No. 02-1343

In the Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT, *ET AL.,*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics — which are otherwise approved for sale by state and federal regulators — are preempted by Section 209(a) of the Clean Air Act, which expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Engine Manufacturers Association ("EMA"), a not-for-profit trade association, was plaintiff and appellant below. It has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in EMA.

Petitioner Western States Petroleum Association ("WSPA") intervened as a plaintiff and was an appellant in the court of appeals. It is a trade association organized as a non-profit corporation. WSPA has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in WSPA.

Respondents South Coast Air Quality Management District, its individual Board Members (William A. Burke, Norma J. Glover, Michael D. Antonovich, Hal Bernson, Jane W. Carney, Cynthia P. Coad, Beatrice J.S. Lapisto-Kirtley, Ronald O. Loveridge, Jon D. Mikels, Leonard Paulitz, Cynthia Vedugo-Peralta, and S. Roy Wilson), and its Executive Officer (Barry S. Wallerstein) were defendants and appellees below.

The Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened as defendants and were appellees in the court of appeals.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 309 F.3d 550. The opinion of the district court granting summary judgment for respondents (Pet. App. 3a-27a) is reported at 158 F. Supp. 2d 1107.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002, and a petition for rehearing was denied on December 11, 2002. Pet. App. 2a, 28a-29a. The petition for a writ of certiorari was filed on March 11, 2003, and was granted on June 9, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * 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.

Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), provides:

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

The Fleet Rules promulgated by respondent South Coast Air Quality Management District appear at pages 16-74 of the Joint Appendix.

STATEMENT

This case concerns the scope of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), which expressly preempts state and local "standard[s] relating to the control of emissions from new motor vehicles." This Court has observed that by this language "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114 (1972).

Respondent South Coast Air Quality Management District ("SCAQMD" or "the District"), a local governmental body in California, has adopted "Fleet Rules" that prohibit an operator of a fleet of 15 or more vehicles from purchasing certain types of new motor vehicles because of those vehicles' emission characteristics. The Fleet Rules are preempted "standard[s] relating to the control of emissions" under Section 209(a). They were adopted with the undisputed purpose and effect of reducing motor vehicle emissions by prohibiting the purchase of certain new motor vehicles otherwise approved for sale in California by the federal and state governments.

Unlike stationary sources of air pollution such as factories and power plants — over which the States retain substantial regulatory authority, subject to general oversight by the United States Environmental Protection Agency ("EPA") (see 42 U.S.C. §§ 7401-7515; *Washington*, 406 U.S. at 114) — mobile sources of air pollution (particularly new motor vehicles) are regulated exclusively by federal law, subject to narrow exceptions allowing the State of California to adopt and enforce standards relating to new motor vehicle emissions, but only with the approval of EPA, 42 U.S.C. § 7543(b).

States other than California, under certain limited conditions set forth in Section 177 of the Clean Air Act, may also adopt California's motor vehicle emission standards as to which EPA has waived preemption, 42 U.S.C. § 7507. Under no circumstances, however, may any State (including California) impose any standard relating to the control of new motor vehicle emissions without the express approval of EPA. Nor may any local governmental body impose standards relating to the control of emission from new motor vehicles.

The Fleet Rules at issue in this case are not covered by any of the limited exceptions in the Clean Air Act for state motor vehicle emission standards. First, the District is not a State. Second, the Fleet Rules vary from the EPA-approved standards adopted by the State of California by prohibiting the purchase of certain vehicles that already have been approved for sale in the State. Third, the Fleet Rules have never been approved by EPA.

If the District can adopt local standards banning the purchase of certain new motor vehicles based on their emission characteristics, then other local governments can do the same. Such action would directly contravene the express, and plainly stated, provisions of the Clean Air Act that prohibit the adoption of such standards except in strict accordance with EPA's preemption waiver procedures. Allowing the District's Fleet Rules to stand would undermine Congress's determination that — to prevent chaos in the motor vehicle industry — only the federal government and the State of California, with EPA's approval, should be permitted to establish standards relating to emissions from new motor vehicles.

A. The Clean Air Act.

The Clean Air Act (42 U.S.C. §§ 7401-7671q) divides the sources of air pollution into two categories — stationary and mobile — and provides fundamentally different regulatory regimes for each. Title I of the Act, which regulates stationary

sources of air pollution, directs EPA to establish "national ambient air quality standards" and requires each State to submit for EPA review and approval a "state implementation plan" for meeting those standards. 42 U.S.C. §7408. The plan must identify and describe the state emission control regulations adopted for sources of air pollution in the State.

Title II of the Act (42 U.S.C. §§ 7521-7590), which is at issue here, regulates mobile sources of air pollution, primarily motor vehicles. "In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions ha[s] been a principally federal project." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

1. The first time Congress mandated the exercise of federal regulatory authority to reduce air pollution was in 1965, when Congress directed the federal government to regulate emissions from new motor vehicles and new motor vehicle engines. Pub. L. No. 89-272, § 101(8), 79 Stat. 992 (1965) (42 U.S.C. § 1857f-1 (Supp. IV, 1966-1968)). Despite the enactment of this statute and the adoption of a regulation establishing emission levels in 1966 (see 31 Fed. Reg. 5,170 (1966)), "[a] number of states * * * continued to develop separate emission programs. Congress thereupon promptly amended the Clean Air Act in 1967 to impose federal preemption." *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) ("*MVMA*"); see also H.R. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967) (preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles"); S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (under federal preemption, "industry * * * will be able to minimize economic disruption and therefore provide emission control systems at lower costs to the people of the Nation").

The express preemption provision adopted by Congress, now Section 209(a) of the Act (codified at 42 U.S.C.

§ 7543(a)), contains two separate restrictions on state authority. First, "[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 subject to this part." Second, "[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment."

The provision also contains a savings clause, now codified in Section 209(d), in which Congress delineated the outer boundaries of its preemption of state and local law. It provides that "[n]othing in this title shall preclude or deny to any State or political subdivision the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." Pub. L. No. 90-148, § 2, 81 Stat. 501 (1967) (codified as amended at 42 U.S.C. § 7543(d)). Thus, the States retained authority to regulate the use, operation, or movement of motor vehicles only through means *other than* standards or approvals relating to the control of emissions from new motor vehicles or new motor vehicle engines.

Congress permitted only one exception to Section 209(a)'s expansive preemption. During the debate on the 1967 statute, "representatives of the State of California were clearly opposed to displacing that State's right to set more stringent standards to meet peculiar local conditions." S. Rep. No. 403, at 33. Congress concluded that "California's unique problems and pioneering efforts justified a waiver of the preemption section to the State." *Ibid*.

Accordingly, the statute requires the federal government to waive application of the preemption section to a standard adopted by the State of California unless EPA finds that the State "[did] not require standards more stringent than applica-

ble Federal standards to meet compelling and extraordinary conditions" or that the California standard was inconsistent with the rule-making criteria established by federal law. Pub. L. No. 90-148, § 2, 81 Stat. 501 (now codified, as subsequently amended, at Section 209(b), 42 U.S.C. § 7543(b)). The statute, by its terms, made the waiver process available to any State that had adopted motor vehicle emission control standards prior to March 30, 1966, but California was the only State that satisfied that test. *MVMA*, 17 F.3d at 525.

Given the broad language in Section 209(a), and the limited exception for California in Section 209(b), it is not surprising that when this Court surveyed federal law with respect to air pollution in 1972 it observed that "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington*, 406 U.S. at 114 (citing Section 209(a)); see also *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("*MEMA*") ("Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states, all, that is, except California"); *City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1264 (7th Cir. 1972) (footnote omitted) (Section 209(a) preempts "the entire field of standards for emissions from new motor vehicles").

