed and submitted to the Office of Administrative Law (“OAL”) all final revisions to the proposed regulation, a *Final Statement of Reasons*, an executive order, and other supporting documents.¹⁶

CARB’s final analysis concluded that the promulgated regulation was feasible for all manufacturers in terms of both cost effectiveness and technological capacity.¹⁷ As far as introduction of the new technologies and future availability of particular types of light-duty vehicles, the board did not expect that manufacturers would withdraw or reduce production of any particular vehicles from the market.¹⁸ The board also estimated “CO₂ equivalent emissions benefits of the proposed regulation are 87,700 tons per day in 2020 and 155,200 tons per day in 2030.”¹⁹ If converted to annual totals, these figures yield “32 million tons per year in 2020 and 56.7 million tons per year in 2030.”²⁰ Even if, in the near term, there is a delay in consumers purchasing vehicles that meet the new GHG emissions standards because of increased initial purchase cost, CARB concluded that there “will be no significant adverse environmental impact”²¹ from the delayed fleet turnover.

Further, despite increased production costs that will certainly be passed onto consumers, CARB predicted that the offset from operating savings will net consumers in the aggregate an “annual savings of \$4,042 million in 2020 and \$6,799 million in 2030.”²² Overall, the board found that “the net effect of the regulation on

additional support documents. See also California Air Resources Board, Rulemaking on the Proposed Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, <http://www.arb.ca.gov/regact/grnhs gas/grnhs gas.htm> [hereinafter *CARB Proposed Regulations*] (last visited Nov. 22, 2008) (providing a list of links to all proposed and final rulemaking documents related to amendments to sections 1900 and 1961 and adoption of new sections).

¹⁴ FINAL STATEMENT OF REASONS, *supra* note 2, at 10. Without further modification and incorporation of the public’s insightful comments and pending waiver approval from the EPA, the regulations would otherwise have gone into effect in 2006. *Id.* The new standards were set for implementation starting with new passenger vehicles and light-duty trucks in model year 2009. *Id.* at 9.

¹⁵ *CARB Proposed Regulations*, *supra* note 13. The proposed modifications and support information was posted October 19, 2004, and a new fifteen day comment period started with a deadline set at November 5, 2004. *Id.* Following the second notice and comment period, and several months of drafting additional supporting documentation to support the proposed regulation, CARB opened a third notice and comment period from May 11-26, 2005. *Id.*

¹⁶ *Id.*

¹⁷ See FINAL STATEMENT OF REASONS, *supra* note 2, at 1-6 (discussing agency’s responses to comments about implementation of the act and agency’s assurances that act is feasible and maximizes cost-effectiveness).

¹⁸ *Id.* at 11-13.

¹⁹ *Id.* at 12.

²⁰ *Id.*

²¹ *Id.* at 13.

²² FINAL STATEMENT OF REASONS, *supra* note 2, at 12. CARB also explained that:

The fully phased in mid-term standards will result in an estimated average cost increase of \$1,064 for passenger cars and small trucks/SUVs, and \$1,029 for large trucks/SUVs. The staff analysis concludes, however, that these increased costs will be more than offset by operating cost savings over the lifetime of the vehicle. Using the average increase in vehicle prices associated with the fully phased-in regulation

the economy is expected to be small but positive.”²³ Finally, the analysis demonstrated that the money consumers save from vehicle operating costs will likely be converted into expenditures on other goods and services, lead to increased job opportunities and personal income, and allow businesses to remain competitive in the national market.²⁴

OAL approved the final rulemaking package and filed it with the California Secretary of State on September 15, 2005, to become operative on October 15, 2005.²⁵ Pursuant to the California Code of Regulations, the regulations were to take effect on January 1, 2006.²⁶ Finally, on December 21, 2005, in accord with the preemption waiver provision of section 209(b) of the Clean Air Act (“CAA”),²⁷ California applied to the U.S. Environmental Protection Agency (“EPA”) for regulatory review and request for waiver approval.²⁸

Simultaneously, a group of states,²⁹ local governments,³⁰ and private organizations,³¹ sued EPA for its failure to regulate motor vehicle GHGs at the federal level.³² EPA decided that before it could make a decision regarding California’s waiver request, it needed a judgment by the U.S. Supreme Court in *Massachusetts v. EPA*. In *Massachusetts v. EPA*, EPA argued that it “lacked authority under 42 U.S.C. § 7521(a)(1) to regulate new vehicle emissions because carbon dioxide is not an ‘air pollutant’ as that term is defined in § 7602.”³³ Further, EPA argued that even if it possessed authority, it would decline to exercise it because the regulations would be duplicative based on other agencies regulating in the field, would constrain the President in other negotiations, and would be a

(2016), and an assumed fuel price of \$1.74 per gallon, staff calculated that the increased vehicle payment minus the reduction in operating cost would result in a monthly savings of about \$3.50 to \$7.00. At higher fuel prices, the monthly savings increase.

Id. at 11.

²³ *Id.* at 13.

²⁴ *Id.*

²⁵ *CARB Proposed Regulations*, *supra* note 13.

²⁶ CAL. CODE REGS. tit. 13, § 1961.1(g) (2008).

²⁷ Clean Air Act § 209(b), 42 U.S.C. § 7543(b) (2006); *see* discussion *infra* Section II.A.

²⁸ *See* Letter from Catherine Witherspoon, Executive Officer, Cal. Air Res. Bd., to Stephen L. Johnson, Adm’r, U.S. Env’tl. Prot. Agency (Dec. 21, 2005), *available at* <http://www.arb.ca.gov/cc/docs/waiver.pdf>. For the documentation supporting the waiver request and referencing the effects of 72 Fed. Reg. 21,260 (Apr. 30, 2007), *see* California Air Resources Board, Climate Change for Mobile Sources, <http://www.arb.ca.gov/cc/ccms/workshops.htm> (last visited Jan. 6, 2009). *See also* Email from Andrew D. Koblenz, Vice President and General Counsel, National Automobile Dealers Association (Oct. 12, 2007) (on file with National Automobile Dealers Association).

²⁹ *Massachusetts v. EPA*, 549 U.S. 497, 505 n.2 (2007) (listing California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington).

³⁰ *Id.* at 505 n.3 (listing District of Columbia, American Samoa, New York City, and Baltimore).

³¹ *Id.* at 505 n.4 (listing Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group).

³² *Id.* at 505. The case was argued before the U.S. Supreme Court on Nov. 29, 2006, and the Court issued its opinion on Apr. 2, 2007.

³³ *Id.* at 528.

piecemeal approach and thus ineffective.³⁴ The Court, however, held that EPA does have the authority.³⁵ The majority pointed directly to the relevant statutory language of § 7602(g), stating that “‘any air pollution agent . . . including any physical, chemical, . . . substance . . . emitted into . . . the ambient air’ . . . embraces all airborne compounds of whatever stripe.”³⁶ The Court went on to say that just because EPA’s environmental responsibilities overlap with the Department of Transportation’s (DOT) energy efficiency standards, the fact “that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities”³⁷ pursuant to § 7521(a)(1). Finally, the Court held that EPA’s refusal to promulgate GHG regulations was “arbitrary, capricious, or otherwise not in accordance with law”³⁸ because EPA did not either determine “that greenhouse gases do not contribute to climate change or . . . provide some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”³⁹ The Court then remanded the case and directed that “EPA must ground its reasons for action or inaction” in the CAA.⁴⁰

Following the Court’s ruling in *Massachusetts v. EPA* on April 2, 2007, and California’s April 25, 2007, notice of intent to sue EPA for a decision,⁴¹ EPA Administrator Stephen Johnson finally proceeded with a notice and comment period which ultimately yielded more than 60,000 comments.⁴² Interestingly, despite a request by DOT, who wanted EPA to deny the waiver, to extend the deadline past June 15, 2007, the Administrator refused.⁴³ He held public hearings in Arlington, Virginia on May 22, 2007⁴⁴ and in Sacramento, California on May 30, 2007,⁴⁵ and then on June 21, 2007, sent a letter to California Governor Arnold Schwarzenegger informing him that EPA intended to make a decision on the waiver by the end of

³⁴ *Massachusetts v. EPA*, 549 U.S. at 531-35.

³⁵ *Id.* at 532.

³⁶ *Id.* at 528-29 (citing 42 U.S.C. § 7602(g) (2006)).

³⁷ *Id.* at 532.

³⁸ *Id.* at 534.

³⁹ *Massachusetts v. EPA*, 549 U.S. at 533.

⁴⁰ *Id.* at 534-35.

⁴¹ See Press Release, Office of the Governor of Cal., Governor Schwarzenegger Warns U.S. EPA of California’s Intent to Sue if Federal Government Fails to Act on Waiver to Reduce Emissions (April 25, 2007), <http://gov.ca.gov/index.php/?press-release/6031>.

⁴² See California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21,260, at 21,260 (April 30, 2007); *Examining of the Case for the California Waiver: An Update from EPA: Hearing Before the S. Comm. on Env’t & Pub. Works*, 110th Cong. 2 (2007) (statement of Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency), available at http://www.epa.gov/ocir/hearings/testimony/110_2007_2008/2007_0726_slj.pdf; see also Letter from William L. Wehrum, Acting EPA Assistant Adm’r, to Catherine Witherspoon, Executive Officer, Cal. Air Res. Bd. (Feb. 21, 2007), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OAR-2006-0173-0002> (informing Ms. Witherspoon that EPA would stay making its decision re: CARB’s waiver request, pending a ruling in *Massachusetts v. EPA*).

⁴³ JAMES E. MCCARTHY, CRS REPORT FOR CONGRESS: CALIFORNIA’S WAIVER REQUEST TO CONTROL GREENHOUSE GASES UNDER THE CLEAN AIR ACT 5 (updated Aug. 20, 2007), <http://www.azclimatechange.gov/download/082007.pdf>.

⁴⁴ *Examining of the Case for the California Waiver*, *supra* note 42.

⁴⁵ *Id.*

2007.⁴⁶ After waiting nearly two years for EPA to act make a decision on the waiver, California filed its lawsuit to compel EPA to act on November 8, 2007.⁴⁷ Finally, on December 19, 2007, EPA Administrator Johnson sent a letter to Governor Schwarzenegger, stating that he intended to deny the waiver request and would subsequently publish his official justification in the Federal Register.⁴⁸ California immediately appealed to the Court of Appeals for the Ninth Circuit to petition the Administrator's denial.⁴⁹ The EPA and automakers' prompt motion to dismiss the appeal, however, was granted by the Ninth Circuit on July 26, 2008, on the grounds that the court lacked jurisdiction because Administrator Johnson's letter was not a reviewable "final action."⁵⁰ The petition for review is now pending in the District of Columbia Circuit Court of Appeals and is appropriately based on the EPA's official action as posted in the Federal Register.

II. FEDERALISM AND PREEMPTION HURDLES⁵¹

As part of the waiver approval process, AB 1493⁵² faces multiple preemption hurdles that are all grounded in issues of federalism. First, Section II.A addresses

⁴⁶ Letter from Stephen L. Johnson, Adm'r, U.S. Env'tl. Prot. Agency, to Arnold Schwarzenegger, Governor of Cal. (Jun. 21, 2007), available at <http://www.cleancarscampaign.org/web-content/cleanairact/docs/06-21-07CAwaiverletter.pdf>; see Clean Cars Campaign, <http://www.cleancarscampaign.org/web-content/cleanairact/cleanairact.html> (last visited Nov. 15, 2008) (providing links to many AB 1493 related documents).

⁴⁷ See Press Release, Office of the Governor of Cal., Governor Schwarzenegger Announces Lawsuit against U.S. EPA for Failing to Act on California's Tailpipe Emissions Request (Nov. 8, 2007), <http://gov.ca.gov/index.php?/press-release/8047>; see also *California v. EPA*, No. 1:07-CV-02024-RCL (D.D.C. filed Nov. 8, 2007); *California v. EPA*, No. 07-1457 (D.C. Cir. filed Nov. 8, 2007).

⁴⁸ Letter from Stephen L. Johnson, Adm'r, U.S. Env'tl. Prot. Agency, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), available at http://www.cleancarscampaign.org/web-content/newsroom/docs/121907_EPALetter.pdf [hereinafter Denial Letter]; see also Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 Greenhouse Gas Emissions Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008), available at <http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=626702480786+13+2+0&WAIAction=retrieve> [hereinafter Published Justification for Denial of Waiver] (stating official justification for denying waiver).

⁴⁹ *California v. EPA*, appeal docketed, No. 08-70011 (9th Cir. Jan. 2, 2008), <http://www.arb.ca.gov/board/ma/2008/ma022808.htm>; see Petition for Review of Decision of the United States Environmental Protection Agency filed with the United States Court of Appeals for the Ninth Circuit, available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf.

⁵⁰ Dismissal Order, *Cal. v. EPA*, No. 08-70011 (9th Cir. July 25, 2008), available at <http://theusconstitution.org/blog.warming/?p=441> (last visited Nov. 9, 2008).

⁵¹ While this article analyzes the predominant preemption arguments asserted by the automobile industry and their fellow preemption advocates, there remains an even broader and perhaps more fundamental question that must be answered as well, but which is beyond the scope of this article. The question is even if California's automobile GHG regulations and other state legislation and regulatory schemes survive all Constitutional challenges and statutory conflicts, whether the prevailing balance of cooperative federalism should shift in favor of a more central role of states regulating environmental issues. Particularly in the absence of federal leadership and action, it seems that the Nation needs and deserves some level of government to step forward and lead.

⁵² The author frequently refers throughout the note to AB 1493 as a catchall term for California's new automobile GHG emissions legislation and regulations. Clearly AB 1493 technically refers to the legislation in its bill form as it worked through the California Assembly. However, for purposes of simplicity and because much other scholarship refers generically to AB 1493, this author also attempts to streamline and reference AB 1493 even when the more accurate reference should be the codified statute in the California Health & Safety Code or the actual standards in the California Code of Regulations.

the arguments for and against CAA preemption. The analysis proceeds by judging California's ability to satisfy each of the 42 U.S.C. § 7543(b) waiver requirements, considering arguments posited by California, the automakers, other federal preemption commentators, as well as, EPA's justification for its denial of California's waiver request. Second, Section II.B addresses the Energy and Policy Conservation Act ("EPCA") preemption arguments. The EPCA preemption arguments are that the EPCA preempts the new vehicle GHG standards because the regulations are *related to* fuel economy standards that are in the strict province of the National Highway Traffic Safety Administration ("NHTSA"), the regulations intrude upon the exclusive federal domain of new automobile emissions regulation, and, finally, that the California GHG regulations conflict with, or serve as an obstacle to, NHTSA carrying out the federal CAFÉ program. The analysis primarily consists of the findings in the recently-decided *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*⁵³ and *Central Valley Chrysler-Jeep, Inc. v. Goldstene*⁵⁴ cases. Third, Section II.C addresses the argument that the GHG standards are preempted because the state standards "intrude upon the foreign policy of the United States and the foreign affairs prerogatives of the President and Congress of the United States."⁵⁵ Each of these challenges is addressed, in turn, below. Based on a thorough assessment of statutory language, statutory construction, legislative history, past and ongoing practices of the relevant agencies, and the facts and data presented by all parties, each preemption challenge is dismissed by this author as insufficient.

As with most any preemption discussion, this assessment must also start with the Supremacy Clause.⁵⁶ The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law."⁵⁷ In modern day parlance, the invalidation of the state law is what is referred to as preemption. The question then is whether the CAA, the EPCA, or the doctrine of foreign policy preempts AB 1493. The following analysis evaluates both of the federal statutes and the foreign policy doctrine, concluding that AB 1493 survives each preemption argument.

A. Clean Air Act

The CAA⁵⁸ clearly preempts California's AB 1493 GHG regulations when it states that "[n]o state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."⁵⁹ However, in the very next subsection, Congress included a waiver provision which directs the following:

The [EPA] Administrator shall, after notice and opportunity for

⁵³ 508 F. Supp. 2d 295 (D. Vt. 2007).

⁵⁴ 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

⁵⁵ *Green Mountain*, 508 F. Supp. 2d. at 392 (citing Complaint at ¶ 120, *Green Mountain*, 508 F. Supp. 2d 295 (No. 2:05-CV-302)).

⁵⁶ U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁵⁷ *Green Mountain*, 508 F. Supp. 2d. at 343 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

⁵⁸ 42 U.S.C. §§ 7401-7671q (2006).

⁵⁹ *Id.* § 7543(a).

public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicles engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that – (A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.⁶⁰

Thus, while the express language of the CAA initially indicates “any State,” which would include California, is prohibited from regulating emissions from new motor vehicles, it then provides an exception. Interestingly, because California has been a pioneer in the field of regulating automobile emissions in an effort to address unique air pollution problems, it is the only state that satisfies the March 30, 1966 requirement.⁶¹ To determine whether California is entitled to a waiver for its AB 1493 standards, Sections II.A.1-5 present a five-part evaluation of the § 7543(b) factors.

As already noted *supra*, the following analysis first looks at the statutory language to see what Congress expressly stated when it wrote the federal law. Then, as necessary, the analysis considers Congress’s intent when it wrote the statute or what Congress envisioned as it debated the language of the statute, and then how courts have interpreted the language and the history. Further, the analysis accounts for the actual practice of the respective agencies charged within the relevant statutes with authority to promulgate regulations. Specifically, the assessment considers how EPA and NHTSA have responded to similar state legislation in the past. Each portion of the following analysis is important because the CAA waiver provision requires California to satisfy all conditions. However, the § 7543(b)(1)(B) “compelling and extraordinary conditions” discussion in Section II.A.4 is the most robust and includes the most analysis because it is on this criterion alone that Administrator Johnson justified his decision to deny California’s waiver request.

1. *California is a Qualifying State*

First, California must have regulated emissions from new motor vehicles, not including crankcase standards, prior to March 30, 1966.⁶² As noted *supra*, California is the only state that satisfies the criterion and thus, only California can apply for the waiver.⁶³ The ripple effect of California as the only authorized applicant for a preemption waiver is that if California’s waiver is denied, then the foundation is gone for all other states to adopt the statute or regulations for their own use. This incredibly important building block concept, while technically not legal justification for satisfying the § 7543(b) waiver requirements, is addressed in greater

⁶⁰ *Id.* § 7543(b)(1).

⁶¹ See *Green Mountain*, 508 F. Supp. 2d at 304 n.7; see also MCCARTHY, *supra* note 43, at 1.

⁶² 42 U.S.C. § 7543(b)(1).

⁶³ S. REP. NO. 90-403, at 532 (1967).

depth in the § 7507 “piggyback” analysis in Section II.A.6.a.