Congress's approach with respect to emissions from new motor vehicles stands in sharp contrast to the path that it took with respect to stationary sources of air pollution. Although under Title I of the Act, the federal government sets the national ambient air quality standards that establish permissible concentrations of various types of air pollutants, "it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train* v. *NRDC*, 421 U.S. 60, 79 (1975) (footnote omitted); see also *id.* at 79 n.16 (characterizing the federal government's authority over emissions from new motor

vehicles as an "[e]xception" to this approach); *Washington*, 406 U.S. at 115 ("[s]o far as factories, incinerators, and other stationary devices are implicated, the States have broad control * * *").

To confirm the leading role for the States in controlling *non-mobile* sources of air pollution, Congress enacted a general savings clause in Title I, 42 U.S.C. § 7416, preserving "the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." Nevertheless, to confirm federal authority over *mobile* sources of air pollution, Congress expressly excepted the "standard[s] relating to the control of emissions from new motor vehicles" set forth in Section 209(a) from that savings clause.

Congress has amended the Clean Air Act several times since 1967, but it has not altered the basic scheme that establishes the federal government as preeminent with respect to the regulation of pollution from new motor vehicles and motor vehicle engines. To this day, only two sets of standards relating to new motor vehicle emissions are permissible — those adopted by the federal government and those adopted by the State of California for which EPA has granted a waiver.

2. Congress in 1977 amended the motor vehicle provisions of the Clean Air Act in two relevant respects. First, it allowed certain States other than California — under conditions "carefully circumscribed to avoid placing an undue burden on the automobile manufacturing industry" (*MVMA*, 17 F.3d at 527) — to adopt, in whole, California standards as to which the federal government has waived preemption. Section 177 of the Act, 42 U.S.C. § 7507, excludes from the preemptive scope of Section 209(a) "standards relating to control of emissions" and "such other actions as are referred to in [Section 209(a)] if * * * such standards are identical to the California standards for

which a waiver has been granted for such model year" and if both California and the other State adopt the standards at least two years before the commencement of the model year. Thus, "[r]ather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory standards * * *." *Engine Mfrs. Ass'n*, 88 F.3d at 1080.

The 1977 amendments also revised the statutory test for granting a request by California for a waiver of preemption. The principal change was to require the federal government "to consider California's standards as a package, so that California could seek a waiver from preemption if its standards 'in the aggregate' protected public health at least as well as federal standards." *MVMA*, 17 F.3d at 525. In addition, Congress directed the federal government in considering a waiver request under Section 209(b) of the Act to accord deference to the State's judgment regarding the effect of its standards on the public health and welfare. 42 U.S.C. § 7543(b) (Pub. L. No. 95-95, § 207, 91 Stat. 755 (1977)).

3. Congress again revisited the Clean Air Act in 1990. It added a second paragraph to Section 177 — the provision authorizing other States to adopt California standards that received a Section 209(b) preemption waiver — to emphasize the strict limitations on the authority of such a State:

> Nothing in this section or [in the title of the Act concerning mobile source pollution] shall be construed as authorizing any * * * State [that adopts California standards] 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 (a "third vehicle") or otherwise create such a "third vehicle."

Pub. L. No. 101-549, § 232, 104 Stat. 2529 (1990). This language was added to "codif[y], in effect, Congress's understanding of the authority originally [given] to states by Section 177 as expressed in the legislative history of Section 177 when it was adopted in 1977." Clean Air Conference Report (Oct. 27, 1990), A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 1001, 1021-1022 (1993); see also Exhibit 1 (Oct. 27, 1990), *id*. at 790 (entered by Sen. Mitchell) (describing the amendment to section 177 as "a mere clarification of current law").

Congress in 1990 also required some States that had failed to reduce air pollution levels in accordance with national ambient air quality standards to force operators of fleets of cars and trucks to purchase specified percentages of vehicles that "would be substantially cleaner than conventional vehicles." H.R. Conf. Rep. 101-952, 101st Cong., 2d Sess. 337 (1990). Each State must submit to EPA for approval an implementation plan setting forth the emission limitations and other rules adopted by the State — relating principally to the regulation of stationary sources such as power plants and factories — that are designed to produce compliance with the federal air quality standards and other requirements of the Act. See generally *General Motors Corp.* v. *United States*, 496 U.S. 530, 533 (1990); *Train*, 421 U.S. at 79-80.

The 1990 amendments provide that a State that has failed to attain specified air quality levels must submit for EPA approval a revised implementation plan that requires operators of centrally fueled fleets of ten or more specified types of vehicles to purchase a designated percentage of "clean-fuel vehicles." Section 246, 42 U.S.C. § 7586 (Pub. L. No. 101-549, § 229(a), 104 Stat. 2520). A "clean-fuel vehicle" is one that meets the clean-fuel vehicle emission standards established

under the Act (Section 241(7), 42 U.S.C. § 7581(7) (Pub. L. No. 101-549, § 229(a), 104 Stat. 2513)).

Significantly, the Clean Air Act's "clean-fuel fleet" provisions state that "[t]he plan revision * * * shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operators subject to the requirements" of Section 246. Section 246(d), 42 U.S.C. § 7586(d). The provisions also broadly define "clean alternative fuel" as "any fuel (including methanol, ethanol, or other alcohols * * *, reformulated gasoline, diesel, natural gas, liquefied petroleum gas, and hydrogen) or power source (including electricity) used in a clean-fuel vehicle that complies" with the standards established under the Act (Section 241(2), 42 U.S.C. § 7581(2)); and apply only to limited percentages of a fleet operator's covered fleet vehicles (Section 246(b)-(c), 42 U.S.C. § 7586(b)-(c)). Thus, the "clean-fuel fleet" provisions do not authorize States (much less local governments) to limit a fleet operators' ability to choose among the various types of clean-fuel vehicles that otherwise comply with the applicable emission regulations.

Finally, Congress authorized the federal government to excuse a State from its obligation to impose a "clean-fuel fleet" purchasing requirement if the State proposed an alternative approach that would achieve emission reductions equal to those that would be achieved under a fleet purchasing rule. 42 U.S.C. § 7511a(c)(4)(B).

B. The California Motor Vehicle Emission Regulations.

California law designates the California Air Resources Board ("CARB") as "the air pollution control agency for all purposes set forth in federal law" (Cal. Health & Safety Code § 39602) and vests CARB with authority to promulgate regulations addressing air pollution resulting from motor vehicles, including limitations on emissions from new motor vehicles and new motor vehicle engines. See *id.* §§ 39003,

43013, 43018, 43100-43108. Three sets of CARB's regulations are relevant here.

1. CARB's low-emission vehicle ("LEV") program, governing low-emission passenger cars and medium-duty vehicles, was adopted in 1990 and 1991 and applies to 1994 to 2003 model-year vehicles. Cal. Code Regs. tit. 13, § 1960.1; Pet. App. 13a; CARB, *Low-Emission Vehicle Program*, at http://www.arb.ca.gov/msprog/levprog/evprog.htm (last updated Oct. 2, 2002). In 1999, CARB adopted "LEV II" rules, which are applicable to the 2004 and later model years. See Cal. Code Regs. tit. 13, § 1960(a); CARB, *Low-Emission Vehicle Program*, at http://www.arb.ca.gov/msprog/levprog/levprog.htm (last updated Oct. 2, 2002). Although the numerical requirements differ, the basic structure of the two programs is substantially similar. The rules establish different tiers of emission regulation, which are, in order of increasing stringency: Transitional Low-Emission Vehicles ("TLEVs"), which include diesel-fueled vehicles; Low-Emission Vehicles ("LEVs"); Ultra-Low-Emission Vehicles ("ULEVs"); Super-Ultra-Low-Emission Vehicles ("SULEVs"); and Zero-Emission Vehicles ("ZEVs"). Each tier has a set of emission limitations for carbon monoxide, formaldehyde, non-methane organic gases, oxides of nitrogen, and particulate matter. Cal. Code Regs. tit. 13, §§1960.1(e)(3), (g), (h)(2), (p) (LEV I); *id.* § 1961(a) (LEV II). A vehicle may be sold in California only if it qualifies under one of these categories. See Cal. Health & Safety Code §§ 43009, 43016-43017, 43102, 43105.