2. *California’s AB 1493 GHG Standards are as “Protective of Public Health and Welfare as Applicable Federal Standards”*

Second, California’s standards must be “in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”⁶⁴ As simple as this requirement may seem on its face, it is actually multifaceted. The threshold issue that must be addressed by the Ninth Circuit in California’s petition is whether Congress is referring in § 7543(b) to the GHG standards in *isolation*, or rather all of California’s automobile emissions standards as a *package*. If Congress intended the GHG standards in isolation, then it seems that because the EPA has not promulgated any GHG regulations, California’s standards must by default be at least as protective as federal standards.⁶⁵ In fact, § 7543(b)(2) states that if “each . . . standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective.”⁶⁶ Basically, because some protection must be more protective than no protection, California satisfies this requirement. Moreover, even if federal regulations for GHG emissions existed, it is important to note that the statute specifically says “if the *State* determines.”⁶⁷ This terminology and construction indicates that there should be some presumption in favor of California’s findings as it is the state that makes the determination. As the reader will notice in Section II.A.4, the EPA completely rejects this assessment and instead uses the isolation approach as its foundation to deny California’s waiver request.—

The more accurate interpretation, and the more desirable interpretation for the purpose of successfully satisfying the remaining three conditions, is that Congress intended that “the State standards . . . in the aggregate” denotes all of California’s automobile emissions standards as a total program or package. “Considered as a package” means that as each standard is assessed by EPA, the standard should be assessed in the context of every emission waiver request that California has submitted to EPA for waiver approval across the past four decades.

In fact, there is ample evidence to indicate that this is the interpretation that Congress intended, and that California and the EPA have understood and used in practice. For example, a 1977 House Report that accompanied the CAA Amendments of 1977 stated that legislators intended that § 7543(b) “permits the

⁶⁴ 42 U.S.C. § 7543(b)(1).

⁶⁵ See The White House, *Twenty In Ten: Strengthening America’s Energy Security*, <http://www.whitehouse.gov/stateoftheunion/2007/initiatives/energy.html> (last visited Nov. 21, 2008); see also The White House, *Protecting Our Nation’s Environment*, <http://www.whitehouse.gov/infocus/environment/> (last visited Nov. 21, 2008). As evidenced in part by his signing into law the EISA, President Bush finally made efforts to address the United States’ mobile source GHG emission contributions by way of increasing fuel efficiency standards. See The White House, *President Bush Signs H.R. 6, the Energy Independence and Security Act of 2007*, <http://www.whitehouse.gov/news/releases/2007/12/20071219-6.html> (last visited Jan. 6, 2009). He also announced his intent to participate in global discussions to finalize long-term goals for reducing global GHG emissions, although not mobile source specific. See The White House, *President Bush Discusses Climate Change*, <http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html> (last visited Jan. 6, 2009). While all of these efforts are steps in the right direction, for purposes of California’s AB 1493 GHG waiver request the fact remains that the United States still does not have any sort of GHG *emissions* standards.

⁶⁶ 42 U.S.C. § 7543(b)(2).

⁶⁷ *Id.* § 7543(b)(1) (emphasis added).

State to have its standards considered as a package that would require the Administrator in most instances to waive the preemption.”⁶⁸ In practice, California has asked for the *package* interpretation, and the EPA has obliged.⁶⁹ In 1984, EPA Administrator William Ruckelshaus stated that:

CARB argues that . . . EPA’s inquiry is restricted to whether California needs its own motor vehicle pollution control program to meet compelling and extraordinary conditions, and not whether any given standard . . . is necessary to meet such conditions For the reasons elaborated below, I agree with California⁷⁰

One of those reasons to which Ruckelshaus referred was Congress’s specific use of “in the aggregate” to describe the context in which the standards submitted should be considered. As will be discussed in depth in the “compelling and extraordinary conditions” analysis in Section II.A.4, California once again specifically requested that the GHG emissions standards be considered as a package.⁷¹

At this point California has satisfied the basic threshold requirements for waiver consideration. The remaining three considerations, § 7543(b)(1)(A)-(C), are the more potentially problematic factors for California that are often referenced by advocates for federal preemption of AB 1493 GHG standards and § 7543(b)(1)(B).

3. California’s AB 1493 Standards are Well Supported – Not “Arbitrary and Capricious”

Third, California’s determination that its standards, in the aggregate, are at least as protective as federal standards, cannot be “arbitrary and capricious.”⁷² California easily satisfies this requirement. As noted in Section I, both the California legislature in AB 1493, and then CARB in its *Final Statement of Reasons*, provide an exhaustive list of very real and catastrophic circumstances and conditions that scientists believe will, in combination, negatively impact California.⁷³ Considering the volume of research conducted and scientific data compiled by NESCCAF, it is highly unlikely that the EPA will take issue with California’s decision-making process if and when the Ninth Circuit remands the denial decision.

⁶⁸ Rachel L. Chanin, Note, *California’s Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 720 n.110 (2003) (citing H.R. REP. NO. 95-294, at 23 (1977), reprinted in 1977 U.S.C.C.A.N. 1077). The House Report went on to say that “[t]he Administrator would be authorized to deny such waiver only if (1) California’s judgment that its standards, considered together, are at least as protective of health and welfare as Federal standards, considered together, was arbitrary or capricious; or (2) one of the findings under existing section 209(b) is made.” *Id.*

⁶⁹ CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, REQUEST FOR A CLEAN AIR ACT SECTION 209(B) WAIVER OF PREEMPTION FOR CALIFORNIA’S ADOPTED AND AMENDED NEW MOTOR VEHICLE REGULATIONS AND INCORPORATED TEST PROCEDURES TO CONTROL GREENHOUSE GAS EMISSIONS: SUPPORT DOCUMENT 15 (2005), available at http://www.arb.ca.gov/cc/docs/att2_support.pdf [hereinafter WAIVER REQUEST SUPPORT DOCUMENT].

⁷⁰ California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18,887, 18,889-90 (May 3, 1984).

⁷¹ See Chanin, *supra* note 68, at 720 n.110.

⁷² 42 U.S.C. § 7543(b)(1)(A).

⁷³ See FINAL STATEMENT OF REASONS, *supra* note 2, at 6-7.

4. California Meets “Compelling and Extraordinary Conditions” Requirement

Fourth, the EPA must determine whether California’s automobile emissions standards are needed to “meet compelling and extraordinary conditions.”⁷⁴ This factor is perhaps the most debated aspect of the waiver process. Essentially it is this factor alone that makes the assessment of whether standards submitted for a § 7543(b) waiver are to be considered in *isolation* or as a *package* so critical. If California’s GHG standards are considered in isolation, as EPA Administrator Johnson recently interpreted § 7543(b) to require in the context of mobile source GHG emissions, critics of AB 1493⁷⁵ have a more plausible argument for why GHG standards in California fail to meet “compelling and extraordinary conditions.” The following discussion proceeds in three parts. First, the author presents California’s persuasive argument for evaluating the AB 1493 standards as part of California’s overall air pollution control program (package), which lays the foundation for its argument that California’s AB 1493 standards satisfy the “compelling and extraordinary conditions” requirement. Second, the author presents EPA Administrator Johnson’s justifications for evaluating the standards in isolation. Administrator Johnson presented two separate arguments to justify his denial: (1) that California does not satisfy the “compelling and extraordinary conditions” criterion because of the global nature of GHGs, and, independent from his first set of findings, (2) that California does not satisfy the criterion because the state does not suffer more severe climate change impacts than the rest of the nation as a whole. Lastly, after comparing the two arguments the author asserts that the Ninth Circuit should adopt California’s more persuasive statutory interpretation and factual argument and remand to EPA for Administrator Johnson’s reconsideration and ultimate approval of the AB 1493 standards.

a. California

California argues that it needs the new automobile GHG standards, in combination with and in addition to already approved and implemented emissions standards, to meet “compelling and extraordinary conditions.”⁷⁶ The unique geographical and climatic conditions in California, most particularly in and around Los Angeles, coupled with a seemingly ever increasing population and automobile fleet, create an environment where air quality is so poor that even after four decades of concerted efforts to improve emissions levels the region is still in nonattainment.⁷⁷ California crafts its argument in conformity with EPA’s explanation of the criterion as far back as 1981 that “‘compelling and extraordinary conditions’ does not refer to levels of pollution directly, but primarily to the factors that tend to produce them: geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles create serious air pollution problems.”⁷⁸ The AB

⁷⁴ 42 U.S.C. § 7543(b)(1)(B).

⁷⁵ See Steven G. Davison, *Regulation of Emission of Greenhouse Gases and Hazardous Air Pollutants from Motor Vehicles*, 1 PITT. J. ENVTL. PUB. HEALTH L. 1, 18 (2006). Note that actual publication page numbers were not available in the electronic version of Mr. Davison’s article.

⁷⁶ WAIVER REQUEST SUPPORT DOCUMENT, *supra* note 69, at 15-16.

⁷⁷ *Id.* at 16.

⁷⁸ *Id.* (citing California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18,887, 18,890 (May 3, 1984)).

1493 GHG standards constitute another much needed arrow in California's quiver of regulations to help the people of California compensate for the conditions that, *inter alia*, envelop and anchor the poisonous air pollution in San Joaquin Valley, contribute to raging wild fires, and exacerbate water shortages throughout the state.

Further, a brief contrast of the statutory language of the 1970⁷⁹ waiver provision and the 1977⁸⁰ amended version, as well as a review of the relevant legislative history, clearly indicate that Congress was expanding the waiver provision to mirror the intensified fight against air pollution. The language from the 1970 Amendments required that California's standards be as stringent as federal standards.⁸¹ The 1977 amendments, however, expanded the potential opportunities for waiver approval by replacing "as stringent as federal standards"⁸² with "at least as protective of public health and welfare as applicable Federal standards."⁸³ The new language demonstrated Congress's intent to "ratify and strengthen the California waiver provision and to affirm the underlying intent of the provision, i.e. to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."⁸⁴ In response to a skewed industry interpretation of the 1977 amended waiver provision, the Court of Appeals for the D.C. Circuit stated:

The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short to act as a kind of laboratory for innovation.⁸⁵

Finally, if an assessment of statutory language, legislative intent, and D.C. Circuit case law is not sufficient to quiet the critics, EPA's practice of approving California emissions standards, postured as part of a total vehicle pollution control package is further instructive. California has requested and been granted § 7543(b) waivers, often referred to as "CAA § 209(b) waivers," at least fifty-three times since 1967.⁸⁶ EPA indicates that it has never outright denied a California waiver request, although EPA has denied portions of waivers or delayed implementation of the regulations on feasibility grounds.⁸⁷ Moreover, EPA has never denied a California emissions request for waiver in whole.⁸⁸ In fact, EPA approved, in part, California's most

⁷⁹ Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. The waiver provision actually existed as far back as 1967, where it was embodied in the National Emission Standards Act, Pub. L. No. 90-148, § 208(b), 81 Stat. 485, 501 (1967).

⁸⁰ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

⁸¹ Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

⁸² *Id.* §§ 8(a), 11(a)(2)(A), 15(c)(2), 84 Stat. 1676, 1694, 1705, 1713.

⁸³ Clean Air Act Amendments of 1977 § 207, 91 Stat. 685, 755.

⁸⁴ H.R. REP. NO. 95-294, at 301-02 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1380-81.

⁸⁵ Motor & Equip. Mfr. Ass'n v. EPA (*MEMA I*), 627 F.2d 1095, 1110-11 (D.C. Cir. 1979).

⁸⁶ MCCARTHY, *supra* note 43, at 2.

⁸⁷ *Id.* at 12 n.30.

⁸⁸ *Id.*

recent waiver request on December 28, 2006.⁸⁹ Perhaps most important for the instant discussion, EPA has never disapproved a waiver because California failed to demonstrate “compelling and extraordinary conditions.”⁹⁰ Concluding, based upon the information contained in the present section and in Section II.A.2, that Congress intended that all § 7543(b) waiver requests be considered in the context of the overall vehicle pollution control package, California once again asserts that “[t]he relevant inquiry under section 209(b)(1)(B) is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions.”⁹¹ It thus appears rather bizarre for EPA to now interpret California’s GHG standards in any manner other than as part of the package of regulations that address California’s “compelling and extraordinary conditions.”

Perhaps at the core of California’s approach to regulating vehicular emissions and EPA’s practice of approving the waiver requests is the very simple, yet very powerful concept espoused by the Supreme Court in *Massachusetts v. EPA*, that incremental steps are acceptable. Albeit discussed in the context of standing, specifically redressability, the Court stated that “[a]gencies, like legislatures, do not generally resolve massive problems in one fell swoop . . . but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed.”⁹²

The incremental approach bolsters the argument that the predicted emissions reductions standards are not only reasonable and necessary to address the “compelling and extraordinary conditions” in California, but also demonstrate a solid starting point in the progress toward addressing emissions beyond state borders. It is estimated that the United States emits approximately seven billion tons of GHG every year, with worldwide emissions totaling approximately thirty-four billion tons.⁹³ Thus, although California’s estimated 56.6 million tons per year reduction of CO₂ equivalent would reduce national emissions by less than 1% and reduce

⁸⁹ California’s Notice of Federal Preemption Waiver for Zero-Emission Vehicles, 71 Fed. Reg. 78,190, 78,192 (Dec. 28, 2006). EPA approved the waiver portion for standards applying to model years 2007 thru 2011, but did not make a decision for subsequent model years. *Id.*

⁹⁰ Chanin, *supra* note 68, at 723.

⁹¹ WAIVER REQUEST SUPPORT DOCUMENT, *supra* note 69, at 15. *See generally* Notice of Decision to Grant California’s Request for a Waiver of Federal Preemption, 68 Fed. Reg. 19,811 (Apr. 22, 2003) (granting California its request for a waiver of federal preemption for its Low-Emission Vehicle amendments (LEV II Amendments) to its Low-Emission Vehicle (LEV) program). The AB 1493 GHG regulations were incorporated with other automobile emissions standards into California’s Low-Emission Vehicle (“LEV II”) program, for which a waiver request was approved. Accordingly, some commentators argue that in the event the EPA disapproves the Dec. 21, 2005 waiver request for AB 1493, California will enforce the regulations nonetheless as approved within LEV II. *See* Letter from Don Perata, Cal. State Senate President Pro Tem, to Mary Nichols, Chair, Cal. Air Res. Bd. (Dec. 20, 2007), available at <http://www.cleancarscampaign.org/web-content/cleanairact/docs/Perata-nextsteps.pdf>

⁹² *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007); *see also* 42 U.S.C. § 7521(a)(1) (2006) (“The Administrator shall by regulation prescribe . . . 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.”). The statute then goes on to list considerations that the Administrator must take into account as those regulations are promulgated, which generally serve to protect the health and welfare of the American public as well as to ensure some balance of economics for industry. *Id.*

⁹³ MCCARTHY, *supra* note 43, at 8.

worldwide emissions by a seemingly negligible amount, these steps are only the beginning.⁹⁴ The additional fourteen states that have either adopted or are considering adopting California's GHG standards would increase the national reduction to 2-3% and worldwide reduction to approximately 0.6%.⁹⁵ Further, considering that California historically serves as a mini-laboratory for innovation, developing regulations and technologies that serve as models for nationwide adoption and implementation,⁹⁶ it is likely that AB 1493 embodies the humble beginnings of a robust regulatory scheme and technology implementation trend that will realize even greater reductions.

b. EPA Denied Waiver Because it Found no "Compelling and Extraordinary Conditions"

This section presents an overview of EPA Administrator Johnson's justification for his denial of the California preemption waiver, and then analyzes the California and EPA arguments to show that both support the author's assertion that the Court of Appeals for the District of Columbia Circuit should find that California's AB 1493 regulations do in fact satisfy the § 7543(b)(1)(B) "compelling and extraordinary conditions" waiver criterion. The D.C. Circuit should immediately remand the waiver request to EPA for reconsideration pursuant to the court's instructions to interpret § 7543(b) as requiring the package approach rather than the isolation approach used by EPA.

It is worth briefly noting that California initially appealed Administrator Johnson's decision,⁹⁷ in the Ninth Circuit instead of the D.C. Circuit.⁹⁸ While California followed normal procedure in filing its petition within the sixty-day window in which states may challenge EPA decisions,⁹⁹ some commentators argue that California was trying to slip its petition into the more liberal Ninth Circuit when the appropriate forum was the D.C. Circuit. Their rationale rests on the fact that the AB 1493 standards have a nationwide application and impact as a second national emissions standard and thus the petition should be heard only in the D.C. Circuit pursuant to 42 U.S.C. § 7607(b)(1).¹⁰⁰ Ultimately, the petition was moved to the D.C. Circuit, but not because of the national application concern.

⁹⁴ See *id.*; see also INITIAL STATEMENT OF REASONS, *supra* note 12, at viii. The regulated passenger cars and light-duty trucks constitute approximately twenty percent of total U.S. emissions, and approximately thirty percent of total GHG emissions in California. *Id.* While these percentages indicate that stationary sources are the primary emissions sources that must be aggressively regulated to realize truly significant reductions, the United States must also deal with mobile sources as there is no indication that passenger car and light-duty truck use is on the decline.

⁹⁵ *Id.*

⁹⁶ See *Motor & Equip. Mfr. Ass'n v. EPA (MEMA I)*, 627 F.2d 1095, 1110 (D.C. Cir. 1979).

⁹⁷ See Denial Letter, *supra* note 48.

⁹⁸ See *California v. EPA*, *appeal docketed*, No. 08-70011 (9th Cir. Jan. 2, 2008), <http://www.arb.ca.gov/board/ma/2008/ma022808.htm>.

⁹⁹ Petition for Review of Decision of the United States Environmental Protection Agency filed with the United States Court of Appeals for the Ninth Circuit, *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf (showing a filing date of Jan. 2, 2008, which is within the sixty-day window).

¹⁰⁰ 42 U.S.C. § 7607(b)(1) (2006) ("A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard . . . may be filed only in the United States Court of Appeals for the District of Columbia.").

Ordinarily, a petition for review of EPA decisions cannot be filed until the underlying action is final, meaning published in the Federal Register.¹⁰¹ The problem for California was that while Administrator Johnson sent his waiver-denial letter on Dec. 19, 2007, his official notice (with justification) was not published in the Federal Register until March 6, 2008.¹⁰² EPA quickly filed a motion to dismiss the appeal on grounds that the letter did not constitute “final action.” After an initial denial of EPA’s motion on April 10, 2008,¹⁰³ the Ninth Circuit reversed itself, granting EPA’s motion for the court to reconsider its initial denial of EPA’s motion to dismiss.¹⁰⁴ The petition for review is now pending in the D. C. Circuit, where California also filed a petition after the March 6, 2008 Federal Register publication.¹⁰⁵ While California bases its appeal to the D.C. Circuit on Administrator Johnson’s denial letter, arguing the March 6, 2008 publication was a mere post-hoc justification, at least the timing allows California to now proceed in accord with the CAA as petitioning a “final action” by Administrator Johnson.

On December 19, 2007, EPA Administrator Stephen Johnson sent California Governor Arnold Schwarzenegger a letter stating that EPA denied CARB’s § 7432(b) waiver request.¹⁰⁶ The letter was very unusual for EPA final action as it did not include the Administrator’s supporting rationale or justification. In fact, the letter did not even address any of the waiver criteria except § 7543(b)(1)(B), stating that because of the global nature of climate change and the perceived need for a global rather than state solution, the EPA found that “California does not have a ‘need to meet compelling and extraordinary conditions.’”¹⁰⁷ Moreover, Administrator Johnson stated that he believed the Energy Independence and Security Act of 2007 (“EISA”),¹⁰⁸ signed into law by President Bush on December 19, 2007, was the better approach to combating new automobile GHG emissions because it requires a more aggressive increase in fuel efficiency than AB 1493’s resultant fuel efficiency increase, and because EISA is applied nationally, avoiding the California and piggyback state “patchwork” effect.¹⁰⁹ On February 29, 2008, Administrator Johnson signed his post-hoc denial justification, submitted it to the Federal Register for official notice, and also published the forty-seven page document on the EPA website.¹¹⁰

¹⁰¹ *Id.* (“Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register . . .”).

¹⁰² See Published Justification for Denial of Waiver, *supra* note 48.

¹⁰³ Order of April 10, 2008, *California v. EPA*, No. 08-70011 (9th Cir. April 10, 2008), available at http://climate.alston.com/files/docs/Ninth_Circuit_Ruling.pdf (denying EPA’s motion to dismiss appeal for lack of jurisdiction).

¹⁰⁴ See Dismissal Order, *supra* note 50.

¹⁰⁵ See Update on the California Preemption Case: Automakers Appeal to the Ninth Circuit, <http://theconstitution.org/blog/warming/?p=450> (last visited Dec. 20, 2008).

¹⁰⁶ See Denial Letter, *supra* note 48.

¹⁰⁷ *Id.*

¹⁰⁸ Pub. L. No. 110-140, 121 Stat. 1492 (2007).

¹⁰⁹ Denial Letter, *supra* note 48.

¹¹⁰ Published Justification for Denial of Waiver, *supra* note 48; Stephen L. Johnson, Administrator, EPA, Submitted Notice of Decision Denying Waiver of Clean Air Act Preemption for California’s 2009 Greenhouse Gas Emissions Standards for New Motor Vehicles (Feb. 29, 2008), <http://www.epa.gov/otaq/url-fr/fr-waiver.pdf> (unofficial version of notice as submitted for publication in the Federal Register).

After outlining the history of AB 1493, the EPA's process of consideration of CARB's § 7543(b) waiver request, and the express statutory preemption language in the CAA, Administrator Johnson began his analysis of EPA's interpretation of controlling law and application of the specific facts in this case.¹¹¹ He set the groundwork for his rejection of California's waiver by explaining that while he would not stray from EPA's traditional deference to California's *policy* reasons for their proposed regulations and request for a waiver, he was not bound to give deference to California's *interpretation* of the CAA and the limits of California's authority within the confines of § 7543(b)(1)(B) to regulate GHG as part of a state air pollution program.¹¹²

Administrator Johnson then proceeded with an analysis of two independent arguments that supported his decision to deny the waiver. First, he argued that the AB 1493 GHG emission standards should be reviewed separately from the rest of California's automobile emissions control program.¹¹³ When actually reviewed independently under § 7543(b)(1)(B), the standards tend to show that California overreached its authority to regulate because the GHGs are air pollutants that are global in nature and thus do not bear the "same causal link to factors local to California as do local or regional air pollution problems."¹¹⁴ Second, Administrator Johnson argued that the impacts of global climate change in California are not sufficiently different from the rest of the United States such that California has the requisite "compelling and extraordinary conditions" to justify its own automobile GHG emissions standards.¹¹⁵ The following section summarizes the two arguments.

*(1) EPA Applies § 7543(b)(1)(B) to AB 1493 GHG Standards Separately;
GHG do not Share Causal Link to Local Factors – No "Compelling and
Extraordinary Conditions"*

Administrator Johnson started by reviewing the 1984 particulate matter waiver¹¹⁶ as discussed *supra* Sections II.A.2 and II.A.4.a. He noted that Administrator Ruckelshaus's justification for the *package* or *program* interpretation was that the text of § 7543(b)(1) used the terms *standards* (plural) and *in the aggregate*, denoting that the entire automobile emissions scheme of regulations are the focus and not the individual standard(s) in the waiver.¹¹⁷ Ruckelshaus also noted that if approved, the California emissions package only creates a second set of emissions standards and not an *entire patchwork* as asserted by many automobile manufacturers.¹¹⁸ However, Administrator Johnson stated that while the general EPA interpretation of assessing standards submitted for waiver as a package has not changed, the AB 1493 GHG emissions standards are distinguishable because they do not address local or regional air pollution problems as have the standards in every waiver from 1984 to

¹¹¹ Published Justification for Denial of Waiver, *supra* note 48, at 12,157 to 12,158.

¹¹² *Id.* at 12,158.

¹¹³ *Id.* at 12,162.

¹¹⁴ *Id.* at 12,163.

¹¹⁵ *Id.* at 12,168.

¹¹⁶ California State Motor Vehicle Pollution Control Standards, *supra* note 70.

¹¹⁷ Published Justification for Denial of Waiver, *supra* note 48, at 12,160.

¹¹⁸ *Id.*

date.¹¹⁹

Administrator Johnson argued that the factors¹²⁰ considered in the past to determine the existence of “compelling and extraordinary conditions,” such as the unique “geography and climate in California, and the large motor vehicle population in California . . . no longer perform the same causal function.”¹²¹ The mobile GHG emissions in California, while still a notable percentage of the national total, simply rise to the upper atmosphere and mix with all other GHG emissions from around the globe in uniform distribution, unaffected by California’s geography and climate conditions.¹²² Thus, the California mobile GHG emissions do not affect California any differently than GHG emissions from or in any other part of the world.¹²³

Administrator Johnson went on to note that because the text of § 7543(b)(1)(B) is not explicit, and ambiguous as to whether EPA must consider the submitted standard alone or as part of the overall auto emissions regulatory program, his decision is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (“*Chevron* deference”).¹²⁴ In short, because the statute is ambiguous, any reviewing court should uphold his decision as long as his interpretation was a permissible construction or was “sufficiently rational.”¹²⁵ Despite prior use of the program or package interpretation for waivers for standards addressing purely local or regional air pollution, the judges on the court of appeals should defer to Administrator Johnson’s interpretation as he applies the statute to standards that seek to regulate pollution produced globally, with uniform effects around the world. Moreover, Administrator Johnson argued, the legislative history of § 7543 indicates that Congress was focused on the “unique problems faced in California as a result of its climate and topography,”¹²⁶ in particular the smog¹²⁷ and other “peculiar local conditions.”¹²⁸ There was no discussion that indicated Congress justified § 7543 based on, or hoped that its application would remedy, national or global pollution problems.¹²⁹

Once Administrator Johnson established the lens through which he would look at California’s GHG standards – as separate standards instead of as a part of a complete mobile emissions air pollution package¹³⁰ – he determined that California did not

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Published Justification for Denial of Waiver, *supra* note 48, at 12,160.

¹²³ *Id.*

¹²⁴ *Id.* at 12,161 (“I note that because the statute is not clear with respect to the interpretation of this paragraph, my decision is entitled to deference and should be upheld as long as it is a permissible construction of the statute.” (citing *Chevron, U.S.A., Inc. v. Natrual Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984))).

¹²⁵ *Id.* at 12,161 n.23 (“The court need only find that the EPA’s understanding of [the] statute is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.” (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1084 (D.C. Cir. 1996))).

¹²⁶ *Id.* at 12,161 (citing H.R. REP. NO. 90-728, at 21 (1967)).

¹²⁷ Published Justification for Denial of Waiver, *supra* note 48, at 12,161.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 12,162 (“The appropriate criteria to apply therefore is whether the emissions of California motor vehicles, as well as California’s local climate and topography, are the fundamental causal factors for the air pollution problem of elevated concentrations of greenhouse gases, and in the alternative

need its own state auto GHG emissions standards to meet “compelling and extraordinary conditions.”¹³¹ He recounted three waiver denial advocate arguments: (1) that there is no causal link between automobile GHG emissions in California and the damaging effects that California alleges; (2) that GHGs are not localized; and (3) that California’s independent regulation of GHGs will not redress California-specific problems to whatever extent such alleged problems exist.¹³² He then revisited the discussion immediately above, regarding the distinction between prior waivers that dealt only with localized air pollutants in conjunction with the unique geographic and climatic conditions, versus the instant mobile source GHG emissions that contribute to the uniform global distribution of GHGs from all sources in every country and have no California-specific effects due to local conditions.¹³³ Finally, Administrator Johnson again referred to the legislative history that he believes demonstrates Congress’s intention for EPA to grant a § 7543(b) waiver for states to regulate independently when states can demonstrate the link between the regulated pollutants and causal factors of local or regional air pollution problems.¹³⁴

Administrator Johnson then dismissed California’s arguments as insufficient justifications for satisfying the § 7543(b)(1)(B) criterion.¹³⁵ California argued that GHG-induced climate change is a causal factor for increased ozone levels in California and that reduced fuel use by the more efficient cars will result in a net reduction in upstream emissions and reduce California’s ozone levels;¹³⁶ however, Administrator Johnson was not convinced by either argument. He concluded by stating that he believes “that atmospheric concentrations of GHGs are not the kind of local or regional air pollution problem Congress intended to identify in the second criterion of section 209(b)(2),”¹³⁷ and thus “California does not need its GHG standards to meet compelling and extraordinary conditions.”¹³⁸

(2) Global Climate Change Effects are not Sufficiently Different from Rest of the Nation – No “Compelling and Extraordinary Conditions”

Second, Administrator Johnson stated that, notwithstanding his decision *supra* Section II.A.4.b(1), he could and does independently deny California’s waiver request because the potential impacts of global climate change do not impact California to such an extent that, when compared to the rest of the nation, the effects

whether the effect in California of this global air pollution problem amounts to compelling and extraordinary conditions.”)

¹³¹ *Id.* at 12,163 (“I believe that it is not appropriate to waive preemption for California’s standards to regulate GHGs. Atmospheric concentrations of greenhouse gases are an air pollution problem that is global in nature, and this air pollution problem does not bear the same causal link to factors local to California as do local or regional air pollution problems. I believe that atmospheric concentrations of GHGs are not the kind of local or regional air pollution problem Congress intended to identify in the second criterion of section 209(b)(2). As such I find that California does not need its GHG standards to meet compelling and extraordinary conditions.”)

¹³² Published Justification for Denial of Waiver, *supra* note 48, at 12,162.

¹³³ *Id.*

¹³⁴ *Id.* at 12,162 to 12,163.

¹³⁵ *Id.* at 12,163.

¹³⁶ *Id.*

¹³⁷ Published Justification for Denial of Waiver, *supra* note 48, at 12,163.

¹³⁸ *Id.*

amount to “compelling and extraordinary conditions.”¹³⁹ He reached this conclusion after an ostensibly thorough analysis where he compared the impact climate change will likely have on temperatures, precipitation, and sea level rise across the globe, in the United States, and specifically in California. The following is a synopsis of those many figures and cross references derived in great part from scientific data, reports, summaries, and commentaries from those climate change professionals involved with the International Panel on Climate Change (“IPCC”).¹⁴⁰

Starting with temperature comparisons, Administrator Johnson noted as a baseline that “global mean surface temperatures have risen by 0.74°C (1.3°F) over the last 100 years . . . higher during the last few decades of the 20th Century than during any comparable period during the preceding four centuries.”¹⁴¹ Temperatures in the United States have risen approximately 1.0°F across the last century¹⁴² and, in California, approximately 2.3°F between 1901 and 2005.¹⁴³ As for the future, models indicate that global temperatures will increase from a 1990 baseline an average of 1.8 to 4.0°C (3.2 to 7.2°F), with an uncertainty range of 1.1 to 6.4°C (2.0 to 11.5°F).¹⁴⁴ Temperatures in the United States are projected to increase 2°C (3.6°F) on average across the twenty-first century, “with 5 out of 21 models from IPCC projecting average warming in excess of 4°C (7.2°F).”¹⁴⁵ In contrast, California’s temperatures are projected to increase 3° to 10.4°F in the same time span.¹⁴⁶

As for precipitation, Administrator Johnson noted that total annual precipitation across the contiguous United States increased at an average rate of 6% from 1901 to 2005, while the western part of the country saw an increase of approximately 9%.¹⁴⁷ California-specific trends were not sufficiently clear to report. Global and California future projections were not included in the Administrator’s report because the various modeling scenarios did not show consistent trends.¹⁴⁸ The report did, however, indicate that average precipitation in the United States is projected to increase resulting in increased flooding, greater runoff and erosion, and adverse

¹³⁹ *Id.* at 12,168 (“While I find that the conditions related to global climate change in California are substantial, they are not sufficiently different from conditions in the nation as a whole to justify separate state standards. As the discussion above indicates, global climate change has affected, and is expected to affect, the nation, indeed the world, in ways very similar to the conditions noted in California.”).

¹⁴⁰ Any omission of material facts or figures from the Denial Letter that would more fully explain or accurately portray the comparisons is the fault of the author of this article. The author certainly encourages readers to review the Federal Register notice for Administrator Johnson’s complete analysis.

¹⁴¹ Published Justification for Denial of Waiver, *supra* note 48, at 12,165 (citing *IPCC 2007: Summary for Policymakers*, in *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1* (S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor & H.L. Miller eds., Cambridge University Press 2007), http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf [hereinafter *CLIMATE CHANGE 2007*]).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 12,166.

¹⁴⁵ *Id.* (citing J.H. Christensen et al., *Regional Climate Projections*, in *CLIMATE CHANGE 2007*, *supra* note 141, at 847).

¹⁴⁶ Published Justification for Denial of Waiver, *supra* note 48, at 12,165.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 12,166.

water quality effects.¹⁴⁹

Finally, the baseline sea level rise data showed an estimated rise of 6.7 ± 2 inches (0.17 ± 0.05 m) throughout the twentieth century,¹⁵⁰ with California trends at nearly 0.08 inches per year (2 mm per year) or generally less than or equal to the rate of sea level rise in other coastal regions of the United States.¹⁵¹ Future projections indicate that during the twenty-first century, global sea level rise will average between 0.18 and 0.59 meters compared to a 1990 baseline,¹⁵² and sea level rise along United States coastlines, including California, will generally reflect global averages.¹⁵³ Of particular note, the middle to higher end projections indicate that California coast sea level rise will “substantially exceed the historical rate of sea level rise observed at San Francisco and San Diego during the past 100 years.”¹⁵⁴

Administrator Johnson concluded by discussing what the increases highlighted above really mean – how increases in temperature, precipitation, and sea level rise translate into impacts on the lives of people.¹⁵⁵ He noted that while GHGs tend to have long life spans and uniformly distribute around the world, the resultant impacts vary across and within countries.¹⁵⁶ Across the United States generally, the IPCC reports that climate change will increasingly stress coastal communities and habitats, constrain over-allocated water resources, compound problems for the already aging urban centers, and promote and intensify wildfires and insect outbreaks.¹⁵⁷ Further, intensifying heat waves will likely lead to increases in mortality and morbidity rates, the spread of invasive species that is expected to disrupt ecosystem services, and declining air quality that is expected to lead to increases in ozone pollution and adverse effects on certain vegetation.¹⁵⁸

In addition to the effects noted above, California is likely to suffer further harm because of its physical and economic characteristics. For example, California has the largest agricultural based economy and the largest coastal population of any State in the United States.¹⁵⁹ It has unique geographic and climatic conditions that have been recognized for decades as factors that attribute to severe tropospheric ozone

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 12,165.

¹⁵¹ Published Justification for Denial of Waiver, *supra* note 48, at 12,166.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 12,167 (citing CALIFORNIA CLIMATE CHANGE CENTER, SCENARIOS OF CLIMATE CHANGE IN CALIFORNIA: AN OVERVIEW (2006), available at <http://www.energy.ca.gov/2005publications/CEC-500-2005-186/CEC-500-2005-186-SF.PDF>).

¹⁵⁵ *Id.* (“Coastal communities and habitats will be increasingly stressed by climate change impacts interacting with development and pollution; climate change will constrain North America’s over-allocated water resources, increasing competition among agricultural, municipal, industrial and ecological uses . . . and, disturbances such as wildfire and insect outbreaks are increasing and are likely to intensify in a warmer future with drier soils and longer growing seasons.”).

¹⁵⁶ Published Justification for Denial of Waiver, *supra* note 48, at 12,167 (“[E]ven though GHGs are global pollutants that remain in the atmosphere long enough to distribute themselves homogenously around the globe, the end-point risks and impacts associated with the resultant climate change vary across and within countries, and over time.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

problems, raging wild fires, and stressed water resources.¹⁶⁰ Further, “California has the greatest variety of ecosystems in the U.S., and the second most threatened and endangered species (of plants and animals combined) and the most threatened and endangered animal species, representing about 21% of the U.S. total.”¹⁶¹ Armed with all of this information, Administrator Johnson concluded that although “the conditions related to global climate change in California are substantial, they are not sufficiently different from conditions in the nation as a whole to justify separate state standards.”¹⁶²

c. Conclusion

In sum, while every bit of information presented above is critical to a full and complete discussion, the author of this article finds that the argument for “compelling and extraordinary conditions” ultimately rests on two points – one of statutory interpretation and one of facts. First, California argues that the text of § 7543(b), the underlying legislative history, and the on-record interpretation by both EPA and United States federal courts support California’s assertion that the AB 1493 standards should be evaluated as a *package* with all other California mobile emission air pollution regulations. EPA, however, citing to substantially the same sources, distinguishes the AB 1493 standards from all previous waiver requests on the grounds that GHG pollution “does not bear the same causal link to factors local to California as do local or regional air pollution problems.”¹⁶³ Thus, says Administrator Johnson, the mobile GHG emission standards must be evaluated in *isolation*. While this author does not directly question the political pressures that may have swayed Administrator Johnson’s interpretation and judgment, this author does believe that EPA is wrong and that California’s package interpretation should prevail for three reasons.