The LEV program further requires that vehicles that a single manufacturer delivers for sale in California must meet overall fleet average emission requirements. These requirements are reduced over time, "requiring manufacturers to sell progressively cleaner mixes of vehicles." Pet. App. 14a; see Cal. Code Regs. tit. 13, § 1960.1(g)(2) (LEV I); *id.* § 1961(b) (LEV II). "Automobile manufacturers, under CARB's regulations, have the flexibility to decide how many vehicles of each

type they manufacture and sell in order to meet the fleet average." Pet. App. 14a. Additional flexibility is provided through establishment of a marketable credit system: manufacturers may earn credits against the non-methane organic gas emission standards by exceeding the fleet average requirements, and against the ZEV requirements by creating Partial Zero-Emission Vehicles ("PZEVs"), reducing carbon dioxide emissions, or increasing fuel efficiency. Cal. Code Regs. tit. 13, § 1960.1(g)(2) (note 7 to appended table of fleet average emission requirements) (non-methane organic gas credits); *id*. § 1961(c)(1) (same); *id*. § 1962(g) (ZEV credits).

In 1993, EPA granted California a waiver of federal preemption under Section 209(b) for the LEV program applicable to light-duty vehicles. 58 Fed. Reg. 4,166 (1993). California's LEV program for medium-duty vehicles received preemption waivers from EPA in 1994 (59 Fed. Reg. 48,625 (1995 and later model years)) and in 1998 (63 Fed. Reg. 18,403 (1998 and later model years)). In April 2003, EPA granted a preemption waiver for California's LEV II amendments as they apply to light-duty and medium-duty vehicles — except with respect to California's ZEV program. 68 Fed. Reg. 19,811. CARB initially sought but later withdrew its requests for EPA consideration of California's ZEV program. 67 Fed. Reg. 60,680 (2002).

In addition to granting California's LEV program a waiver from federal preemption, EPA also approved that program as a substitute for the federal "clean-fuel fleet" program required by Section 246 for "nonattainment" areas in the State. 64 Fed. Reg. 46,849 (1999). But for EPA's approval of California's LEV program as a substitute, six "nonattainment" areas in California, including the South Coast Air Basin, would have been required by Section 246 to adopt federal "clean-fuel fleet" programs. 64 Fed. Reg. 46,850.

2. CARB promulgated an emission control program for heavy-duty urban transit buses (the "Urban Bus Program") in February 2000. See CARB News Release, *ARB Cuts Emissions From Transit Buses* (Feb. 24, 2000), at http://www.arb.ca.gov/newsrel/nr022400.htm (viewed Aug. 18, 2003). One element of the program establishes increasingly stringent emission standards for new urban buses and bus engines. Cal. Code Regs. tit. 13, § 1956.1(a)(6)-(12).

The Urban Bus Program also imposes a ceiling on the average emission level of a bus fleet operated by a public transit agency. CARB nonetheless respected fleet operators' need "to determine their optimal fleet mix in consideration of such factors as air quality benefits, service availability, cost, efficiency, safety, and convenience." Accordingly, CARB established "two paths to compliance with this fleet rule * * *: the alternative-fuel path and the diesel path." Cal. Code Regs. tit. 13, § 1956.2(a).

Operators choosing the diesel path are obligated to retrofit a larger number of existing buses to reduce nitrogen oxide emissions than those choosing the alternative-fuel path (see Cal. Code Regs. tit. 13, § 1956.2(f)(2)-(3)) and must purchase a specified minimum number of zero emission buses (see *id.* § 1956.3(c)). The alternative-fuel path requires that at least 85% of new buses be capable of operating on alternative fuel, which is defined as "natural gas, propane, ethanol, methanol, electricity, fuel cells, or advanced technologies that do not rely on diesel fuel" (*id.* § 1956.2(b)(1)); a lesser retrofit obligation (see *id.* § 1956.2(f)(2)-(3)); and a deferred obligation to purchase zero-emission buses (see *id.* § 1956.3(c)). All operators, regardless of the path selected, must retrofit existing buses to reduce particulate emissions. *Id.* § 1956.2-1956.3; Pet. App. 15a.[1]

[1] CARB Board Resolution 00-02 at 6 (Feb. 24, 2000), available at http://www.arb.ca.gov/regact/bus/res00-2.pdf (viewed Aug. 18, 2003), (continued...)

3. CARB also has developed an emission control program for heavy-duty vehicles (those over 14,000 pounds in gross vehicle weight rating), including diesel-fueled trucks. Under CARB's Heavy-Duty Vehicle Program, emission limits are established for oxides of nitrogen, non-methane hydrocarbons, particulate matter, and carbon monoxide. Heavy-duty vehicles that CARB certifies as meeting those emission limits may be sold throughout the State. Cal. Code Regs. tit. 13, §§ 1956.8, *et seq*. (2003); CARB, *On-Road Heavy-Duty Vehicle Program*, at http://www.arb.ca.gov/msprog/onroadhd/onroadhd.htm (last updated May 12, 2003).

Significantly, and in recognition of the need for regulatory uniformity in the capital-intensive heavy-duty vehicle market, CARB's Heavy-Duty Vehicle Program standards are largely identical to, and incorporate by reference, the standards EPA has adopted for heavy-duty vehicles. Compare Cal. Code Regs. tit. 13, §§ 1956.8, *et seq*. with 40 C.F.R. Part 86; see also J.A. 163, 165. As a result of these standards, "[heavy-duty] diesel vehicles will [during 2007 to 2010] achieve gasoline-like exhaust emission levels, in addition to their inherent advantages over gasoline vehicles with respect to fuel economy, greenhouse gas emissions, and lower evaporative hydrocarbon emissions." 66 Fed. Reg. 5,005 (2001).

C. The Challenged Fleet Rules.

The District is a political subdivision of the State of California. It is a regional entity responsible for "implement[ing] a strategy for achieving and maintaining ambient air quality standards within the South Coast Air Basin," which consists of parts of Los Angeles, San Bernardino, Riverside and

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[1](...continued)
directed CARB's Executive Officer to forward the details of the Urban Bus Program to EPA and request "a waiver or confirmation that the regulations are within the scope of an existing waiver" under Section 209(b). According to EPA's on-line docket, however, CARB's waiver request for the Urban Bus Program has not yet been submitted to EPA.

Orange Counties. Pet App. 4a-5a; see Cal. Health & Safety Code § 39052.5, 40402, 40410-40412, 40440-40459. The district court in this case stated that the South Coast Air Basin "experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution." Pet. App. 5a.

The California legislature in 1987 authorized the District to adopt regulations governing vehicle purchases by operators of "public and commercial vehicle fleets" of 15 or more vehicles. Cal. Health & Safety Code § 40447.5. With some exceptions, the District was permitted to require such operators "to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating" in the District. *Ibid.*

In June, August and October 2000, the District promulgated a series of six "Fleet Rules" regulating purchases or leases of new vehicles by various private and public operators (including federal, state, regional, county, and city departments and agencies) of commercial fleets to "reduce air toxic and criteria pollutant emissions." J.A. 16. Each of the Rules addresses a separate type of vehicle fleet, but all follow a common approach, prohibiting fleet operators from purchasing many types of new vehicles — including some low-emission vehicles and all diesel-fueled vehicles — that are certified by CARB for sale within California.