The first reason the GHG standards should be considered for waiver in the context of California’s overall vehicle pollution control package is that to whatever extent the statutory text is ambiguous, California has interpreted, EPA administrators across nearly four decades have agreed, and federal judges have upheld that the use of the terms *standards* (plural) and *in the aggregate* to denote a package approach. While Administrator Johnson’s attempt to distinguish the GHG standards and evaluate them in isolation because he believes the causal link to local factors is missing is certainly a fundamentally reasonable position on its face, he fails to account for the more robust legislative history to which California points.

Thus, the second reason for the package approach is that legislative history for the § 7543(b) waiver provision extends beyond the seminal quotes cited from the 1967 Congressional record, to legislative history behind the 1977 amendments that indicates Congress intended to strengthen the waiver provision and affirm its desire in 1970 “to afford California the broadest possible discretion in selecting the best

¹⁶⁰ *Id.* (“The conditions which create California’s tropospheric ozone problems remain (e.g., topography, regional meteorology, number of vehicles.”).

¹⁶¹ Published Justification for Denial of Waiver, *supra* note 48, at 12,168 (citing U.S. Fish and Wildlife Service, Threatened and Endangered Species System, http://ecos.fws.gov/tess_public/StartTESS.do (last visited Nov. 18, 2008)).

¹⁶² *Id.*

¹⁶³ *Id.* at 12,163.

means to protect the health of its citizens and the public welfare.”¹⁶⁴ This seems to convey the message that Congress wanted, and which the D.C. Circuit echoed in 1979, California to “expand its pioneering effort . . . [and to] . . . act as a laboratory for innovation.”¹⁶⁵ While the 1977 Congress may not have had the science to foretell global climate change, and thus could not be expected to debate the calculus of pollution of a global nature combined with California’s unique geographic and climatic conditions, it certainly did have the clear intent to afford broad discretion to California. The AB 1493 standards fit squarely within that vision despite not being the traditionally submitted regulations that focused on local pollutants.

Moreover, the third reason is that the AB 1493 standards are simply another incremental step in California’s overall air pollution program intended to remedy the extreme pollution problems that stem from its unique conditions. California, apparently, as the Congress of the late 1960s and 1970s envisioned, is developing a “more nuanced understanding of how best to proceed”¹⁶⁶ and is trying to develop and implement innovative and trend-setting regulations in an attempt to whittle away at the many different components of automobile emissions that wreak havoc in southern California. In order to isolate the AB 1493 standards from the rest of California’s automobile air pollution control program as he did on December 19, 2007, Administrator Johnson must be thinking that he is above the law. He wants the people of California, and now the judges of the Ninth Circuit, to believe that his interpretation trumps the statutory text, clear legislative history, federal court analysis, and decades of consistent interpretation by his own agency that all dictate the *package* approach. Administrator Johnson’s justification, while creative and apparently based on much consideration of raw data and proper constructs of statutory interpretation, is based on an innovative interpretation of the waiver provision that is not sufficiently rational to entitle him to *Chevron* deference.¹⁶⁷

Additionally, this author is persuaded that the facts support California’s assertion that the State needs the AB 1493 standards to address its “compelling and extraordinary conditions.” Regardless of whether EPA evaluates the AB 1493 standards in isolation or as part of the overall air pollution package, the aforementioned legislative intent to afford California broad discretion instructs that two sets of facts should be viewed in the light most favorable to California’s position. The first set is the unchanged geographic and climatic conditions, as well as the high density of automobiles in California cities (particularly Los Angeles) – facts that even EPA did not dispute.¹⁶⁸ It is these unique conditions that have been, are, and will continue to be the key factors that tend to produce the effects burdening California. The second set of facts include all of the model data demonstrating projected increases in temperature, precipitation, and sea level rise that Administrator Johnson presented in his denial justification, along with the projected practical effects of these increases that disproportionately impact California.¹⁶⁹

Both parties agree that California’s urban centers, particularly in the San Joaquin

¹⁶⁴ H.R. REP. NO. 95-294, at 301-02 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1380-81.

¹⁶⁵ Motor & Equip. Mfr. Ass’n v. EPA (*MEMA I*), 627 F.2d 1095, 1110-11 (D.C. Cir. 1979).

¹⁶⁶ Massachusetts v. EPA, 549 U.S. 497, 524 (2007).

¹⁶⁷ Chevron, U.S.A., Inc. v. Natrual Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

¹⁶⁸ Published Justification for Denial of Waiver, *supra* note 48, at 12,163 to 12,164.

¹⁶⁹ *Id.* at 12,166 to 12,168.

Valley, suffer from suffocating ozone levels and are subject to intense heat waves and water shortages.¹⁷⁰ In addition, many other parts of California experience regular water shortages and droughts that severely impact the extensive agricultural economy and lead to seemingly never-ending wild fires.¹⁷¹ The IPCC and other scientific bodies project that as GHG emissions continue to further exacerbate global warming, global increases in temperature and sea level rise will be more dramatic than in decades and centuries past.¹⁷² The same projections demonstrate that the United States will endure increases equal to or greater than most other regions of the world, and, moreover, California will experience increases equal to or greater than the national average.¹⁷³

Administrator Johnson noted in his justification, *inter alia*, that some states or regions of the nation are projected to experience a bit more severe sea level rise or a more pronounced increase in precipitation than California.¹⁷⁴ But in large part recounting raw data does not tell the entire story. This author believes that the following calculus, which Administrator Johnson fails to use, better represents how to determine “compelling and extraordinary.” When California, with the largest agricultural based economy, largest coastal population, and greatest variety of ecosystems in the United States (to which belong many species that are threatened or endangered), experiences the projected higher-than-national-average increases in the three noted categories, in combination with the unique geographic, climatic, and population and automobile density conditions, California suffers more than the other regions of the country. No other state or region shoulders that same incredible burden. For all of the reasons stated above, this author believes that California has “compelling and extraordinary conditions” that set it apart from other parts of the United States. Thus, EPA wrongly denied California’s § 7543(b) waiver request and the Ninth Circuit should remand for reconsideration.

5. California’s AB 1493 GHG Standards are Consistent with 42 U.S.C. § 7521(a)

Finally, California’s standards must be consistent with 42 U.S.C. § 7521(a). While the vast majority of § 7521, often referred to as section 202(a) of the CAA, does not apply to the waiver at issue, the EPA Administrator most certainly evaluated a couple particular provisions that do apply. It is, however, difficult to tell if and to what extent the Administrator actually conducted this portion of the waiver review because his Federal Register notice focuses solely on the § 7543(b)(1)(B) criterion. Most relevant for the AB 1493 waiver request, the Administrator will, on remand if he did not already, ensure that any unreasonable risks to public health, welfare, or safety associated with the standards themselves or technologies required by the standards are resolved,¹⁷⁵ and that there is sufficient lead time built into the regulation to provide industry the time necessary to develop the requisite

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Published Justification for Denial of Waiver, *supra* note 48, at 12,167 to 12,168.

¹⁷⁴ *Id.*

¹⁷⁵ 42 U.S.C. § 7521(a)(4)(A) (2006) (“[N]o emission control device, system, or element of design shall be used . . . if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.”).

technologies that meet the standards.¹⁷⁶

If lead time is insufficient, then Administrator Johnson could find, on remand, that California's regulations are inconsistent with § 7521(a)(2), and either disapprove the waiver or delay implementation¹⁷⁷ to provide the automobile industry sufficient time to acquire, adapt, or develop the necessary technologies. Although absolute denial on grounds of insufficient lead time is unlikely, it is possible and to some extent even reasonable, that on remand Administrator Johnson could delay implementation of California's GHG regulations because the regulations mandate implementation of the standards for new vehicles as of the 2009 model year. Had Administrator Johnson found that California satisfied all other § 7543(b) waiver criteria when he made his initial decision in December 2007, this author believes that it is highly unlikely that the Administrator could have then justified disapproval of the waiver in part or whole based on unavailability of the requisite technologies.

Not only does history demonstrate that EPA routinely grants California's § 7543(b) waiver requests for California's technology-forcing regulations,¹⁷⁸ but further cutting against industry in this case is the fact that California passed AB 1493 in 2002 and CARB promulgated the final regulations as submitted to EPA in 2005. While this may not serve as official notice for the automobile industry to begin development and application of the requisite technology, because until the waiver request is approved the standards are technically preempted by § 7543(a), industry was certainly apprised of the details of California's waiver request and EPA's traditional approval of such waivers. Moreover, California points to a multitude of currently available technologies in its twenty-one pages of technology description that accompanied its waiver request.¹⁷⁹ With so many options already available, it is hard to imagine that EPA would delay implementation for more than one year. Reasonable justification for delay would not be based on lead time for industry to develop the technology, but rather to incorporate the technology into the manufacturing process.

Moreover, EPA stated in a 1975 waiver determination that when Congress drafted the waiver provisions, "[s]ponsors of the language eventually adopted referred repeatedly to their intent to make sure that no 'Federal bureaucrat' would be able to tell the people of California what auto emissions standards were good for them, as long as they were stricter than Federal standards"¹⁸⁰ EPA's practice of generally deferring to State judgment as to whether its standards are consistent with § 7521(a) appears nearly without exception but for a single instance where EPA found a California waiver request inconsistent with § 7521(a) because the California standard "would have forced manufacturers out of the California market for an entire

¹⁷⁶ *Id.* § 7521(a)(2) ("Any regulation prescribed under [§ 7521(a)(1)] . . . shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.").

¹⁷⁷ *See* MCCARTHY, *supra* note 43, at 9 ("The Administrator has used the latter authority [lead time requirement] in the past, and could do so again, to delay the effective date of California standards.").

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *See* WAIVER REQUEST SUPPORT DOCUMENT, *supra* note 69, at 21; *see also* INITIAL STATEMENT OF REASONS, *supra* note 12, at 35-86.

¹⁸⁰ California State Motor Vehicle Pollution Control Standards, 40 Fed. Reg. 23,102, 23,103 (May 20, 1975).

class of vehicles, i.e., light duty trucks.”¹⁸¹ Entire closure of a portion of the market certainly is not the case here, and thus EPA should defer to California’s well-supported decision.

6. Additional Considerations Related to the CAA, but not Within the Scope of the § 7543(b) Waiver Request

This section briefly addresses two additional points that are not squarely within the scope of the CAA preemption and waiver evaluation, but which merit attention due to their relationship to the CAA and because Administrator Johnson referred to the points in his denial justification. Section II.A.6.a addresses the 42 U.S.C. § 7507 “piggyback provision” and the potential for even greater reduction of GHG emissions from new automobiles and light trucks when other states adopt California’s AB 1493 standards. Section II.A.6.b addresses the Energy Independence and Security Act of 2007.¹⁸² Specifically, the discussion summarizes the mandated increase in CAFÉ standards in Title I, Subtitle A, and then notes the comparison drawn by CARB between the goals and projected benefits of EISA and AB 1493 standards.

a. AB 1493 as a Building Block for Other States to Adopt Standards

While perhaps not a reason expressly stated by Congress that California waiver requests should receive great deference, there is at least one additional practical reason that the AB 1493 waiver request should be granted. The reason is that if California’s waiver is not granted, the entire country will remain without GHG standards for new automobile emissions.¹⁸³—

The federal government has yet to promulgate a single GHG emissions tailpipe standard that is enforced nationwide and affects the production of new vehicles entering the market place in every state. Accordingly, the only way GHG emissions standards for new vehicles can come into force is via a California 42 U.S.C. § 7543(b) waiver.¹⁸⁴ Further, the only way those standards can take effect in any state other than California is if other states adopt the California standards pursuant to 42

¹⁸¹ California Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision of the Administrator, 49 Fed. Reg. 18,887, 18,892 (Aug. 27, 1984).

¹⁸² Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492.

¹⁸³ Despite the Court’s ruling a full year ago in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that EPA has authority pursuant to the CAA to regulate GHGs as air pollutants and remanding with specific instructions for EPA to decide whether to regulate mobile source GHG emissions with justification grounded in the statute itself, EPA still has not acted. See Letter from Martha Coakley, Attorney Gen. of Mass. et. al., to Stephen L. Johnson, Administrator, Env’tl. Prot. Agency (Jan. 23, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1518_johnson_letter_draft.pdf (expressing concern that EPA’s failure to take action pursuant to the Supreme Court’s order in *Massachusetts v. EPA*, as well as EPA’s failure to act in accord with its own public declarations of its intent to promulgate regulations by the end of 2007, constitutes unreasonable delay).

¹⁸⁴ President Bush did sign into law, on Dec. 19, 2007, the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, which, in relevant part, mandates increases in Corporate Average Fuel Economy standards. As is discussed in depth *infra*, Sections II.A.6.b and II.B, it is necessary to distinguish the EISA provisions that direct the National Highway Traffic Safety Administration to promulgate and implement the fuel economy regulations from air pollutant regulations that EPA promulgates, implements, and enforces.

U.S.C. § 7507,¹⁸⁵ which provides that any state with an EPA-approved State Implementation Plan (“SIP”)¹⁸⁶ “may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines.”¹⁸⁷ The only limitations are that the “piggyback states”¹⁸⁸ must adopt the California regulations in whole¹⁸⁹ and at least two years prior to the first model year that is subject to the standards.¹⁹⁰ The 1990 CAA amendments clarified that only two vehicle emissions regulatory programs are permitted – either the federal standard or the approved § 7543(b) California standard – in order to prohibit yet a third emissions standard or a “third car.”¹⁹¹ While this author does not read Administrator Johnson’s denial letter reference to the “patchwork of other states”¹⁹² that have already or will soon adopt California’s AB 1493 standards to mean he is concerned that a *third car* will emerge, many preemption advocates argue that, if EPA eventually grants California’s waiver, such a scenario may arise. As the text and history of § 7507 indicate, however, such arguments are simply weak attempts at finding yet another reason to deny the waiver because Congress explicitly states that “piggyback states” must adopt the California regulations in whole. The Congressional intent behind § 7507 seems to be an equitable compromise between accounting for the economic concerns of manufacturing automakers and the purchasing public, protecting the environment and human health, and continuing to encourage technological developments in California.¹⁹³

Today, there are fourteen states poised to implement the AB 1493 standards the moment EPA approves California’s waiver request, and two other states, Colorado and Utah, are preparing to adopt the regulations.¹⁹⁴ The states that have already

¹⁸⁵ This section is more often referred to as section 177 of the CAA. The author always cites directly to the United States Code sections throughout the note to assist the reader.

¹⁸⁶ It appears that the SIP requirement is rooted in Congress’ determination that air pollution prevention and control “is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3) (2006).

¹⁸⁷ *Id.* § 7507. See MCCARTHY, *supra* note 3, at 5 (noting that the only states without EPA-approved SIPs are Hawaii, North Dakota, and South Dakota).

¹⁸⁸ Piggyback states adopt California’s standards in EPA-approved waiver requests.

¹⁸⁹ 42 U.S.C. § 7507(1). See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (discussing that when Vermont adopted California’s automobile GHG emissions regulations, Vermont’s environmental agency did make estimated cost calculations accounting for, *inter alia*, the difference in the cost of gasoline from the West Coast to the East Coast). These substitutions of variables in the support document equations in no way changed the substance of the regulations, but rather served to provide the necessary economic feasibility assessments specific to Vermont. *Id.*

¹⁹⁰ 42 U.S.C. § 7507(2).

¹⁹¹ See Clean Air Amendments of 1990, Pub. L. No. 101-549, tit. II, § 232, 104 Stat. 2529 (codified as amended at 42 U.S.C. § 7507) (“Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards or otherwise create such a ‘third vehicle.’”).

¹⁹² Denial Letter, *supra* note 48, at 1.

¹⁹³ Chanin, *supra* note 68, at 720-21.

¹⁹⁴ Pew Center on Global Climate Change, States Poised to Adopt California Vehicle GHG Standards, http://www.pewclimate.org/what_s_being_done/in_the_states/vehicle_ghg_standard.cfm (last visited Nov. 18, 2008). The table is a compilation of the fourteen states and the manner in which the states have adopted, by legislation, regulations, and executive order. *Id.*

formally adopted the AB 1493 standards include Arizona, Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.¹⁹⁵ The combined population of these fourteen states plus California constitutes a staggering forty-four percent of the total population of the United States.¹⁹⁶ Thus, particularly in the absence of federal standards, now is the prime opportunity for EPA to approve California's GHG emissions standards in order to allow nearly half of the United States population to start making positive contributions in the global effort to arrest global warming.

b. AB 1493 Standards Complement the Energy Independence and Security Act of 2007

The EISA, signed into law on December, 19, 2007, is an omnibus energy policy law that addresses CAFÉ standards, renewable fuels standards, energy efficiency equipment standards, and which repeals several oil and gas tax incentives.¹⁹⁷ The only relevant portion of the EISA for purposes of this discussion is title I, subtitle A.¹⁹⁸ This section mandates the Secretary of Transportation to phase-in thirty-five mile per gallon ("mpg") combined fleet standards (passenger and non-passenger cars and light-duty truck1; light duty truck2) from 2011 through 2020,¹⁹⁹ requires manufacturers to come within ninety-two percent of the standard set by the Secretary for each model year in the published phase-in schedule,²⁰⁰ and provides for a credit scheme where manufacturers exceeding in one class while failing in another can transfer those credits within its own fleet to use or bank, or trade with other manufacturers.²⁰¹

Administrator Johnson noted in his December 19, 2007 waiver-denial letter to

¹⁹⁵ In addition to the individual states adopting or preparing California's automobile GHG emissions standards, there are numerous regional initiatives and coalitions that support AB 1493. *See generally* Kirsten H. Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006) (highlighting efforts to protect against climate change issues and difference between local governments and federal governments' efforts); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 65 (2005) (discussing Conference of New England Governors and Eastern Canadian Premiers and its adoption of joint Climate Action Plan); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 780-86 (2006) (discussing innovative environmental regulations adopted by some state and local governments); Letter from States of Oregon and Washington to Stephen L. Johnson, Administrator, Env'tl. Prot. Agency (Jun. 15, 2007), available at <http://www.westernlaw.org/files-1/Clean%20Air%20Act%20Waiver%20Comments%20version%20200706151.doc> (last visited Nov. 18, 2008) (requesting federal waiver similar to one granted in California for Washington state and Oregon).

¹⁹⁶ MCCARTHY, *supra* note 43, at 6.

¹⁹⁷ *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492; *see also* FRED SISSINE, CRS REPORT FOR CONGRESS: ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS (updated Dec. 21, 2007), http://energy.senate.gov/public/_files/RL342941.pdf [hereinafter EISA SUMMARY]; BRENT D. YACOBUCCI & ROBERT BAMBERGER, CRS REPORT FOR CONGRESS: AUTOMOBILE AND LIGHT TRUCK FUEL ECONOMY: THE CAFÉ STANDARDS (updated Dec. 3, 2007), <http://www.ncseonline.org/NLE/CRSreports/07Nov/RL33413.pdf>.

¹⁹⁸ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1498-1519.

¹⁹⁹ *Id.* § 102(a)(2), 121 Stat. at 1499 (codified as amended at 49 U.S.C. § 32902(b)(2)(A)-(C) (2006)).

²⁰⁰ *Id.* § 102(a)(2), 121 Stat. at 1499-1500 (codified at 49 U.S.C. § 32902(b)(4)).

²⁰¹ *Id.* § 104, 121 Stat. at 1502-03 (codified at 49 U.S.C. § 32903(f)-(g)).

Governor Schwarzenegger that he believed that because the climate change problems and GHG emissions extend beyond the borders of any single state, he supports the national approach to addressing climate change as embodied in the EISA.²⁰² While Administrator Johnson did not expressly use the EISA as part of his justification for denying the waiver, nor reference the EISA in his Federal Register notice, he nonetheless felt compelled to state in his denial letter that he “strongly support[s] this national approach [EISA] to this national challenge which establishes an aggressive standard of 35 miles per gallon for all fifty states, as opposed to 33.8 miles per gallon in California and a patchwork of other states.”²⁰³ The statement is benign at first blush; however, those few words merit attention in this article for two reasons.

First, it appears that Administrator Johnson is saying that with EISA signed into law there is no need, or at least less of a need, for California’s AB 1493 standards. After taking no action for two years, Administrator Johnson finally sent his denial-letter on December 19, 2007 (the same day that President Bush signed the EISA) implying that because the United States now has national legislation that will increase *fuel economy*, there is no reason for California and sixteen other states to have their own *mobile emissions standards*. Perhaps it was simply a poor choice of words, but the use of “as opposed to”²⁰⁴ seems to imply that there is a comparison to be made. As the reader will discover *infra* Section II.B, EPCA preemption analysis, there is ample discussion in two recent federal cases indicating there is not sufficient overlap between National Highway Traffic Safety Administration (“NHTSA”) promulgated CAFÉ standards and EPA, or EPA-approved, emissions standards to compare the two. The emissions standards have too many variables for a precise comparison to be made with the fuel efficiency standards. Further, the § 7543(b) prerequisite for waiver approval that “State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal Standards” specifically refers to “emissions from new motor vehicles” and not CAFÉ standards. Clearly the provision directs a comparison of emissions standards, and not any other convenient federal pollution standard the Administrator chooses.

Second, Administrator Johnson refers to “California and a patchwork of other states”²⁰⁵ as if to underscore that the national CAFÉ legislation is better because the entire country will immediately see cars and light trucks at dealerships that will meet the EISA mandated 35 mpg average fleet standard instead of California’s lower 33.8 mpg average fleet standard that just a few states adopted. This language is misleading at best. Notwithstanding the Administrator’s factual error or misrepresentation regarding the California fuel efficiency of 33.8 mpg (discussed in depth immediately below), the Administrator presumes that NHTSA will act speedily in promulgating and implementing the regulations so that the EISA timeline can actually be followed. Assuming, *arguendo*, however, that NHTSA and manufacturers conduct business pursuant to the EISA, follow the phase-in timeline eventually set by NHTSA, and meet the ninety-two percent requirement by model year, the 35 mpg standard still is not phased in until 2020. In contrast, had

²⁰² Denial Letter, *supra* note 48, at 1.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

California's waiver been granted without EPA-mandated delay or amendment to adjust for insufficient lead time, California phase-in would have started in 2009 in California and shortly thereafter in the fourteen states that adopted California's standards. Moreover, the AB 1493 standards would yield an estimated 36.6 mpg fleet average standard by 2016 and 43.9 mpg by 2020 (not the alleged 33.8 mpg).²⁰⁶ This discrepancy in fuel efficiency leads to the second reason the Administrator's EISA reference merits attention.

The Administrator provided unsupported and, according to CARB's January 2, 2008, Technical Assessment ("Assessment"),²⁰⁷ inaccurate facts. The Assessment noted that the "ARB staff had never seen this figure before [33.8 mpg], and it was not clear how the USEPA had arrived at this estimate."²⁰⁸ Because the Administrator directly asserted that EISA standards were more effective, CARB prepared the technical study to correct the record and provide for public consumption a fully supported comparison of the projected raw data.²⁰⁹ The Assessment demonstrated that AB 1493 standards would (had EPA granted the waiver) reduce California's GHG emissions by approximately 17.2 million metric tons ("mmt")²¹⁰ compared to EISA's 7.7 mmt²¹¹ by 2016, and approximately 33.4 mmt²¹² compared to 18.9 mmt,²¹³ respectively, by 2020. The projected cumulative reduction of carbon dioxide realized in California between 2009 (effective date for AB 1493) and 2016 was estimated at approximately 58 mmt using the AB 1493 standards, compared to approximately 20 mmt using EISA standards.²¹⁴ By 2020, the difference between AB 1493 and EISA standards was projected at 167 mmt versus 76 mmt.²¹⁵ In terms of estimated fuel economy, the Assessment showed that the AB 1493 standards yielded a combined fleet average of 33.1 mpg in 2016 and 40.4 mpg in 2020,²¹⁶ compared to EISA's federal fleet average of 29.6 mpg in 2016 and 35.0 mpg in 2020.²¹⁷ The bottom line is that clearly California's standards yield

²⁰⁶ CAL. AIR RES. BD, TECHNICAL ASSESSMENT 3, 6 (Jan. 2, 2008), http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=92ca4249-b954-483e-894f-d1e70880a34d [hereinafter CARB TECHNICAL ASSESSMENT]. While AB 1493 in its original form as submitted for waiver only set a phase-in period for the standards out to 2016, the California Climate Action Team subsequently recommended amending the regulations to require additional GHG emissions reductions out to 2020. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 3.

²⁰⁹ *Id.* Before providing the comparison of data in multiple tables, CARB described its methodology for converting miles per gallon into equivalent GHG emissions rates (grams per mile of carbon dioxide), the calculation of fleet mix, and several other underlying calculations and explanations. Also, CARB notes that it prepared the report even though the "Administrator's comparison is legally irrelevant to and not a proper basis for his decision . . ." CARB TECHNICAL ASSESSMENT, *supra* note 206, at 3 n.4.

²¹⁰ CARB TECHNICAL ASSESSMENT, *supra* note 206, at 7 n.10, 8 tbl.9. These calculations, for all tables, are a combination of passenger cars (PC), light duty truck 1 (LDT1), and light duty truck 2 (LDT2). California fleet starts at 70% PC/LDT1 and 30% PC/LDT2, whereas the federal fleet starts at 50% PC/LDT1 and 50% LDT2. The percentages for both are slightly adjusted over time based on U.S. EPA MOBILE6 models projecting changes in consumer purchasing.

²¹¹ *Id.* at 10 tbl.11.

²¹² *Id.* at 9 tbl.10.

²¹³ *Id.* at 10 tbl. 12.

²¹⁴ *Id.* at 11 fig. 1.

²¹⁵ CARB TECHNICAL ASSESSMENT, *supra* note 206, at 11 fig.1.

²¹⁶ *Id.* at 7 tbl.7.

²¹⁷ *Id.*

a greater increase in fuel efficiency and much greater of a reduction in carbon dioxide equivalent emissions.²¹⁸

Finally, the Assessment estimated the comparative benefits of the AB 1493 standards over the EISA standards for the twelve piggyback states²¹⁹ that have adopted California's mobile GHG emissions regulations.²²⁰ CARB estimated that in 2016 GHG reduction in the twelve AB 1493 adopting states will be approximately 28.2 mmt, compared to the estimated 15.7 mmt GHG reduction from the federal EISA standards – a difference of approximately 12.5 mmt, or a seventy-nine percent benefit of California standards over EISA standards.²²¹

This discussion simply serves to demonstrate that even while California, with which two federal district court judges also happen to agree, does not believe a comparison between AB 1493 *emissions* standards and EISA *fuel efficiency* standards is appropriate for determining EPCA preemption (or the “at least as protective of public health and welfare” CAA waiver requirement), the comparison as presented by Administrator Johnson is flawed. As a purely pragmatic argument, divorced from the statutory interpretation and body of case law presented in this article, the AB 1493 standards yield better fuel efficiency and greater GHG reductions, which further supports why the California standards are desirable in and of themselves.

7. Conclusion

Before concluding this section, it is worth noting the response to Administrator Johnson's decision to deny California's waiver from within EPA and from several congressional committees. Many news sources and congressional committees are reporting that EPA attorneys advised Administrator Johnson that, as a legal matter, the waiver should be granted.²²² To find otherwise would not be in accordance with the law and would open EPA to significant criticism as a mere puppet of the

²¹⁸ The author accepts California's assessments as true and accurate if for no other reason than because EPA has to date failed to provide any of their own data to counter California's myriad of statistics and conclusions.

²¹⁹ At the publication of the Technical Assessment, only twelve states had adopted AB 1493 regulations. As of the writing of this article, fourteen states had adopted. Pew Center on Global Climate Change, *supra* note 194.

²²⁰ CARB TECHNICAL ASSESSMENT, *supra* note 206, at 12. The figures would change slightly, ostensibly continuing in the direction of more significant reduction of emissions and even better fuel efficiency, using AB 1493 over EISA standards, because there are now fourteen states that have officially adopted California's standards.

²²¹ *Id.* at 13 tbl.15. By 2020, assuming adoption and implementation of the extended AB 1493 schedule (“Pavley II rules”), the twelve states will realize a 59.0 mmt GHG reduction under AB 1493 standards compared to a 37.2 mmt GHG reduction under federal standards. This is a 21.8 mmt, or fifty-nine percent benefit using AB 1493 over federal EISA standards.

²²² See Juliet Eilperin, *EPA Chief Denies California Limit on Auto Emissions*, WASHINGTON POST, Dec. 20, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902012.html> (reporting EPA-internal dissension over Administrator Johnson's denial of California's AB 1493 waiver request, specifically that attorneys advised that EPA should approve the waiver); see also Foxnews.com, *Decision to Nix California Greenhouse Plan Prompts EPA Worker Protest* (Mar. 3, 2008), <http://www.foxnews.com/story/0,2933,334675,00.html> (discussing the recent letter from unionized EPA scientists to Administrator Johnson, wherein over 10,000 EPA employees, represented by four unions, accuse Administrator Johnson of, *inter alia*, breaching EPA's commitment to the upholding the Principles of Scientific Integrity).

Washington political machine. Many EPA employees, including scientists, attorneys, and specialists involved in the AB 1493 assessment, were so outraged over Administrator Johnson's flagrant disregard of their scientific findings and recommendations regarding numerous EPA decisions that they publicly chastised the Administrator in a March 3, 2008 letter.²²³ While the letter explains that discontent within EPA has been building for several years, and it appears that the AB 1493 waiver-denial may simply serve as the proverbial "straw that broke the camel's back," the letter clearly indicates that Administrator Johnson repeatedly ignored advice offered by EPA Labor Union Coalition employees.²²⁴ He replaced their advice, based on scientific evidence and statutory interpretation, with his own assessment, apparently crafted to conform to the prevailing political winds.

Further, two congressional committees are specifically investigating EPA's decision-making process: the Senate Environment and Public Works Committee and the House Committee on Oversight and Government Reform. Senator Barbara Boxer, Chairwoman of the Senate Environment and Public Works Committee, along with several other U.S. Senators, is calling for an open and thorough review of the entire AB 1493 waiver-denial process in which Administrator Johnson and his staff engaged. The committee alleges that Administrator Johnson ignored his staff's recommendations, current science, and controlling law, and instead denied the waiver in response to pressure from industry and the White House.²²⁵ Representative Henry A. Waxman, Chairman of the House Committee on Oversight and Government Reform, and his colleagues are engaging in a similar investigation.²²⁶

Finally, while California Governor Schwarzenegger, CARB, and several AB 1493 advocates are taking action in the federal courts, California Senators Boxer and Feinstein are taking action in Congress to reverse Administrator Johnson's denial.²²⁷

²²³ Letter from EPA Labor Union Coalition to Stephen L. Johnson, Administrator, Env'tl. Prot. Agency (Mar. 3, 2008), available at http://www.peer.org/docs/epa/08_3_3_union_letter_on_johnson.pdf.

²²⁴ *Id.* at 3.

²²⁵ See Senator Barbara Boxer, Chairman of Senate Committee on Environment and Public Works, Opening Statement at Full Committee Field Briefing: Investigating EPA's Obstruction of Global Warming Controls for Vehicles (Jan. 10, 2008), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e0646ea1-de9d-4a3d-b7b9-49d298afae4a. The author recommends that readers go to the Senate Environment and Public Works Committee Majority website, <http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases> (last visited Mar. 15, 2008), to see a comprehensive list of links to AB 1493 related press releases, hearing testimony, and speeches.

²²⁶ See Letter from Rep. Henry A. Waxman, Chairman of House Committee on Oversight and Government Reform, to Stephen L. Johnson, Administrator, Env'tl. Prot. Agency (Dec. 20, 2007), available at <http://www.cleancarscampaign.org/web-content/newsroom/docs/WaxmanRequest-12-20-07.pdf> (requesting all documentation related to the AB 1493 waiver request); Press Release, House Committee on Oversight and Government Reform, Chairman Waxman Issues a Subpoena for EPA Documents (Mar. 13, 2008), available at <http://oversight.house.gov/story.asp?ID=1817> (last visited Mar. 15, 2008) (announcing issuance of subpoena on EPA compelling production of 196 documents). See the webpage for the House Committee on Oversight and Government Reform, <http://oversight.house.gov/investigations.asp?id=121> (last visited Mar. 15, 2008), for links to the ongoing communications between the committee and EPA, hearing transcripts, and other related materials.

²²⁷ See Press Release, Senate Committee on Environment and Public Works, Boxer Introduces Bill to Reverse EPA Global Warming Waiver Decision (Jan. 24, 2008), available at http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=ae230690-802a-23ad-4b41-cfdc0d90bac6&Region_id=&Issue_id= (last visited Mar. 15, 2008).

On January 24, 2008, Senator Boxer and a bipartisan group of cosponsors introduced Senate Bill 2555 (“S2555”), the Reducing Global Warming Pollution Act of 2008. The bill, which was immediately referred to the Committee on Environment and Public Works (“EPW”) for action, essentially directs Administrator Johnson to grant California’s waiver request. While the Senate EPW Committee approved S2555 on May 21, 2008 and reported the bill out to the Senate for a vote on June 27, 2008, S2555 still has not moved forward to a vote.²²⁸ Similarly, the House of Representatives is also working to reverse EPA’s denial. Representative Welch of Vermont, along with a bipartisan group of cosponsors, introduced the Right to Clean Vehicles Act on March 6, 2008.²²⁹ The bill, as introduced, only consists of a few lines that amend 42 U.S.C. § 7543 by adding the following:

(f) Waiver – Notwithstanding subsection (b) or any other provision of law, the application for a waiver of preemption dated December 21, 2005, submitted to the Administrator pursuant to subsection (b) by the State of California for the regulation of that State to control greenhouse gas emissions from motor vehicles shall be considered to be approved.²³⁰

While many bills referred to committee for review, investigation, and revision never make it to the House or Senate floor for a vote – a fate the two aforementioned bills may ultimately suffer – Congress is nonetheless sending a message. Congress is telling EPA and the American people that, although the House and Senate may not be able to efficiently draft national legislation that can pass both houses and survive veto by the President, Congress can at least work to ensure that EPA properly reviews California’s waiver request to give the pioneering state of California an opportunity to lead the way.

All of this is to say that Administrator Johnson, who is charged to make decisions grounded in science and the controlling statutory language, is under attack for allegedly disregarding what should serve as his guiding principles. In sum, regardless of public outcry, internal dissent within EPA, and congressional action to reverse EPA’s decision, as a purely legal matter California has a strong case for how and why its AB 1493 waiver request meets the requirements of § 7543(b). Thus, the D.C. Circuit should remand the waiver denial to EPA for reconsideration, whereupon EPA should approve the standards in whole, without delay.

²²⁸ Reducing Global Warming Pollution from Vehicles Act of 2008, S. 2555, 110th Cong. (2008). The reader can quickly find the text and status of the Bill by inputting “2555” in the search box at <http://thomas.loc.gov/home/c110query.html> (last visited Nov. 9, 2008).

²²⁹ See Right to Clean Vehicles Act, H.R. 5560, 110th Cong. (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h5560ih.txt.pdf (last visited Nov. 9, 2008).

²³⁰ *Id.* § 2.

B. Energy and Policy Conservation Act²³¹

Unlike the CAA, which preempts state mandated new vehicle emissions standards and then creates an explicitly deferential waiver provision for California (albeit not by name), the Energy and Policy Conservation Act (“EPCA”) appears on its face to preempt, without exception, any standard that might infringe upon the EPCA’s complete and sole jurisdiction over corporate average fuel economy (“CAFÉ”) standards. The argument that the EPCA does in fact preempt California’s AB 1493 was first raised in earnest by automobile manufacturers and dealerships while CARB promulgated its GHG standards. The first legal challenge, however, *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, was filed December 7, 2004²³² by a group of automobile dealerships following CARB’s 2004 approval of the regulations pursuant to California Health and Safety Code section 43018.5(b)(1).²³³ In response to California’s motion for judgment of dismissal for all claims, the court dismissed claims under the Sherman Act and the Dormant Commerce Clause, but denied the motion with respect to preemption under the CAA, the EPCA, and United States foreign policy.²³⁴ California then argued multiple justiciability grounds²³⁵ whereupon the court ordered a stay pending the outcome of *Massachusetts v. EPA*.²³⁶

Finally, after many oral briefings by both sides, Judge Ishii handed down his final ruling on December 11, 2007 in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*,²³⁷

²³¹ Energy and Policy Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified in scattered sections of 42 U.S.C.). In 1994, Congress recodified certain laws related to transportation, including the fuel economy laws, into Title 49 of the United States Code. See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (revising, codifying, and enacting without substantive change certain general and permanent laws related to transportation). EPCA fuel economy provisions are now codified at 49 U.S.C. §§ 32901-32919 (2006).

²³² Complaint for Declaratory and Injunctive Relief, *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04cv06663, 2004 WL 2846142 (E.D. Cal. Dec. 7, 2004).