For example, Rule 1194 (J.A. 58-65) applies "to all public and private fleet operators of fifteen (15) or more vehicles operated by the airport authority or any other public or private fleet operators that transport passengers from commercial airports located in the District." Rule 1194(b) (J.A. 58). It imposes separate restrictions on different types of transportation providers, as follows:

- For operators "providing limousine or transit shuttle services out of commercial airport terminals to the public

through the collection of fares or fees, or [that] provide courtesy pickup services out of commercial airport terminals," any new passenger car or medium-duty vehicle purchase or lease "shall be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards." Rule 1194(d)(1) (J.A. 61-62). These operators are barred from purchasing or leasing other vehicles that also are certified by CARB and therefore permitted to be sold in California — such as those meeting the TLEV and LEV emissions standards. See Cal. Code Regs. tit. 13, § 1960.1(g)(2) (LEV I fleet average requirements permitting sale of TLEVs and LEVs as part of manufacturers total fleet of vehicles); *id*. § 1961(b) (same for LEV II).

• Operators of "shuttle van services that provide multiple-party passenger transportation services to commercial airport terminals and do not operate on fixed or scheduled routes" were subjected to a phased-in requirement: from July 1, 2001, through June 30, 2002, half of their purchases or leases of new passenger cars or medium-duty vehicles were required to be CARB-certified as meeting ULEV, SULEV, or ZEV emission standards; beginning July 1, 2002, all purchases and leases had to meet this standard. Rule 1194(d)(2) (J.A. 62). As noted above (at pages 11-12), CARB's rules permit the purchase and lease within California of new passenger cars and medium-duty vehicles that do not meet these particular standards.

• For providers of "shuttle services to the public in and out of airport terminals to airport parking lots, car rental lots, or hotels/motels, all new heavy-duty transit vehicle purchases or leases shall be alternative-fueled vehicles," (Rule 1194(d)(3) (J.A. 62)), which the Rule defines as a "vehicle or engine that is not powered by gasoline or diesel fuel," (Rule 1194(c)(2) (J.A. 59)). Under CARB's rules, heavy-duty transit vehicles powered by gasoline or diesel

fuel are CARB-certified and may be sold within California. See Cal. Code Regs. tit. 13, § 1956.1(a)(6)-(12).

• Finally, for fleet operators "providing taxicab pickup services out of commercial airport terminals," any new purchase or lease of a passenger car or medium-duty vehicle to perform such services "shall [only] be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards" (Rule 1194(d)(4) (J.A. 62-63)), despite the availability of other CARB-certified vehicles, including diesel-powered vehicles (see page 11, *supra*). The Rule provides for an exemption for such operators if the District has failed to make available a subsidy to cover any amount in excess of $10,000 that the operator is required to pay for such a vehicle. Rule 1194(e)(3) (J.A. 63-64).

Rule 1194 contains exemptions for situations in which the operator demonstrates to the District that the vehicle required under the Rule is not available commercially or could not be used; for vehicles converted to be wheelchair accessible; and for buses "used for the express purpose of providing long-distance service." Rule 1194(e)(1)-(2), (4) (J.A. 63-64).

Each of the other Fleet Rules follows the same approach for different types of fleets: public and private street-sweeper fleet operators (Rule 1186.1 (J.A. 16-23)); public fleet operators of passenger cars, light-duty trucks, or medium-duty vehicles (Rule 1191 (J.A. 24-45)); public transit fleet operators (Rule 1192 (J.A. 46-51)); public and private solid waste collection fleet operators (Rule 1193 (J.A. 52-57)); and public fleet operators of heavy-duty vehicles (Rule 1196 (J.A. 66-74)). In each instance, the purchase of certain low-emission vehicles and all covered diesel-fuel vehicles is generally prohibited. See Pet. App. 16a-19a.

D. The Proceedings Below.

Petitioner Engine Manufacturers Association commenced this action against respondent SCAQMD in the United States District Court for the Central District of California asserting that the Fleet Rules are preempted by Section 209(a) of the Clean Air Act and seeking an injunction barring the District from enforcing those Rules. Petitioner Western States Petroleum Association intervened as a plaintiff; and respondents Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened as defendants. Pet. App. 19a-20a.

The district court granted respondents' motion for summary judgment (Pet. App. 3a-27a). The court recognized that the First and Second Circuits had held that state-imposed requirements regarding the sales of motor vehicles constitute a "standard relating to the control of emissions" preempted by Section 209(a). Pet. App. 23a. Nonetheless, the district court stated that "[i]t does not follow, however, that a rule regulating the *purchase* of vehicles is such a standard." *Ibid*. (emphasis in original). "Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard. No restriction on the sale of vehicles is present here. Plaintiffs may continue to sell any vehicle which is otherwise certified in California." *Ibid.*

The district court also relied on Section 246's requirement that some States require fleet operators to purchase certain low-emission vehicles. "It is not rational to conclude that the [Clean Air Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." Pet. App. 23a.

Finally, the district court concluded that Section 177's requirement that a State adopt standards "identical" to Califor-

nia's to be exempt from preemption was not applicable because it referred only to "the non-California 'opt-in' states." Pet. App. 26a. The court also determined that the District's Fleet Rules did not impose a "third car" requirement in violation of Section 177 because "they require purchasers to choose from among a subset of previously certified vehicles. Automobile manufacturers will not be forced to do something more than they already must." Pet. App. 27a. "The Fleet Rules may lead to decreased demand for some cars and trucks certified in California, but the Rules do not require the manufacturers to build or sell any particular model for this area." *Ibid.*

The Ninth Circuit affirmed the judgment "for the reasons stated in" the district court's "well-reasoned opinion." Pet. App. 1a-2a. The court of appeals subsequently denied rehearing. Pet. App. 28a-29a.

SUMMARY OF THE ARGUMENT

Section 209(a) of the Clean Air Act prohibits any "State or any political subdivision thereof" from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." This provision sweeps broadly and encompasses the emissions-based purchasing restrictions imposed on fleet operators by the Fleet Rules at issue in this case.

The District's Fleet Rules prohibit the purchase of certain new motor vehicles — including all diesel-fueled vehicles — based on the emission characteristics of those vehicles. As a result, the Rules are "standard[s] relating to the control of emissions from new motor vehicles" preempted by Section 209(a). The distinction drawn by respondents and the courts below between purchase prohibitions (which they contend are not preempted) and sales restrictions (which they acknowledge are preempted) finds no support in the text of Section 209(a) or the Clean Air Act's regulatory scheme. Indeed, the distinction

is illusory; every sale includes a purchase and every purchase includes a sale.

The Fleet Rules also expressly refer to and incorporate a subset of the emission standards adopted by CARB. That subset includes only the most stringent and restrictive of the broader range of CARB emission standards and phase-in provisions. The Fleet Rules amount to a new and different set of standards adopted for the undisputed purpose of controlling emissions. If the District can adopt these standards, then other state and local governments can as well. The congressional scheme for regulating mobile sources of emissions would be gutted.

No provision of the Clean Air Act — not the preemption waiver provision for California (Section 209(b)), the "opt-in" provision allowing other States to adopt California emission standards that have been approved by EPA (Section 177), nor the clean-fuel fleet provisions (Section 246) — saves the Fleet Rules from federal preemption. The District is not a State. The Fleet Rules vary from the EPA-approved standards adopted by the State of California. And the Fleet Rules have never been approved by EPA.