²³³ See *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CV F 04-6663AWI LJO, 2007 WL 135688, at *1 (E.D. Cal. Jan. 16, 2007) (ordering stay to further proceedings pending decision from the U.S. Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007)). This order followed *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006), wherein the court granted California’s motion for judgment on the Dormant Commerce Clause and Sherman Act claims, and denied California’s motions for judgment regarding the CAA, EPCA, and foreign policy preemption claims. *Witherspoon*, 2007 WL 135688, at *1.

²³⁴ *Witherspoon*, 2007 WL 135688, at *7-9. The Defendants moved for dismissal on June 1, 2006, and the court ruled Sept. 25, 2006. *Id.* at *1.

²³⁵ *Id.* at *1 (“Defendants . . . seek to bring this proceeding to a permanent or temporary halt by arguing that Plaintiffs’ remaining claims for relief are not now ripe for adjudication or are now moot, or that the proceedings should be stayed pending the outcome of the Supreme Court Case of *Massachusetts v. EPA*.” (citation omitted)).

²³⁶ *Id.* at *15. The Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), on April 2, 2007, and as will be discussed in depth later in this article, Judge Ishii granted California’s EPCA and foreign policy motions to dismiss in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

²³⁷ *Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). At the time of original filing in the case, Catherine E. Witherspoon was the Executive Director of CARB, and thus the principal defendant named in the case. By the time Judge Ishii made his final ruling on December 11, 2007, Ms. Witherspoon was no longer the Executive Director and the action was amended to reflect the name of the new Executive Officer appointed on October 26, 2007, Mr. James Goldstene. See Press Release, California Air Resources Board, CARB Appoints New Executive Officer (Oct. 26, 2007), available at <http://www.arb.ca.gov/lispub/rss/displaypost.php?pno=838>.

holding that neither EPCA nor foreign policy concerns preempt AB 1493 standards. Intervening between Judge Ishii's stay ruling in *Witherspoon*²³⁸ and his final ruling in *Goldstene*,²³⁹ the Federal District Court for the District of Vermont ruled in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*²⁴⁰ with respect to Vermont's new automobile GHG emissions standards that it adopted in whole from California pursuant to the 42 U.S.C. §7507 piggyback provision. Both parties stipulated in *Green Mountain* and *Goldstene*, and the court proceeded with its analysis, assuming that California's GHG new vehicle emissions standards waiver request, as discussed *supra* Section II.A, was approved in whole. This assumption was necessary so that the court could execute a complete assessment of whether EPCA preempts the GHG standards as incorporated into federal law pursuant to the CAA.

Ultimately, the court held that Vermont's GHG regulations were not preempted by EPCA because "the preemption doctrines do not apply to the interplay between section 209(b) of the CAA and EPCA, in essence a claim of conflict between two federal regulatory schemes."²⁴¹ Both courts, in fact, cite to the Supreme Court's holding in *Massachusetts v. EPA* that the existence of EPCA does not eliminate EPA's mandate under the CAA to protect the public "health" and "welfare."²⁴² While the two acts overlap to some extent in the regulation of mobile sources, each statute has its own purpose and set of criteria that must be followed when the charged agencies promulgate regulations. However, because the express language of EPCA's preemption provision, 49 U.S.C. § 32919(a), appears to forbid any state from promulgating or enforcing GHG regulations regardless of its conformity to the CAA, and because the industry plaintiffs in *Green Mountain* and *Goldstene* claim the regulations actually conflict with the CAFÉ standards, both courts conducted a full EPCA express preemption analysis.²⁴³ With a general foundation laid for understanding the intersection of the CAA and EPCA with regard to GHG auto emissions preemption, both courts then went on to hold that Vermont's GHG regulations are not preempted by the doctrines of field preemption or conflict preemption. Each of the three arguments is explored in turn, below, as evaluated in *Green Mountain* and then *Goldstene*, respectively.²⁴⁴

1. AB 1493 Standards Survive § 32919(a) "Related to" Clause Express Preemption

The automobile manufacturer plaintiffs argued that "Vermont's GHG emissions standards not only are 'related to fuel economy standards,' but essentially constitute

²³⁸ *Witherspoon*, 2007 WL 135688, at *1.

²³⁹ 529 F. Supp. 2d 1151.

²⁴⁰ 508 F. Supp. 2d 295 (D. Vt. 2007).

²⁴¹ *Id.* at 350.

²⁴² 549 U.S. 497, 532 (2007) (citing 42 U.S.C. § 7521(a)(1) (2006)).

²⁴³ *Green Mountain*, 508 F. Supp. 2d at 350; *Goldstene*, 529 F. Supp. 2d at 1165.

²⁴⁴ See *Lincoln-Dodge, Inc. v. Sullivan*, No. 06-70T, 2007 WL 4577377 (D. R.I. Dec. 21, 2007). The auto industry continues to file lawsuits in other states that chose to adopt California's AB 1493 standards. One of the lawsuits that is rapidly moving through the United States District Court for the District of Rhode Island is a challenge by several Rhode Island auto dealerships, the Alliance of Automobile Manufacturers, Chrysler, and General Motors, seeking a declaration that, *inter alia*, EPCA preempts the Rhode Island regulations. Judge Ernest C. Torres, in *Lincoln-Dodge v. Sullivan* recently denied Rhode Island's motion to dismiss on grounds that the plaintiff's claim is not ripe. *Id.* at *1. While the court has yet to reach the substantive matters, readers should watch the *Lincoln-Dodge v. Sullivan* litigation to see how Judge Torres parses the preemption arguments.

‘de facto fuel economy standards.’”²⁴⁵ The language to which the plaintiffs referred comes from 49 U.S.C. § 32919(a), which states in relevant part that “a State . . . may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles.”²⁴⁶ Because the *Green Mountain* and *Goldstene* courts use different approaches to answer this question, the following analysis will address each court’s rationale separately.

a. Green Mountain

Chief Judge William Sessions III, who ruled on and wrote the voluminous opinion for *Green Mountain*, began his exhaustive analysis by stating that “the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’s pre-emptive intent.”²⁴⁷ First, the court addressed the plaintiff’s *de facto* argument and found that Vermont’s regulations *are not* de facto fuel economy standards. The court acknowledged that “[t]here is indeed a mathematical relationship between the carbon content of a fuel and the carbon which is released through emissions of hydrocarbons, carbon monoxide, or carbon dioxide.”²⁴⁸ However, the court said that “the fact that manufacturers may have to increase fuel economy to some degree in order to comply does not per se convert an emissions standard to a fuel economy standard.”²⁴⁹

There are other variables that require accounting that could even further attenuate the fuel-consumed to emissions relationship. One such variable is on-going and future changes in the composition of fuels currently used in new passenger autos and light-duty trucks – better refined diesels and gasoline, E85 (85% ethanol; 15% gasoline), electricity, and other fuels under development.²⁵⁰ Other variables include adjustments such as air conditioning changes or using air conditioning credits that could further complicate the equation and further dilute the *de facto* assertion by automakers.²⁵¹ Moreover, because Vermont regulations measure *carbon dioxide equivalents*, which include not only carbon dioxide, but also “methane (a hydrocarbon), carbon monoxide, and nitrous oxide, each of which is weighted according to its global warming potential,”²⁵² the correlation of fuel-consumed to carbon dioxide equivalents is not the same near-perfect correlation as fuel-consumed to the emission of carbon dioxide with which EPA and NHTSA are concerned. Finally, while the CAFÉ standards do not account for upstream emissions – those emissions associated with production of alternative fuels such as corn ethanol, liquid petroleum gas (propane), or compressed natural gas – the GHG regulations in California, Vermont, and other adopting states do account for the upstream emissions.²⁵³

²⁴⁵ *Green Mountain*, 508 F. Supp. 2d at 351.

²⁴⁶ 49 U.S.C. § 32919(a) (2006).

²⁴⁷ *Green Mountain*, 508 F. Supp. 2d at 351 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 352.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 353.

²⁵² *Green Mountain*, 508 F. Supp. 2d at 352.

²⁵³ *Id.* at 353.

Second, the court addressed the “related to” preemption argument and found it too was lacking. Because the “related to” language is so incredibly broad, the court decided that it must look to more than the mere text of the statutory provision and conduct a more thorough analysis using statutory construction, the actual practice of NHTSA, and legislative intent.²⁵⁴

The court first noted two statutory construction reasons that support the argument that AB 1493 is not preempted by EPCA’s “related to” clause. First, the EPCA requires NHTSA to consider federal emissions standards, those standards that are promulgated by EPA or approved by waiver in accordance with the CAA, when establishing its average fuel economy standards.²⁵⁵ Second, the court points to the actual order of enactment of the two statutes – the CAA in 1970 and then EPCA in 1975 – indicating that the language of 49 U.S.C. § 32919(f) clearly refers to the emissions standards governed by an act already in existence and with a comprehensive body of explanatory legislative history. Further, the 1977 revision of the § 7543(b) waiver language²⁵⁶ to its current wording, unchanged by the 1990 amendments, was accounted for in 1994 when Congress made technical revisions to the CAFÉ standard provisions and recodified the provisions in Title 49 of the Code.²⁵⁷

The court then went on to discuss NHTSA’s practice²⁵⁸ of including EPA-approved California waiver requests relating to emissions standards as within “other motor vehicle standards of the Government.”²⁵⁹ Not only does this practice demonstrate that NHTSA considers the federal emissions standards, but more importantly, NHTSA recognizes that EPA-approved waivers are adopted and incorporated into CAA-regulated and federally sanctioned emissions standards.

Finally, Judge Sessions pointed to the legislative history that clearly indicates Congress did not intend for the EPCA to expressly preempt EPA-approved § 7543(b) emissions waivers via the § 32919 “related to” clause. While committee reports accompanying the EPCA bill did not specifically discuss the scope of the § 32919(a) preemption clause, the legislative history clearly indicates that Congress expected NHTSA to account for other regulations such as EPA emissions regulations.²⁶⁰ Further, the House report makes clear that EPA-approved § 7543(b)

²⁵⁴ *Id.* at 354.

²⁵⁵ *Id.* (citing 49 U.S.C. § 32902(f) (2006)). Delegation of authority from Congress to NHTSA is located at 49 U.S.C. § 32902(a)-(c), where Congress delegated authority to the Secretary of Transportation to prescribe by regulation the fuel standards for non-passenger and passenger automobiles, albeit with specific instructions that certain recommended amendments must be submitted to the Congress for approval. *See* 49 U.S.C. § 32902(a)-(c). Then, the Secretary of Transportation delegated authority to the Administrator of the National Highway Traffic Safety Administration (“NHTSA”) to design and set the average fuel economy performance standards. *See* 49 C.F.R. § 1.50(f) (2006).

²⁵⁶ Clean Air Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 685, 755.

²⁵⁷ Pub. L. No. 103-272, § 1(e), 108 Stat. 1075 (1994) (added the provisions to Title 49 as § 32918). A subsequent 1994 act then amended the § 32918 to § 32919. Prior to 1994, 49 U.S.C. § 32919 existed substantively the same, but as EPCA section 509 as enacted pursuant to Pub. L. No. 94-163, § 301, 89 Stat. 914 (1975), which amended Title 15 of the Code to include §§ 2001-2012. The provision was then codified as 15 U.S.C. § 2009 (1975). This portion of Title 15 was called the Motor Vehicle Information and Cost Savings Act as enacted by Pub. L. No. 92-513, 86 Stat. 947 (1972). The rest of the EPCA, that is not part of CAFÉ standards, is codified in scattered sections 42 U.S.C.

²⁵⁸ *Green Mountain*, 508 F. Supp. 2d at 346-47.

²⁵⁹ 49 U.S.C. § 32902(f) (2006).

²⁶⁰ *Green Mountain*, 508 F. Supp. 2d at 354.

waivers as well as other states that subsequently adopt and incorporate California's standards via the § 7509 “piggyback” provision, are deemed to satisfy federal standards and require consideration by NHTSA.²⁶¹ Congress was aware when it debated the 1977 Amendments that potential conflict existed between the new and more stringent CAA provisions and EPCA’s domain over improved fuel economy, but legislative history indicates that the use of new technologies and “the experience of the stricter California standards shows that tighter standards do not necessarily mean a fuel economy reduction.”²⁶² Finally, multiple reports reiterate that when the CAFÉ standard sections were transferred from Title 15 to Title 49, Congress did not intend for any substantive changes in the text.²⁶³ Thus, “other motor vehicle standards of the Government”²⁶⁴ has exactly the same meaning today that it did prior to 1994. All agencies and courts should continue to interpret the clause to include all federal mobile source emissions regulations, including those state standards as approved through the § 7543(b) waiver process.

b. Goldstene

While Judge Ishii in *Goldstene* reaches the same conclusion as Judge Sessions in *Green Mountain*, that provided EPA grants a § 7543(b) waiver the EPCA does not expressly or impliedly preempt AB1493, Judge Ishii reached that conclusion using a different approach.²⁶⁵

First, the court asked whether EPA has the authority to promulgate automobile emission control regulations that affect fuel economy. Citing to the recent *Massachusetts v. EPA* opinion, the court found that “Congress intended EPA to be able to promulgate emissions control regulations for the protection of public health and welfare notwithstanding the potential effect of those regulations on average fleet fuel economy standards determined under EPCA.”²⁶⁶ The Supreme Court made clear that regardless of whether EPA emissions regulations affect fuel efficiency, the threshold issue is whether the new provisions regulate GHG emissions that EPA determined threaten health and welfare.²⁶⁷ As noted earlier, the Court held that EPA not only has the authority to regulate, but in fact is charged with regulating air pollutants in order to protect the public health and welfare.²⁶⁸ “Air pollutants,” said the Court, is defined to include GHGs even though the drafters of the CAA likely did not even know GHGs existed at the writing of the CAA.²⁶⁹

Second, the court asked if the EPCA precludes the EPA-promulgated emission control regulations if they have an incidental effect of requiring greater fuel

²⁶¹ *Id.* at 346 (citing H. REP. NO. 95-294, at 302 (1977), reprinted in 1977 U.S.C.C.A.N. 1381).

²⁶² *Id.* (quoting H.R. REP. NO. 95-294, at 245-46, 249, reprinted in 1977 U.S.C.C.A.N. 1324-25, 1328).

²⁶³ See S. REP. NO. 103-265, at 1 (1994); see also H.R. REP. NO. 103-180 (1994), at 1, reprinted in 1994 U.S.C.C.A.N. 818, 818.

²⁶⁴ 49 U.S.C. § 32902(f) (2006).

²⁶⁵ See *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (noting that in light of the *Massachusetts v. EPA* ruling, it was appropriate to revisit the holding in *Witherspoon* regarding EPCA’s preclusive effect on EPA and California’s authority to regulate GHGs).

²⁶⁶ *Id.* at 1167.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1166 (citing *Massachusetts v. EPA*, 549 U.S. 497, 530-33 (2007)).

²⁶⁹ *Id.*

efficiency than NHTSA requires under the CAFÉ standards.²⁷⁰ Judge Ishii found that EPCA does not preclude or preempt the EPA regulations, first by citing to the Court's proclamation in *Massachusetts v. EPA* that where two agencies appear to have overlapping responsibilities "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."²⁷¹ He then goes one step further to determine the mechanism for reconciling the potential inconsistency – harmonization.

Judge Ishii evaluated the structure and text of the EPCA and relevant portions of the CAA. He found that, as noted in *Massachusetts v. EPA*, 42 U.S.C. § 7521(a)(1) clearly provides EPA's purpose as protecting the public's health and welfare.²⁷² As EPA promulgates its regulations, it must consider such "factors as the level of emissions reductions achievable through available technology, cost, and energy and safety factors associated with the application of the emission-reduction technology."²⁷³ Moreover, Judge Ishii noted that in the lengthy discussion on the subject of EPA GHG regulation in *Massachusetts v. EPA*, there is no language that "requires EPA to harmonize its regulation with DOT's administration of EPCA."²⁷⁴

However, the EPCA unequivocally provides that NHTSA must consider technological feasibility, economic practicability, the need for energy conservation, and "other motor vehicle standards of the Government," including, explicitly, regulations promulgated by EPA.²⁷⁵ The court then concludes that as it carries out its EPCA duties, it is NHTSA that must harmonize its regulations with EPA's regulations and not the other way around.²⁷⁶

Third, the court asked whether state emission control regulations that have EPA-approved § 7543(b) waivers, should be treated differently from EPA-promulgated emission control regulations.²⁷⁷ The court found that the California-promulgated regulations, if approved by EPA, must be treated the same as EPA-promulgated regulations. The regulations "may be implemented to achieve compliance by any state, and both [EPA and California regulations] must be considered by NHTSA in formulating average fuel economy standards."²⁷⁸ While there may be overlapping of obligations or responsibilities, there is no conflict and NHTSA must harmonize its regulations as discussed in the aforementioned section.

Judge Ishii noted that the key to this analysis is that California must submit the AB 1493 promulgated regulations to EPA for a CAA section 209(b) (42 U.S.C. § 7543(b)) waiver and in fact meet the requirements of 42 U.S.C. §§ 7543 and 7521(a) as explained in detail *supra* Section II.A. If, as here, California meets those criteria

²⁷⁰ *Goldstene*, 529 F. Supp. 2d at 1167.

²⁷¹ *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. at 532).

²⁷² *Id.* at 1167.

²⁷³ *Id.* at 1169 (citing 42 U.S.C. § 7521(a)(3)(A) (2006)).

²⁷⁴ *Id.* at 1168.

²⁷⁵ *Goldstene*, 529 F. Supp. 2d at 1168.

²⁷⁶ *See id.* at 1169-70. The court also notes the recent case of *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007), wherein the Ninth Circuit invalidated a final rule promulgated by NHTSA in part because NHTSA failed to consider National Environmental Policy Act ("NEPA") requirements as part of EPCA's requirement to consider "other laws of the Government." Specifically, NHTSA failed to consider the impact on global climate change as it set new fuel efficiency standards.

²⁷⁷ *Goldstene*, 529 F. Supp. 2d at 1171.

²⁷⁸ *Id.* at 1173.

then EPA must grant the waiver. Judge Ishii went on to discuss Congress's intent to provide California with the broadest possible discretion when it drafted the waiver provision, as well as Congress's intent embodied in the CAA section 177 (42 U.S.C. § 7507) "piggyback" provision that other states would be able to adopt the new California standards but no other "third vehicle."²⁷⁹ Further, as discussed in the *Green Mountain* analysis *supra* Section II.B.1.a, Judge Ishii also evaluated the congressional history and statutory text of the EPCA with respect to the evolution "without substantive change"²⁸⁰ of original EPCA section 502(d) to its 1994 recodification. Judge Ishii reached the same conclusion as Judge Sessions, that in fact California's AB 1493 regulations are entitled to the same consideration by NHTSA as EPA-promulgated emissions regulations.