ARGUMENT

The District's Fleet Rules are "standard[s] relating to the control of emissions from new motor vehicles" and are, therefore, preempted by Section 209(a) of the Clean Air Act. The contrary holding of the courts below — based on the conclusion that the Fleet Rules are beyond the reach of Section 209(a) because they proscribe purchases, not sales (see Pet. App. 2a, 23a) — is untenable. It ignores the broad language of Section 209(a), the entire regulatory scheme for controlling motor vehicle emissions under the Clean Air Act, and the purpose and effect of the Fleet Rules themselves.

If the Fleet Rules were not preempted emission standards, then any state or local government could adopt rules permitting

or prohibiting any motor vehicle purchases (whether by fleet operators or individuals) based on the emissions characteristics of those vehicles.[2] The balkanized regulatory scheme that would result is the very sort of "chaotic situation" Congress sought to avoid by preempting state and local regulation of motor vehicle emission standards. See pages 4-7, *supra*. Such localized variation will disrupt "interstate commerce in new motor vehicles" and undermine the regulatory regime created by Congress for mobile sources in Title II of the Act. H.R. Rep. 728, at 21.

I. SECTION 209(A) ENCOMPASSES RESTRICTIONS ON PURCHASES OF NEW MOTOR VEHICLES SUCH AS THE DISTRICT'S FLEET RULES

Whether the Clean Air Act preempts the Fleet Rules is determined by the text of Section 209(a). Where, as here, a federal statute "contains an express pre-emption clause, [the] task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)) (internal quotation marks omitted).

The courts below, and respondents, mistakenly relied on a "presumption" against federal preemption of traditional state "police powers" in seeking to narrow the scope of Section 209(a). Pet. App 2a, 9a. But such a presumption has no bearing on this case, where "Congress has made clear its desire for preemption." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 146 (2001). Moreover, the presumption applies only when Congress legislates "in a field which the States have traditionally occu-

[2] The statute preempts state and local standards applicable to both "new motor vehicles" and "new motor vehicle engines." For ease of reference, we include both "new motor vehicles" and "new motor vehicle engines" in referring to "motor vehicles."

pied" (*United States* v. *Locke*, 529 U.S. 89, 108 (2000) (quoting *Rice* v. *Sante Fe Elevator Corp*., 331 U.S. 218, 230 (1947))), and not in a field "where there has been a history of significant federal presence" (529 U.S. at 108). In this case, there is no "tradition" of state regulation of motor vehicle emissions — only a single State had adopted emission standards at the time Congress enacted the relevant provisions of the Clean Air Act. See pages 5-6, *supra*. To the contrary, there have been decades of a "significant federal presence" in the field. *Locke*, 529 U.S. at 108.

The preemption inquiry in this case begins and ends with the text of Section 209(a), which "provides a reliable indicium of congressional intent with respect to state authority." *Cipollone*, 505 U.S. at 517 (internal quotation marks omitted). Section 209(a) plainly demonstrates Congress's intent to preempt regulations like the Fleet Rules.

A. The Plain Language Of Section 209(a) Establishes That A Rule Barring The Purchase Of New Motor Vehicles Based On Their Emission Characteristics Is A Preempted "Standard Relating To The Control Of Emissions."

The first sentence of Section 209(a) is written in expansive terms: "No State or any political subdivision thereof shall adopt or attempt to enforce ***any standard relating to*** the control of emissions for new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis added). This language "largely preempt[s] the field with regard to 'emissions from new motor vehicles.'" *Washington*, 406 U.S. at 114; see also *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 198 (2d Cir. 1998) ("Under Section 209 of the Clean Air Act, exclusive control over 'standards relating to the control of emissions from new motor vehicles' is vested in the federal government, and the states are preempted from regulating in the area."); *MVMA*, 17 F.3d at 526 (the "cornerstone of Title II [of

the Clean Air Act] is Congress' continued preemption of state regulation of automobile emissions").

Despite the provision's broad language, the courts below concluded that, although Section 209(a) has been properly construed to preempt state laws regulating sales of new motor vehicles based on the vehicles' emission characteristics,[3] "[i]t does not follow * * * that a rule regulating the *purchase* of vehicles is such a standard." Pet. App. 23a (emphasis in original). That construction of the statute cannot withstand even casual scrutiny in light of the breadth of Section 209(a)'s prohibition against "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions," which is evident from each element of the language Congress used in crafting the provision.

First, the statute proscribes "***any*** standard." The term "any" generally means a thing "selected without restriction or limitation of choice," and when used as a modifier — as in Section 209(a) — "any" indicates "the maximum or whole of a number or quantity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1986). Congress's use of the word "any" in a statute "undercuts a narrow construction" of the provision. *United States* v. *James*, 478 U.S. 597, 605 (1986), abrogated on other grounds by *Central Green Co.* v. *United States*, 531 U.S. 425 (2001); see also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) (Congress's use of the "expansive" term "any" "offer[ed] no indication whatever that Congress intended the limiting construction" of the statute urged by the respondents); *Shea* v. *Vialpando*, 416 U.S. 251, 260 (1974) (interpreting Congress's use of the word "any" to

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[3] See *Ass'n of Int'l Auto. Mfrs.* v. *Commissioner*, 208 F.3d 1, 6-7 (1st Cir. 2000) ("a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions" and "must be considered 'standards relating to the control of emissions'" for purposes of Section 209(a) (quoting *Cahill*, 152 F.3d at 200)).

indicate that there was "no limitation, apart from that of reasonableness," upon statute's applicability).

Second, Congress described the object of the preemption provision in broad terms: "any ***standard***." A "standard" is a "criterion for measuring acceptability" (BLACK'S LAW DICTIONARY 1412-1413 (7th ed. 1999)) and "something that is established by authority, custom, or general consent as a model or example to be followed," *i.e.*, a "criterion" or "test" (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2223). The word "standard" includes not only the more limited terms "law" and "regulation," but also encompasses restrictions that are the functional equivalents of standards as well. That is confirmed by the inclusion by Congress of standards that a State or local government *either* "adopt[s]" *or* "attempt[s] to enforce;" an attempt to enforce a standard never formally adopted is sufficient to trigger preemption.

Third, Section 209(a) preempts any standard "***relating to*** the control of emissions from motor vehicles," and Congress's use of the term "relate to" in an express preemption clause signals a "clearly expansive" preemptive intent. *Egelhoff*, 532 U.S. at 146; see also *Barnett Bank of Marion County, NA* v. *Nelson*, 517 U.S. 25, 38 (1996) ("The word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts."); *Morales* v. *Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992) (the phrase "relating to" in a preemption clause "express[es] a broad preemptive purpose").

This Court has interpreted "related to" preemption clauses to invalidate state laws that have a "reference to" or a "connection with" the preempted subject matter. See, *e.g*, *Egelhoff*, 532 U.S. at 147; *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324 (1997); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 (1995). The "reference to" or "connection with" inquiry is based on whether the state or local law at issue is expressly linked in

some fashion to the subject matter that has been reserved for federal regulation. As the Court explained in *Dillingham*, a "reference" sufficient to establish preemption will be found "[w]here a State's law acts immediately or exclusively upon" the preempted subject matter, or where the preempted subject matter "is essential to the law's operation." 519 U.S. at 325.

To determine whether a state or local law has "the forbidden connection," resort must be had to "the objectives of the [federal statute] as a guide to the scope of the state law that Congress understood would survive," and "the nature of the effect of the state law on [the preempted legislative area]." *Dillingham*, 519 U.S. at 325 (internal quotation marks omitted); see also *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (the Court looked to "the objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive").