Finally, notwithstanding its earlier finding that the EPCA does not preclude the EPA-waiver approved state emission controls, the court asks whether the "related to" clause in 49 U.S.C. § 32919 either expressly or impliedly preempts California's AB 1493 regulations if the incidental effects stemming from the new automobile greenhouse gas emission impact fuel efficiency.²⁸¹ The court ultimately held that the EPCA does not expressly or impliedly preempt the AB 1493 regulations.

Similar to the *Green Mountain* court, Judge Ishii started his analysis with the premises that "the ultimate touchstone"²⁸² of any preemption case is congressional intent, and that a federal act should not preempt "historic police powers of the states . . . unless that was the clear and manifest purpose of Congress."²⁸³ Consequently, ostensibly express preemption provisions should be narrowly interpreted. Judge Ishii found that because California had regulated pollution emissions before either the CAA or the EPCA were enacted, and in fact the CAA provided a waiver provision acknowledging the historic state regulation, Congress did not intend to preempt California's regulations.²⁸⁴ Moreover, the court noted it is not conceivable that Congress intended for the EPCA to preempt EPA-approved AB 1493 regulations because Congress expressly stated in the EPCA that the NHTSA must consider those "other motor vehicle standards of the government," in promulgating its own regulations.²⁸⁵ Finally, Judge Ishii cited to the *Massachusetts v. EPA* ruling where the Court held that EPA's regulation of "carbon dioxide emissions serve[s] a purpose that is distinct from, and not in conflict with, the purpose of EPCA."²⁸⁶

The *Goldstene* court also went on to highlight, just as the *Green Mountain* court had, that because there is not a one-to-one correspondence between the AB 1493 regulations reducing carbon dioxide emissions and the incidental increase in fuel efficiency, the AB 1493 regulatory scheme does not constitute a *de facto* regulation of fuel efficiency.²⁸⁷ California incorporates too many variables for NHTSA to argue successfully that the new automobile GHG regulations are simply fuel

²⁷⁹ *Id.* at 1172.

²⁸⁰ *Id.* at 1171.

²⁸¹ *Id.* at 1174.

²⁸² *Goldstene*, 529 F. Supp. 2d at 1174 (quoting *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005)).

²⁸³ *Id.*

²⁸⁴ *Id.* at 1174-75.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Goldstene*, 529 F. Supp. 2d at 1176.

efficiency standards disguised with a different name.

c. Conclusion

The bottom line is that the *Green Mountain* and *Goldstene* rulings provide California, and the increasing number of § 7507 “piggyback” states, with an incredibly thorough and well-structured analysis that unequivocally states that the AB 1493 GHG emissions standards are not expressly or impliedly preempted by § 32919(a). For the Second Circuit²⁸⁸ or Ninth Circuit²⁸⁹ to find otherwise would require the court to find great error in the analysis of well-grounded opinions, or to “ignore decades of EPA-issued and approved regulations that also can be said to ‘relate to’ fuel economy.”²⁹⁰

2. AB 1493 Standards Survive Field Preemption Doctrine Preemption

Returning briefly to *Green Mountain*, Judge Sessions continued on to easily dismiss field preemption as a bar to Vermont’s GHG regulations. Judge Ishii, *supra* Section II.B.1.a, presented this same argument but as part of his “related to” clause analysis and not as an independent argument.²⁹¹ Citing to legislative intent and the recent *Massachusetts v. EPA* holding,²⁹² Judge Sessions opined that the “[p]laintiffs have not shown that Congress exhibited a clear and manifest intent to render the regulation of carbon dioxide emissions from motor vehicles exclusively a federal domain.”²⁹³ He stated that “[u]nder the doctrine of field preemption, state law is preempted if it attempts to regulate in a field that Congress intended the federal government to occupy exclusively.”²⁹⁴ The Supreme Court clearly stated in *Massachusetts v. EPA*, however, that this situation is not the case with GHG emissions. The existence of EPCA does not eliminate EPA’s mandate under the CAA to protect the public “health” and “welfare.”²⁹⁵ The regulation of CO₂ from motor vehicles is not the exclusive province of the Department of Transportation (“DOT”), but instead Congress also charged EPA with protecting public health and

²⁸⁸ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), *appeal docketed*, No. 07-4342-cv(L) (2d Cir. Oct. 5, 2007). The coalition of nine auto makers (BMW Group, DaimlerChrysler, Ford Motor Company, General Motors, Mazda, Mitsubishi Motors, Porsche, Toyota and Volkswagen) seeking relief from Vermont’s new GHG new automobile emissions standards (not yet effective as California’s waiver request was denied and is now on appeal in the Ninth Circuit), appealed Judge Session’s ruling to the Second Circuit on October 5, 2007. See Posting of Kipp Coddington to Alston & Bird, L.L.P. Climate Change and Carbon Management Blog, <http://climate.alston.com/blog.aspx?topic=12&All=null> (Oct. 8, 2007, 10:34 EST) (last visited Mar. 15, 2008).

²⁸⁹ *Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). An appeal was filed in the Court of Appeals for the Ninth Circuit on October 23, 2008. See Form 6 Civil Appeals Docketing Statement, http://www.theconstitution.org/downloadFL.php?file=213_Notice_of_Appeal_by_automakers2.pdf (last visited Nov. 14, 2008).

²⁹⁰ See *Green Mountain*, 508 F. Supp. 2d at 354.

²⁹¹ See *id.* at 355 (“The Supreme Court has described field preemption ‘as a species of conflict preemption: a state law that falls within a preempted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.’” (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990))).

²⁹² 549 U.S. 497 (2007).

²⁹³ *Green Mountain*, 508 F. Supp. 2d at 355.

²⁹⁴ *Id.* at 354 (citing *English v. General Elec. Co.*, 496 U.S. at 79).

²⁹⁵ *Id.* at 355 (citing *Massachusetts v. EPA*, 549 U.S. at 532).

welfare by regulating the emission of air pollutants (which the Court found included GHG) and charged the DOT with regulating CAFÉ standards after first considering EPA's standards. While the EPA now knows it has the authority to regulate, and the American public continues to wait while EPA actually decides whether it *will* regulate mobile source GHGs, at least this decision makes clear that California is not precluded from regulating GHGs if it can satisfy the 42 U.S.C. § 7543(b) provisions.²⁹⁶

Further, states like Vermont and others that have adopted California's AB 1493 standards in whole pursuant to § 7507, will fall within the protection of the CAA that envisioned, and was specifically worded, to incorporate states standards that are "at least as protective of health and welfare as Federal standards."²⁹⁷ Thus, while states' motor vehicle regulations require federal approval, the field is not exclusively occupied by the federal government. While other courts have found field preemption applicable "either by narrowly defining the field or in areas where states have not traditionally regulated,"²⁹⁸ such is not the case here where California has been regulating with EPA-approved waivers for decades.²⁹⁹ Yet again, the court stressed that "[c]ongressional purpose is therefore 'the ultimate touchstone' of preemption analysis,"³⁰⁰ and clearly Congress did not intend that states have *no* place in the field of automobile emissions control. The wording of applicable statutes in the field of automobile emissions, such as the CAA and the EPCA, read in context with the respective legislative histories and decades of judicial interpretation, make clear that Congress intended for state participation within the parameters of the law. California's waiver request for approval of AB 1493 GHG standards, much like the preceding fifty-three waiver requests, is exactly what the authors of the CAA and subsequent amendments envisioned.

3. *AB 1493 Standards Survive Conflict Preemption*

The *Green Mountain* and *Goldstene* courts also found that Vermont's and California's GHG standards, respectively, are not invalidated under the principle of conflict preemption.³⁰¹ The Supreme Court's standard states that if a state law actually conflicts with a federal statute or regulation, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"³⁰² then it is invalidated by conflict preemption. Conflict preemption advocates argue that the GHG standards frustrate Congress's intent to maintain a single, nationwide CAFÉ standard, and that the GHG standards upset NHTSA's balancing strategy for setting a maximum feasible average for fuel economy levels.³⁰³ The automaker coalition could not, however, sufficiently bear its burden to prove the GHG

²⁹⁶ *Id.*

²⁹⁷ 42 U.S.C. § 7543(b) (2006).

²⁹⁸ *Green Mountain*, 508 F. Supp. 2d at 355 (citations omitted) (providing a non-exhaustive but comprehensive list of examples where the field has been narrowly defined so as to preempt state action).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 351 (citations omitted).

³⁰¹ *Id.* at 354; *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1189 (E.D. Cal. 2007).

³⁰² *Green Mountain*, 508 F. Supp. 2d at 355 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (citations omitted)).

³⁰³ *Id.* at 355-56.

regulations do conflict with EPCA.

a. Green Mountain

First, the alleged frustration of the congressional intent to maintain nationwide fuel economy standards is contradicted by legislative history and by actual EPA and NHTSA practices – clearly demonstrating that there is no inherent conflict.³⁰⁴ As discussed *supra* Section II.B.1, Congress knew and understood the balance created between the 1977 CAA Amendments and the EPCA.³⁰⁵ Congress understood that there would likely be overlap in regulations because of the close relationship between emission standards and fuel economy standards, but indicated that the administration of the statutes should not prove inconsistent. Even as of April 2007, the Supreme Court noted that the “EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles.”³⁰⁶ Further, NHTSA and EPA have worked closely in assessing the effects of EPA emissions regulations on NHTSA fuel economy standards.³⁰⁷

Second, automaker compliance with the GHG standards is technologically feasible and economically practical.³⁰⁸ After parsing expert testimony through thirty-three pages of opinion, Judge Sessions concluded that the regulations do not restrict consumer choice, reduce employment, create economic hardship for the auto industry, or decrease traffic safety – all factors the NHTSA has interpreted it must consider in setting the CAFÉ standards to achieve the maximum feasible average fuel economy.³⁰⁹ The opinion reflects much of the supporting data and rationale provided in California’s *Final Statement of Reasons* that predicted positive economic effects for California’s residents and industry, and detailed a list of already available technological advancements for automakers to incorporate into their passenger car and light-duty truck production lines.³¹⁰ CARB assessed readily available improvements that significantly limit any hardship on industry to develop completely new technologies, such as improved specific power and gasoline direct injection, camless valve actuation, engine valvetrain modifications, improved five-speed and six-speed automatic transmissions, five-speed motorized manual gearshifts, continuously variable transmissions, integrated starter generators that shut off idling engines, hybrid electric drive trains, and many other options.³¹¹ In concluding its discussion of conflict preemption, the court even went so far as to note that it “appears clear that any negative safety impact arising from the regulation

³⁰⁴ *Id.* at 356-57.

³⁰⁵ *Id.* at 357 (citing H.R. REP. NO. 95-294, at 244-51 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1101-11).

³⁰⁶ *Massachusetts v. EPA*, 549 U.S. 497, 530-31 (2007).

³⁰⁷ *Green Mountain*, 508 F. Supp. 2d at 356-57; accord Final Rule: Passenger Automobile Average Fuel Economy Standards, 42 Fed. Reg. 33,534, 33,541 (June 30, 1977).

³⁰⁸ See 49 U.S.C. § 32902(f) (2006) (stating that the EPCA requires NHTSA to 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”).

³⁰⁹ *Green Mountain*, 508 F. Supp. 2d at 392.

³¹⁰ See FINAL STATEMENT OF REASONS, *supra* note 2, at 12-13; see also WAIVER REQUEST SUPPORT DOCUMENT, *supra* note 69, at 21-33.

³¹¹ See WAIVER REQUEST SUPPORT DOCUMENT, *supra* note 69, at 21-33; see also Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,925 (Sept. 8, 2003).

will result from changes in consumer behavior, not from any flaw in technology or design likely to be used to reduce GHG emissions.”³¹²

b. Goldstene

It is prudent once again to separate the *Green Mountain* court’s rationale from the *Goldstene* court’s rationale because the two courts took a slightly different approach in reaching the same conclusions. In *Goldstene*, Judge Ishii used an approach that less directly addressed the actual merits of whether the California regulations sufficiently balanced the various economic considerations at issue in the case, and instead focused more specifically on statutory language.

The *Goldstene* court started by clarifying the separate and distinct objectives of the CAA versus the EPCA, by referring to the *Massachusetts v. EPA* opinion. Specifically, that the “EPA has been charged with protecting the public’s ‘health’ and ‘welfare,’ . . . a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency.”³¹³ It then went on to explain that the list of considerations used by the EPA³¹⁴ and NHTSA³¹⁵ in determining whether and how to promulgate their regulations to appropriately meet their respective statutory objectives are *factors* against which the objectives are weighed to determine the feasibility of the regulations. California, in its efforts to secure a § 7543(b) waiver, as discussed *supra* Section II.A, must consider the same factors as the EPA. Further, as EPA and NHTSA promulgate their regulations, there is no set balance that must be satisfied in order to move forward with rulemaking to serve the purpose of their governing statutes.³¹⁶

The court then focused on the *technology-forcing goals* of the CAA as encompassed in the 42 U.S.C. § 7521(a)(3)(A)(i) charge to promulgate standards “that reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which the standards apply.” This provision is central to the automaker plaintiffs’ argument because they assert that California’s AB 1493 technology-forcing regulations impose significant economic burdens on auto manufacturers, dealers, and consumers. The plaintiffs argue that California was not required to consider, and in fact did not adequately consider, “economic practicability” for the aforementioned parties.³¹⁷ However, the court found that the plaintiffs’ interpretation of what factors required consideration and the manner in which the factors must be balanced was wrong for two reasons. First, while the words used to describe the mandated considerations (factors) in the CAA and the EPCA were not exactly the same, the “weighing process covers substantially the same ground in both cases insofar as an assessment of economic impacts is

³¹² *Green Mountain*, 508 F. Supp. 2d at 392.

³¹³ *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1177 (E.D. Cal. 2007) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 530-31 (2007)).

³¹⁴ *See id.* at 1178; 42 U.S.C. § 7521(a)(3)(A)(i) (2006). Considerations include technological availability, cost, energy, safety, and lead time required for regulation implementation.

³¹⁵ *Goldstene*, 529 F. Supp. 2d at 1178; 49 U.S.C. § 32909 (2006). Considerations include pricing, consumer choice, safety for the consumer, and dealer profitability.

³¹⁶ *Goldstene*, 529 F. Supp. 2d at 1177 (citing *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007)).

³¹⁷ *Id.* at 1178.

concerned.”³¹⁸ And second, in order for EPA to grant the waiver request for California’s AB 1493 technology-forcing regulations, the regulations must be consistent with the § 7521(a) considerations.³¹⁹

Thus it follows that there is no indication from Congress that once California’s waiver is granted, that California’s regulation implementation and enforcement should be treated any differently than the way EPA-promulgated regulations (where there is no EPCA conflict preemption) are treated.³²⁰ To whatever extent some incompatibility exists with NHTSA CAFÉ standards, there is no interference with the purpose as stated in the EPCA nor is the NHTSA hindered in revising its standards to account for the *other governmental standards*.

c. Conclusion

In sum, both courts held that the new vehicle GHG standards *do not* conflict with or serve as an obstacle to the NHTSA accomplishing its EPCA mandated mission of developing and regulating average fuel economy standards. In perhaps the most succinct rendition of why EPA-approved AB 1493 standards do not conflict with the EPCA and thus are not preempted, the *Goldstene* court stated that “EPA is empowered to lead . . . and DOT is empowered to follow.”³²¹

C. Foreign Policy Preemption

Finally, both the *Green Mountain* court and the *Goldstene* court addressed the plaintiffs’ foreign policy preemption argument, holding that Vermont’s and California’s GHG regulatory standards, respectively, not only *do not* intrude upon the foreign policy of the United States, but, in fact, are in line with and support the United States’ foreign policy position.³²² The Automobile Alliance argued two specific preemption arguments, both of which are based on seminal Supreme Court opinions in the field of foreign policy preemption – *Zschernig v. Miller*³²³ preemption (“*Zschernig* preemption”) and *American Insurance Ass’n v. Garamendi*³²⁴ preemption (“*Garamendi* preemption”). Both arguments are addressed in turn, below. As in previous sections, the *Green Mountain* case and the *Goldstene* case will be addressed separately as both courts used slightly different approaches.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *See id.* at 1182 (noting that the “court again declines to cast the issue as being one of ‘federalization’ of the proposed California standards,” but instead “refers to its discussion on EPCA preemption in which it determined that there is no indication of congressional intent” to treat a waiver-approved state regulation different than an EPA-promulgated regulation).

³²¹ *Goldstene*, 529 F. Supp. 2d at 1177.

³²² *Id.* at 1188; *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 397 (D. Vt. 2007).

³²³ *See Green Mountain*, 508 F. Supp. 2d at 392 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

³²⁴ *Id.* (citing *American Insurance Ass’n v. Garamendi*, 539 U.S. 396 (2003)).

*I. Green Mountain**a. AB 1493 Standards Survive Zschernig Preemption*

First, the court held that *Zschernig* does not preempt Vermont's GHG regulations because far from "impair[ing] the effective exercise of the Nation's foreign policy,"³²⁵ the State GHG regulations in fact stand out "as exemplifying a cooperative federal state approach to the global issues of climate change."³²⁶ The argument for *Zschernig* preemption asserts that even in the absence of some federal foreign policy in the field of global warming, the very attempt by States to intrude into the inherently international field of global warming demands that the regulations be preempted.³²⁷

For nearly three decades the international community has been grappling with the concept of global warming and attempting to chart a course to research more comprehensive scientific data and then develop the appropriate international response. The United States' resolve to participate in the international response to global warming is evidenced by the federal government's enactment of the Global Climate Protection Act of 1987,³²⁸ its status as a party to the United Nations Framework Convention on Climate Change ("UNFCCC")³²⁹ and commitment to meeting UNFCCC report requirements, its intimate involvement with the negotiation of the Kyoto Protocol,³³⁰ its agreement to the G-8 Summit "Growth and Responsibility in the World Economy" declaration,³³¹ and its myriad continued efforts in other international fora.³³² Without doubt, preemption advocates are correct that global warming and GHG emissions are squarely within foreign policy.

However, what preemption advocates fail to recognize, or refuse to acknowledge, is that "the United States considers that state and local efforts in concert with federal programs contribute to the UNFCCC's ultimate objective" and thus exemplifies the United States' domestic cooperative federalism approach to addressing global warming. Judge Sessions notes the potential positive impact California's GHG emissions standards could have in reducing emissions in the United States, and consequently emissions on a global scale, particularly as adopted by ten other states and incorporated into multiple regional initiatives.³³³ As required by Article 12 of the UNFCCC, the United States recently submitted its fourth report, detailing

³²⁵ *Zschernig*, 389 U.S. at 450.