In light of these principles, the proscription against "***any standard relating to*** the control of emissions from new motor vehicles" must encompass purchase prohibitions. Whatever the outer limits of Section 209(a)'s preemptive scope, it is plain that a state or local rule that bars the purchase of some new motor vehicles and permits the purchase of others on the basis of the vehicles' respective emission characteristics is well within Section 209(a)'s prohibition. There are only a few ways to regulate motor vehicle emissions. Manufacturers may be barred from producing vehicles that do not meet specified emissions criteria; or sales, purchases, or use of new motor vehicles may be limited on the same basis. Given its expansive language, Section 209(a) necessarily encompasses such direct emission controls.

Certainly, any distinction between sale restrictions and purchase restrictions is nonsensical. Every new vehicle transaction involves the purchase of the vehicle by the purchaser and

the sale of the vehicle by the seller.[4] Thus, the sale and purchase of a new motor vehicle are two sides of the same coin. One cannot occur without the other, and the government cannot regulate one without regulating the other. When Congress preempts emissions-related restrictions on the sale of new motor vehicles (see Pet. App. 23a; *Ass'n of Int'l Auto. Mfrs.*, 208 F.3d at 6; *Cahill*, 152 F.3d at 200), it necessarily preempts emissions-related restrictions on the purchase of new motor vehicles. There is no basis in the text of Section 209(a) to distinguish between sales and purchases.

The contrary approach of preempting emissions-related sales requirements but not purchase requirements would lead to absurd results. A state or local government could easily circumvent the preemption of sales requirements by requiring that every vehicle purchased must meet a novel emission standard. Indeed, the same substantive requirements could be cast as a sales requirement or a purchase requirement simply by changing the wording (but not the practical effect) of the requirement. Such a rule would defeat both the language and purpose of Section 209(a) preemption.

Controls on purchases and sales, of course, do not represent the only types of standards that are "***relat[ed] to*** the control of emissions." Preemption under Section 209(a) extends to any state or local standard whose applicability turns upon ("acts immediately or exclusively upon") or incorporates ("references") either the characteristics of a motor vehicle's emissions or the manufacturing or design criteria for the vehicle that are inextricably related to its emissions. This would encompass, for example, a state or local mandate specifying new vehicle

[4] The district court looked at only half the equation. The court concluded that "a rule regulating the *purchase* of vehicles" is not an emission standard because manufacturers "may continue to sell any vehicle which is otherwise certified in California." Pet. App. 23a. The court failed to note, however, that there can be no sale where there is no lawful purchaser.

emissions (*e.g.*, ULEV or SULEV limits) or a prohibition on the type of fuel used by a vehicle (*e.g.*, diesel fuel).

Thus, the scope of preemption under Section 209(a) is broad, as confirmed by this Court's decision in *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U.S. 125 (1992). In that case, the Court held that the Employee Retirement Income Security Act ("ERISA") expressly preempted a District of Columbia law that "impos[ed] requirements *by reference* to [ERISA] covered programs," because ERISA's preemption clause provides that it "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by ERISA (29 U.S.C. § 1144(a)).[5] 506 U.S. at 130-131.

For the same reason, Section 209(a)'s "relating to" language reaches standards that explicitly refer to emission characteristics or criteria inextricably related to vehicle emissions. Here, the Fleet Rules are organized around subsets of CARB's LEV standards, and each of the Fleet Rules cross-references the LEV standards numerous times. The express "references" to CARB emission standards in the Fleet Rules are more than sufficient to bring those Rules within the scope of Section 209(a) as standards "relating to the control of emissions."

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[5] The breadth of the preemption inquiry under ERISA has led some members of this Court to suggest "that the 'relate to' clause of the preemption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies." *Dillingham*, 519 U.S. at 336 (Scalia, J., concurring). A similar interpretation of Section 209(a) of the Clean Air Act — which this Court has already found "largely preempt[s] the field with regard to 'emissions from new motor vehicles'" (*Washington*, 406 U.S. at 114) — would necessarily include purchase restrictions based on motor vehicle emission characteristics within the preempted field because they have the undisputed purpose and effect of "control[ling] * * * emissions from new motor vehicles."

Finally, even when a state law lacks this express reference to emission characteristics or design criteria, it may nonetheless be preempted if it is linked in some other manner to control of motor vehicle emissions and therefore has the requisite connection to Section 209(a)'s subject matter. This case, however, provides no occasion for the Court to explore the outer limits of Section 209(a) because the Fleet Rules at issue here expressly restrict purchases of motor vehicles based upon the vehicles' fuel type or emission characteristics and therefore fall within the core prohibition of Section 209(a).

B. Other Provisions Of Section 209 Support A Broad Reading Of "Any Standard Relating To The Control Of Emissions" In Section 209(a).

1. The second sentence of Section 209(a) provides that "[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." This provision applies only to "States," which are the only government entities that title and register motor vehicles. And it applies to preemption of state testing and certification of "emission controls" for new motor vehicles and new motor vehicle engines, which is specifically governed by Section 206 of the Act, 42 U.S.C. § 7525 (providing for EPA testing and certification of "emission control systems"). The second sentence of Section 209(a) does not limit the scope of the first sentence and, in fact, supports the view that Congress was concerned about sales (and purchasing) restrictions in preempting state and local laws under Section 209.

Thus, read in tandem, the first sentence of Section 209(a) broadly preempts state "standard[s] relating to the control of emissions" and the second sentence extends that preemption to state testing and other approval requirements to determine

compliance with federal (or federally approved) emission standards. Without the specific preemption of testing and certification, States might have sought to circumvent the broad proscription on standard-setting by designing tests and certification and other approval procedures that would have undermined or changed the standards.

2. Section 209(d), 42 U.S.C. § 7543(d), provides an additional indication of the scope of federal preemption in Section 209(a). Section 209(d) states that "[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."

This provision — which allows the States to regulate the "use, operation, or movement" of motor vehicles that are no longer "new" through, for example, traffic laws and parking restrictions — provides additional confirmation of the broad scope of Section 209(a). Congress plainly believed that it was necessary to delineate the outer boundary of preemption in subsection (d) because it had written so broadly in subsection (a) of Section 209. Moreover, if state "use, operation, and movement" regulations would otherwise be covered within the scope of Section 209(a) — but for the saving language in Section 209(d) — then certainly purchase restrictions based on new motor vehicle emission characteristics (which are not saved by Section 209(d)) are preempted.

C. The 1990 Amendments To The Clean Air Act Confirm That Section 209(a) Preempts Purchasing Prohibitions.

Two of Congress's 1990 amendments to the Clean Air Act confirm the broad preemptive reach of Section 209(a) and the specific inclusion of purchasing restrictions within its scope. These subsequently-enacted provisions are a useful guide to congressional intent on preemption under Section 209(a). See

Vermont Agency of Natural Res. v. *United States*, 529 U.S. 765, 786 n.17 (2000) ("[I]t is well established that a court can, and should, interpret the text of one statute in the light of the text of surrounding statutes, even those subsequently enacted"); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

1. Congress added a second paragraph to Section 177, the provision that permits States to adopt and enforce "standards relating to the control of emissions," so long as those standards "are identical to the California standards for which a waiver has been granted" and manufacturers are given sufficient lead time. This new paragraph states (42 U.S.C. § 7507 (emphases added)):

> Nothing in this section or [in the title of the Act concerning mobile source pollution] shall be construed as authorizing any * * * State [that adopts California standards] ***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 (a "third vehicle") or otherwise create such a "third vehicle."

This addition to Section 177 confirms that Congress intended Section 209(a), which is contained in the Act's title concerning mobile sources, to be interpreted to encompass "direct[] or indirect[]" prohibitions or limitations on the "manufacture or sale of a new motor vehicle." Because every sale includes a purchase, and a ban on vehicle purchases would have the effect of prohibiting vehicle sales, a purchase prohibi-

tion would, at the very least, be an "indirect" limitation on sales preempted by Section 209(a). See pages 25-26, *supra*.

Moreover, excluding purchase restrictions from Section 209(a) would contravene Congress's directive that the Act's provisions relating to motor vehicles not be construed to allow a State to create a "third vehicle." If States could require fleet operators (or individuals) to purchase only those vehicles with certain emission characteristics, they would effectively require manufacturers to produce vehicles meeting those specifications — even if the specifications differed from those adopted by EPA and California (with EPA approval). Accordingly, States and localities could require not just a " third vehicle," but a "fourth," "fifth," and "sixth" vehicle — precisely the opposite of Congress's express direction. The only way to avoid this result is to construe Section 209(a) to encompass purchasing restrictions.

It is important to note that the 1990 addition to Section 177 does not purport to limit the scope of preemption under Section 209(a). Congress did not describe the full scope of Section 209(a), but rather used language — "[n]othing * * * shall be construed as authorizing" — making clear that its intent was simply to identify two specific categories of regulations that are preempted.

Thus, contrary to the district court's suggestion (Pet. App. 26a-27a), Section 177 does not limit preemption under Section 209(a) to state rules that "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 (a 'third vehicle') or otherwise to create such a 'third vehicle.'" 42 U.S.C. § 7507. It merely indicates that such state rules that do create a "third vehicle" would be preempted. It is a sufficient but not a necessary condition.

2. The other 1990 amendment that informs the scope of preemption under the Clean Air Act is the adoption of Section

246, 42 U.S.C. § 7586. See pages 8-10, *supra*. This provision requires States with nonattainment areas to prescribe rules for a clean-fuel fleet program. 42 U.S.C. § 7586.[6] The program must be submitted to EPA for approval as a revision of the State's implementation plan and must be premised on a "phase-in" of purchasing requirements. See Section 246(a)-(b), 42 U.S.C. § 7586(a)-(b); pages 9-10, *supra*. The state fleet program must also guarantee flexibility to fleet operators in purchasing decisions. Section 246(d) dictates that "the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator subject to the requirements of this subsection." 42 U.S.C. § 7586(d).

Section 246 thus allows a State to adopt a purchasing restriction based on emission characteristics that otherwise would be prohibited under Section 209(a), as long as the State complies with all of the requirements set forth in Section 246, which include EPA-established emission limits for "clean-fuel fleet" vehicles. The district court interpreted Section 246 as indicating general approval by Congress of state purchasing restrictions. See Pet. App. 23a. But Section 246's terms demonstrate that Congress created only a limited exception to Section 209(a). If a State revises its implementation plan according to the requirements of Section 246 and receives EPA approval, then the approved fleet purchasing restriction is not preempted. State or local laws and regulations that fail to comply with Section 246 or do not receive EPA approval remain preempted by Section 209(a).

This conclusion is supported by the language added to Section 177 at the same time Section 246 was adopted in 1990. As described above, the amended Section 177 provides that the Act's title on motor vehicle emissions, which includes Section

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[6] A State may either adopt a clean-fuel fleet program approved by EPA or opt out of the federally-mandated program by proposing a substitute program, which is also subject to EPA review and approval. 42 U.S.C. §§ 7586(a), 7511a(c)(4).

246, should not be construed to authorize States to adopt limits on the sale or purchase of a new motor vehicle "that is certified in California as meeting California standards" or to adopt standards that create a "third vehicle." Construing Section 246 as establishing that all state purchasing restrictions are permissible under Section 209(a) would be inconsistent with Section 177's interpretive instruction because it would allow States to adopt standards barring the purchase of California-certified vehicles as well as standards barring the purchase of any vehicles that do not comply with the State's unique emission regulation, which in turn would require automobile manufacturers to produce a "third vehicle" to meet that standard.

Two provisions in the same statutory scheme adopted at the very same time should be construed in a consistent manner. See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Danny Keffeler*, 123 S.Ct. 1017, 1025 n.7 (2003); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992). Accordingly, Congress's addition to Section 177 leaves no doubt that Section 246 should not be interpreted as demonstrating general congressional approval of state restrictions or prohibitions on the purchase and sale of CARB-certified vehicles.

D. The Fleet Rules Are Preempted By Section 209(a).

The Fleet Rules restrict purchases of motor vehicles based on specified emission criteria and fuel types. Vehicles that do not satisfy these criteria — including all diesel-fueled vehicles — may not be purchased by fleet operators. The Rules were specifically adopted "to reduce public exposure to motor vehicle pollutant emissions" (Pet. App. 15a), thereby "act[ing] immediately and exclusively" upon matters that are subject solely to federal regulation (*Dillingham*, 519 U.S. at 325). Likewise, the control of emissions "is essential to the * * * operation" of the Fleet Rules (*ibid.*), insofar as the Rules are

explicitly premised on a fleet operator's purchase of new vehicles that are compliant with specific emissions standards.

Thus, the undisputed purpose and effect of the Fleet Rules are to control emissions from new motor vehicles — the expressly preempted subject matter of the Clean Air Act. See, *e.g.*, Rule 1191 Staff Report (J.A. 103) ("[t]he proposed fleet rule is specifically based on achieving emission reductions beyond the ARB Low Emission Vehicle regulation"); Rule 1193 Staff Report (J.A. 124) ("PR 1193 is specifically based on achieving emission reductions beyond the mandatory U.S. EPA and ARB heavy-duty engine emission standards. The emission benefits for PR 1193 are based on refuse truck fleets purchasing alternative-fueled refuse trucks instead of diesel refuse trucks").

The District's decision to pick and choose among CARB-approved criteria undoubtedly constitutes the adoption of a new "standard" for purposes of Section 209(a). CARB adopted a comprehensive, EPA-approved set of criteria; the District selectively chose from among them. For example, the District prohibited fleet operators from purchasing CARB-certified diesel vehicles for use in their fleets of tow trucks, garbage trucks, street-sweepers, other heavy-duty trucks, and buses. See Fleet Rules 1186.1, 1191, 1193, 1194 and 1196 (J.A. 16-74). Likewise, Fleet Rule 1192 permits transit bus fleet operators to acquire only alternative-fuel heavy-duty vehicles (*e.g.*, natural gas-fueled buses), and prohibits operators in the District from purchasing or leasing diesel-fueled transit buses that have been certified under California's Urban Bus Program. J.A. 47.

In light of their purpose and effect and because, as discussed above (at pages 25-26, *supra*), federal preemption under Section 209(a) extends to purchasing restrictions, the Fleet Rules are within the very core of state and local standards preempted by that provision.

The district court agreed that the Fleet Rules require every fleet operator within the District's jurisdiction to "acquire only

those specific motor vehicles that the SCAQMD has designated as meeting its standards and requirements." Pet. App. 16a. Yet the court concluded that the Fleet Rules "do not set a 'standard relating to the control of emissions.' Rather than imposing any numerical controls on new vehicles, the rules regulate the purchase of previously certified vehicles." Pet. App. 21a.