³²⁶ *Green Mountain*, 508 F. Supp. 2d at 395.

³²⁷ *Id.* at 392 (citing *Zschernig*, 389 U.S. at 432).

³²⁸ Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1331, 1407.

³²⁹ United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter UNFCCC], available at <http://unfccc.int>. The UNFCCC entered into force March 24, 1994.

³³⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol], available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

³³¹ G8 Summit 2007, Heiligendamn, Germany, June 7, 2007, *Summit Declaration on Growth and Responsibility in the World Economy*, <http://www.g-8.de/Content/DE/Artikel/G8Gipfel/Anlage/2007-06-07-gipfeldokument-wirtschaft-eng.property=publicationFile.pdf>.

³³² See U.S. Department of State, Climate Change, <http://www.state.gov/g/oes/climate/index.htm> (last visited Jan. 2, 2009).

³³³ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 394 (D. Vt. 2007). Recall that to date the number of adopting states increased from ten to fourteen, and several others publicly stated intentions to adopt the regulations in whole. See *supra* note 219.

national and subnational efforts to combat GHG emissions.³³⁴ The Fourth U.S. Climate Action Report (“USCAR”) submitted to the UNFCCC on July 27, 2007, stated that national, state, and local governments, along with a multitude of private and nonprofit organizations, are working together in support of the UNFCCC to pursue “a comprehensive strategy to address global climate change that is science-based, fosters breakthroughs in clean energy technologies, and encourages coordinated global action.”³³⁵ The court concluded the *Zschernig* analysis by noting that the USCAR goes on to applaud the initiatives by many states, even specifically citing to California’s new automobile GHG emissions standards.³³⁶

b. AB 1493 Standards Survive Garamendi Preemption

Second, the court found that *Garamendi* does not preempt AB 1493 standards because the GHG emission standards are not in “‘sufficiently clear conflict’ with an ‘express foreign policy of the National government.’”³³⁷ AB 1493 GHG standards are quite distinguishable from the facts of *Garamendi*, where the California Holocaust Victim Insurance Relief Act of 1999 (“HVIRA”), which sought to enforce payment of insurance policies to beneficiaries of Holocaust victims, was preempted because HVIRA directly conflicted with executive agreements between the United States and Germany, Austria, and France.³³⁸ In the instant case the national foreign policy posture calls for international collaboration to reduce GHG emissions, charges the U.S. Department of State to coordinate climate change policy, and encourages domestic regulatory schemes to foster technology advancements. As noted *supra* Section II.C.1.a, the Fourth USCAR specifically singled out California’s GHG standards as an example of the United States’ response to the international movement to reduce emissions. While the automakers may not like California and other states adopting standards that demand development and implementation of more efficient and cleaner technologies because it costs automakers money, they failed to demonstrate that the state GHG standards conflict with national foreign policy.

2. *Goldstene*

The *Goldstene* court used a three-prong approach to ultimately reach the same conclusion that foreign policy preemption does not apply to AB 1493 regulations. First, the *Goldstene* court briefly examined whether foreign policy concerns limited EPA’s authority to regulate GHG emission, and found that there were no foreign policy limitations. In fact, the court cited the *Massachusetts v. EPA* holding, which stated that Congress, in clear and plain language, charged EPA with regulating GHG emissions to carry out its statutory obligation to protect the public’s health and welfare.³³⁹ The Supreme Court further stated that “[i]n particular, while the President has broad authority in foreign affairs, that authority does not extend to the

³³⁴ *Green Mountain*, 508 F. Supp. 2d at 393.

³³⁵ *Id.* (quoting U.S. DEPT. OF STATE, U.S. CLIMATE ACTION REPORT – 2006, at 2 (2007), available at <http://www.state.gov/documents/organization/89646.pdf> [hereinafter USCAR]).

³³⁶ *Id.* (citing USCAR, *supra* note 335, at 52).

³³⁷ *Id.* at 394 (quoting *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003)).

³³⁸ *Id.* at 396.

³³⁹ *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1181 (E.D. Cal. 2007).

refusal to execute domestic laws.”³⁴⁰ All this is to say that regardless of what the President sets as the foreign policy of the United States, the President and by extension all executive agencies, must still carry out the directives of Congress.

Second, the court more specifically examined congressional intent regarding California’s AB 1493 GHG regulations. It started this section by once again citing *Massachusetts v. EPA*, this time noting that the Supreme Court reminded us that congressional intent is the touchstone of preemption, and that the EPA is not the authority on what constitutes United States foreign policy or how EPA regulations might interfere with said foreign policy.³⁴¹ With those two proclamations in mind, the court quickly returned to a discussion of the CAA’s charge to EPA to weigh multiple factors and then make determinations about whether to promulgate automobile GHG regulations to protect the public’s health and welfare. As discussed *supra* Section II.B, Congress also expressly provided the § 7543(b) waiver provision for California to submit its innovative and often technology-forcing regulations to EPA for approval to implement and enforce in an otherwise federally controlled field. Further, legislative history clearly indicates that Congress intended for California to continue acting as a mini-laboratory for innovation, crafting cutting-edge solutions and developing comprehensive regulatory schemes to not only address the significant environmental challenges in and around Los Angeles, but also to serve as templates for adoption by other states via § 7507 or adoption by the EPA on the national level. The court then concluded that for all of the aforementioned reasons, executive branch policies such as foreign policy cannot interfere with CAA statutory mandates to regulate air pollutants such as GHG (including carbon dioxide) or the express waiver and adoption provisions that provide an avenue for California to require compliance with its AB 1493 regulations.³⁴²

Third, the court examined whether, based on the instant facts as applied within the prevailing *Zschernig* and *Garamendi* case law, an actual conflict existed between U.S. foreign policy and California’s AB 1493 regulations. This section will not reiterate the facts and legal rules of *Zschernig* and *Garamendi* as noted *supra* Section II.C.1, but will instead proceed directly to how the court interpreted and applied the legal standards with relation to California.

The court stated that the plaintiffs’ burden was two-fold. The Auto Alliance must “show what the policy of the United States is and precisely how California’s AB 1493 Regulations, if granted waiver of preemption by EPA and implemented, would interfere with U.S. foreign policy.”³⁴³ As to the first prong, the court found that the plaintiffs failed to demonstrate what exactly constituted the foreign policy of the United States. The Alliance rested its argument on two sources of authority, both of which the court dismissed. The automakers first argued that they relied on a part of EPA’s justification for its decision to deny rulemaking for GHG emissions that said EPA regulation of GHG could negatively affect U.S. “efforts to persuade key developing countries to reduce the GHG intensity of their economies.”³⁴⁴ The

³⁴⁰ *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007)).

³⁴¹ *Id.* at 1181-82.

³⁴² *Id.* at 1182.

³⁴³ *Id.* at 1185.

³⁴⁴ *Goldstene*, 529 F. Supp. 2d at 1185 (quoting EPA Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003)).

automakers next argued that they relied on the Solicitor General's brief filed on behalf of the EPA in *Massachusetts v. EPA*, which stated that EPA was correct to deny rulemaking in order to avoid interfering with U.S. foreign policy. The court, however, found that pursuant to the Global Climate Protection Act of 1987,³⁴⁵ only the State Department was authorized to pronounce the foreign policy of the United States. Thus, without approval from the State Department, neither the EPA nor the Solicitor General could authoritatively declare what constitutes foreign policy and, furthermore, what might then interfere with such policy.³⁴⁶ Moreover, the twenty-seven exhibits submitted by the Automaker Alliance merely demonstrate the U.S. strategy of "speaking with one voice"³⁴⁷ when negotiating with foreign states to address environmental concerns. This strategy, says the court, is not a policy within the meaning of *Zschernig*, *Garamendi*, or *Crosby v. National Foreign Trade Council*,³⁴⁸ which evidenced U.S. foreign policy through the formation and results of an agreement, an act of Congress, and a negotiated treaty, respectively.³⁴⁹

The court then found in the second prong of its analysis that there was *no clear conflict* between California's AB 1493 GHG regulations and U.S. foreign policy.³⁵⁰ In fact, the court found no indication that any policy of the President or the State Department either limited or restricted individual state GHG emission programs, or differentiated between efforts to decrease GHG emissions from automobiles versus any other source.³⁵¹ Having found in the first prong that the plaintiffs did not prove what actually constituted U.S. foreign policy, and in the second prong that even if somehow the evidence could have been construed to prove a policy, the plaintiffs still failed to prove that the policy in anyway demonstrated a clear conflict with the AB 1493 regulations, the court concluded with one final note that mirrors much of the *Green Mountain* rationale *supra* Section II.C.1. The court stated that even if the very recent G8 Summit Report of 2007³⁵² sufficiently represented U.S. policy on international regulation of new automobile GHG emissions, instead of finding clear conflict as required by *Zschernig* for foreign policy conflict preemption, the AB 1493 regulations still supported the policy.³⁵³

1. Conclusion

In sum, despite what may appear on face value to be legitimate arguments for federal preemption of state-promulgated automobile GHG emission standards,

³⁴⁵ Pub. L. No. 100-204, tit. XI, 101 Stat. 1407.

³⁴⁶ *Goldstene*, 529 F. Supp. 2d at 1185 (citing *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007)).

³⁴⁷ *Id.* at 1186.

³⁴⁸ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). While the *Green Mountain* court made its only reference to this case in its introduction of conflict preemption, the *Goldstene* court incorporated the ruling into its *Zschernig* and *Garamendi* controlling case law and explanatory precedent. *Goldstene*, 529 F. Supp. 2d at 1186; *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 356 (D. Vt. 2007). In *Crosby* the Supreme Court held that a Massachusetts law that restricted contracts with the country of Myanmar or individuals conducting business with Myanmar was in direct conflict with, and thus preempted by, a subsequently passed act of Congress that authorized the President to apply limited sanctions to Myanmar. *Green Mountain*, 508 F. Supp. 2d at 385.

³⁴⁹ *Goldstene*, 529 F. Supp. 2d at 1186.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 1187.

³⁵² G8 Summit 2007, *supra* note 331.

³⁵³ *Goldstene*, 529 F. Supp. 2d at 1189.

further analysis proves that the opposite is true. EPA is charged with regulating GHG emissions (including carbon dioxide) in order to protect the public's health and welfare, and U.S. foreign policy does not override that congressional mandate. Moreover, there is no evidence to suggest that California's GHG standards conflict in any way with the official foreign policy positions of President Bush or the State Department. In fact, the federal government has used, and continues to routinely use, AB 1493 GHG standards to demonstrate the U.S. commitment to combat global warming.

CONCLUSION

In conclusion, California's AB 1493 GHG legislation and subsequently promulgated regulations are not preempted by the CAA, the EPCA, or the doctrine of foreign policy preemption. The Courts of Appeal for the Second Circuit and Ninth Circuit, in reviewing *Green Mountain* and *Goldstene*, respectively, should find Judge Sessions' and Judge Ishii's opinions solidly grounded, replete with exhaustive and thoughtful citation to statutory interpretation, legislative history, historical agency actions, and specific facts. Furthermore, in considering California's petition for review of EPA's decision to deny California's § 7543(b) waiver request, the D.C. Circuit should afford Administrator Johnson no *Chevron* deference, and immediately remand with instructions to reassess the facts using the package approach instead of the isolation approach.

First, while expressly preempted by the CAA's new automobile emissions preemption clause, 42 U.S.C. § 7543(a), California's GHG regulations nonetheless satisfy each of the statutory requirements of the 42 U.S.C. § 7543(b) waiver provision. California is a § 7543(b) qualifying state (in fact the only qualifying state in the country), as a result of having promulgated new-automobile GHG emissions standards that California determined are "in the aggregate, at least as protective of public health and welfare"³⁵⁴ as the nonexistent federal standards. California's standards are supported and justified with underlying rationale embodied by a myriad of studies, assessments, and reports. In no way could the standards with such comprehensive supporting documentation be construed as "arbitrary or capricious."³⁵⁵ Most importantly for the waiver provision, California *needs* the AB 1493 standards "to meet compelling and extraordinary conditions,"³⁵⁶ in large part because on this criterion alone Administrator Johnson denied California's waiver. This author finds California's justification for satisfying this criterion more persuasive than EPA's post-hoc justification because California presents a well-supported argument for its statutory interpretation and its application of the facts. First, California's assertion that the AB 1493 standards should be evaluated as a *package* with all other California mobile emission air pollution regulations, instead of in *isolation*, is dictated by the text of § 7543(b), the underlying legislative history of the provision, and the on-record interpretation by both EPA and federal court opinions. While Administrator Johnson's adoption of the automakers' innovative argument for an *isolation* approach because GHGs are of a global nature is

³⁵⁴ 42 U.S.C. § 7543(b)(1) (2006).

³⁵⁵ *Id.* § 7543(b)(1)(A).

³⁵⁶ *Id.* § 7543(b)(1)(B).

interesting, his rationale and interpretation simply defy the text of the statute, the very purpose of the waiver provision, and nearly four decades of *package* interpretation. The AB 1493 standards are simply another incremental step in California's overall air pollution program intended to remedy the extreme pollution problems that stem from California's unique conditions. Second, the facts weigh in California's favor. The calculus of the unchanged unique geographic and climatic conditions, the high density of automobiles in California, and the projected increases in temperature, precipitation, and sea level rise that will disproportionately impact California in comparison the rest of the nation as whole, clearly makes the case that California needs the AB 1493 standards. Finally, California's standards are consistent with § 7521(a), with perhaps the only reasonable caveat being that EPA might deem it appropriate to briefly delay implementation because the standards are set to take effect with the 2009 model year.

While certainly not part of the statutory list of criteria in § 7543(b), and thus not legal justifications instructing EPA to grant California's waiver request, two pragmatic reasons support the simple need for California's AB 1493 standards. For starters, the standards are building blocks for at least fourteen other states that have already adopted the regulatory scheme in whole and are simply waiting for the waiver approval. The combined population of these fourteen states and California constitute a staggering forty-four percent of the total U.S. population.³⁵⁷ Thus, particularly in the absence of federal standards, now is the time for EPA to approve California's GHG emissions standards in order to allow nearly half of the U.S. population to start making positive contributions to the worldwide effort to arrest global warming.

Moreover, the AB 1493 standards yield better fuel efficiency and greater GHG reductions than the recently passed EISA CAFÉ standards. As a legal matter under CAA and EPCA preemption, the AB 1493 standards should not be compared with CAFÉ fuel efficiency standards, but as a practical matter the AB 1493 emissions standards are more stringent and yield better results. Common sense dictates that if all other waiver requirements are satisfied, which they are, EPA should grant the AB 1493 waiver request to complement and build on the EISA standards.

Second, California's AB 1493 standards survive EPCA preemption because the regulations are not sufficiently *related to* the National Highway Traffic Safety Administration's fuel economy standards, the regulations do not intrude upon the exclusive federal domain of new automobile emissions regulations, and, finally, the California GHG regulations do not conflict with or serve as an obstacle to the accomplishment or execution of the federal CAFÉ program. Both Judge Sessions in *Green Mountain* and Judge Ishii in *Goldstene*, clearly appreciating the impact their rulings would have as our nation endeavors to take responsibility for our mobile GHG emissions, used slightly different approaches to ultimately reach the same conclusion. Between the two opinions, the judges extensively explore the legislative intent and the history of amendments underlying the EPCA, as well as the dynamic created when the EPCA and CAA intersect as they do in the instant case. While both courts critically assess the often complex facts and models used to project cost and benefits of all kinds, Judge Sessions in particular seems to analyze every single

³⁵⁷ MCCARTHY, *supra* note 43, at 6.

fact in the record.

In terms of field preemption, Judge Sessions in particular noted that history indicates that the field of automobile emissions regulation is *not* exclusively occupied by the federal government. California and § 7507 “piggyback” states have been regulating here for decades with EPA-approved, California-promulgated standards. The wording of applicable statutes in the field of automobile emissions, such as the CAA and the EPCA, read in context with the respective legislative histories and decades of judicial interpretation, makes clear that Congress intended for state participation within the parameters of the law. California’s request for waiver-approval of the AB 1493 GHG standards, much like the preceding fifty-three waiver requests, is exactly what the authors of the CAA and its subsequent amendments envisioned.

Additionally, both courts held that the new vehicle GHG standards do not conflict with or serve as an obstacle to the NHTSA accomplishing its EPCA mandated mission of developing and regulating average fuel economy standards. The two acts, CAA and EPCA, have independent purposes and clear mandates to account for specific factors as the respective agencies, EPA and NHTSA, determine when and how to regulate in order to comply with Congress. The bottom line, as the *Goldstene* court stated, is that “EPA is empowered to lead . . . and DOT is empowered to follow.”³⁵⁸ This rather simplistic synopsis, however, captures exactly why the AB 1493 standards, once approved by EPA, survive conflict preemption. In sum, the *Green Mountain* and *Goldstene* rulings provide California and the increasing number of § 7507 “piggyback” states with an incredibly thorough and well-structured analysis that unequivocally states that the AB 1493 GHG emissions standards are not expressly or impliedly preempted by 49 U.S.C. § 32919(a). For the Second Circuit or Ninth Circuit to find otherwise would require the court to find great error in the analysis of well-grounded opinions, or to “ignore decades of EPA-issued and approved regulations that also can be said to ‘relate to’ fuel economy.”³⁵⁹

Third, and finally, the AB 1493 standards survive foreign policy preemption because the state standards do not “represent an insufferable intrusion upon the field of foreign affairs [of the United States],”³⁶⁰ nor do the standards “constitute a conflict with a national foreign policy.”³⁶¹ In fact, the federal government has used, and continues to routinely use, AB 1493 GHG standards to demonstrate the U.S. commitment to combat global warming. In fact, U.S. Department of State officials and White House representatives, the only persons even authorized to determine what constitutes U.S. foreign policy, tout California’s standards as cutting edge and central to U.S. efforts.

Through a thorough analysis of the relevant statutory language, appropriate statutory construction, legislative history, federal case law interpretation, and past and ongoing practices of the relevant agencies, it is clear that EPA should grant California’s § 7543(b) waiver request and the GHG regulations should take effect with little or no delay. The people and government of California, the citizens of the

³⁵⁸ *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1177 (E.D. Cal. 2007).

³⁵⁹ *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 354 (D. Vt. 2007).

³⁶⁰ *Id.* at 397.

³⁶¹ *Id.*

fourteen “piggyback” states, and participants in the numerous regional organizations and initiatives stand ready to make a difference. Although the new automobile GHG regulations represent only incremental change for California and not a single, unified answer to reduce global warming, it is important that this critical and innovative regulatory scheme not be overridden, preempted, or otherwise suffocated by attenuated arguments. It is important that the darkness not consume the light.