The district court's suggestion that the Fleet Rules are not "standards" because they do not impose "numerical controls" finds no support in the text of the statute and has been squarely rejected by EPA and other courts considering the issue. See *Cahill*, 152 F.3d at 200; *Ass'n of Int'l Auto. Mfrs.*, 208 F.3d at 6; see also Notice Regarding Waiver of Federal Preemption, 61 Fed. Reg. 53,371 (1996) (EPA concludes that CARB's regulations regarding on-board diagnostic systems, which set no numerical emissions targets, constitute a "standard" for purposes of the Act, and therefore require a waiver under Section 209(b)). The district court simply ignored Congress's use of the broad term "standard" to describe the object of its preemption. In any event, contrary to the district court's conclusion, the Fleet Rules do expressly incorporate numerical limits set by CARB and are, therefore, "standards" even under the court's unduly narrow definition. See Fleet Rules 1191(d), (e) (J.A. 27-29); 1194(d) (J.A. 61-62).

In sum, the district court's reasoning provides no basis for excluding the Fleet Rules from the broad scope of Section 209(a). That provision contains no language exempting from preemption some standards relating to the control of emissions based on the particular content or effect of those standards. Rather, Section 209(a) preempts *all* such standards. Accordingly, the district court's decision to uphold the Fleet Rules can be understood only as a conclusion that some other provision of the Act saves the Rules from preemption because the specific emission standards that they adopt are those previously promulgated by CARB. As we next demonstrate, that argument should be rejected by this Court.

II. THE FLEET RULES ARE NOT SAVED FROM PREEMPTION BY ANY OTHER SECTIONS OF THE CLEAN AIR ACT

In defense of the Fleet Rules in the courts below, respondents invoked a number of provisions of the Clean Air Act other than Section 209(a), contending that even if purchase restrictions are generally preempted by Section 209(a), the Fleet Rules nonetheless are not preempted because they are somehow saved by these other parts of the statute. None of those provisions, however, provides the slightest basis for upholding the Fleet Rules.

A. Section 209(b).

The Act provides a straightforward means by which the State of California could lawfully have sought to implement the Fleet Rules — the State itself could have adopted the Fleet Rules as part of its package of state-specific regulations and invoked the waiver procedure set out in Section 209(b). But California did not even attempt to utilize that procedure, let alone obtain the required approval from the federal government for the Fleet Rules. Accordingly, respondents cannot rely on Section 209(b).

Section 209(b) is very specific about the process to be followed in connection with a waiver application. It provides that "after notice and an opportunity for public hearing," the Administrator of EPA shall waive application of Section 209(a) "to any State which has adopted standards" prior to March 30, 1966 — a standard that encompasses the State of California alone — only if a series of requirements are satisfied. First, the State must determine "that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." Second, the waiver may not be granted if the Administrator finds either that the State's determination is arbitrary and capricious, or that the State "does not need such State standards to meet compelling and extraordi-

nary conditions," or that the state standards are not consistent with the Clean Air Act standard applicable to federal emission regulations. See Section 209(b)(1), 42 U.S.C. § 7543(b)(1); 68 Fed. Reg. 35,809, 35,810 (2001).

EPA's role in the waiver process is to "consider all evidence that passes the threshold test of materiality and * * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended denial of the waiver." *MEMA*, 627 F.2d at 1122; see generally 49 Fed. Reg. 18,887 (1984) (detailing procedural requirements for consideration of California waiver requests).

Here, the Fleet Rules were not adopted by the State of California — the only entity whose standards are eligible for a Section 209(b) waiver. They were adopted by a local governmental entity. California did not apply for a federal waiver; there was no public notice and opportunity for comment in connection with a waiver application; California did not make the necessary public health and welfare determination; and the Administrator did not undertake the three inquiries specified in the statutory waiver standard. There are no grounds whatever for finding a Section 209(b) waiver with respect to the Fleet Rules.

Nor can the Section 209(b) waivers that CARB did obtain for its LEV Program and its Heavy-Duty Vehicle Program be stretched to serve as a waiver of Section 209(a) with respect to the very different Fleet Rules. To begin with, the Rules were not adopted by California and there has been no determination by California that the Fleet Rules are at least as protective of public health and welfare as federal law (Section 209(b)(1), 42 U.S.C. § 7543(b)(1)) — both express requirements of the statute and therefore fatal to any such argument.

Moreover, the Fleet Rules were adopted by the District precisely because they would have an impact different from the CARB rules, which already applied within the geographic area under the District's jurisdiction (see J.A. 141, 152). EPA's determination with respect to another element of the waiver test — its conclusion that CARB's rules were consistent with the federal standard governing emission regulations (Section 209(b)(1)(C), 42 U.S.C. § 7543(b)(1)(C)) — therefore could not apply to the Fleet Rules.

The inquiry under this "consistency" prong of the waiver test requires consideration whether the California standards will "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." Section 202(a), 42 U.S.C. § 7521(a). Regulations that give purchasers a variety of options, and that impose fleet requirements on manufacturers (in the case of the LEV Program (see pages 11-12, supra)), or provide fleet operators with alternative paths to compliance in order to increase flexibility and reduce cost (in the case of the Urban Bus Program (see page 13, supra)), or allow for the certification of a broad array of diesel-fueled trucks (in the case of the Heavy-Duty Vehicle Program (see page 14, *supra*)), are quite different from regulations that significantly reduce the options previously available to purchasers and eliminate diesel-fueled vehicles altogether.

The latter approach could lead to increased costs to purchasers as well to manufacturers forced to alter production plans unexpectedly to cope with new rules imposed with little or no transition period. These differences are extremely relevant to the consistency inquiry. See *MEMA*, 627 F.2d at 1118 ("Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchas-

ers. It therefore requires that emission regulations be technologically feasible within economic parameters").

It is an open question whether the Fleet Rules, if they had been adopted by California and subjected to all of the requirements of Section 209(b), would meet the statutory standard and receive a waiver from EPA. But that is not the issue here. What is clear is that EPA's determinations with respect to CARB's rules say nothing about the consistency of the very different Fleet Rules. That is why the appropriate course of action — if California wishes to adopt the Fleet Rules itself — is a Section 209(b) waiver proceeding in which these issues would be decided.

B. Section 177.

The provision of the Clean Air Act enabling States other than California to "opt-in" to the California standards that have received a Section 209(b) preemption waiver from EPA similarly provides no support to respondents.

First, just as the Section 209(b) waiver process is available only to a "State," Section 177 allows "any State" with an EPA-approved nonattainment plan to adopt and enforce California's standards.[7] The structure of the Act makes clear that Congress's choice of words was not accidental: the Act requires only States to submit nonattainment plans. 42 U.S.C. § 7502(b), (d). When Congress intended political entities other than States to submit such plans (see *id.* § 7410(o) (Indian tribes)), Congress expressly provided that such entities would be treated as "States" (*id.* § 7601(d) (certain Indian tribes treated as "States" for purposes of the Clean Air Act)). And Congress would have been concerned that the adoption of California standards on a piecemeal basis by cities and towns within the other States would lead to a regulatory patchwork that would be burden-

[7] Such a plan must be submitted to EPA by States with areas that have been designated as "nonattainment" because pollution levels do not satisfy one or more ambient air quality standards. See generally 42 U.S.C. § 7502.

some for both manufacturers (who would have to keep track of what could be sold where) as well as purchasers (who would be confused about offerings that could differ from town to town). The District is not a State, and therefore cannot rely upon Section 177.

Second, Section 177 applies only if a State adopts and enforces standards that are "identical to the California standards for which a waiver has been granted for such model year." 42 U.S.C. § 7505(1). The District's standards fail this test as well. As noted above, the Fleet Rules were adopted by the District precisely to achieve an impact different from the CARB rules, which already applied within the geographic area under the District's jurisdiction. See pages 33-34, *supra*; J.A. 141, 152. Far from seeking to mirror the CARB standards, the District's entire purpose was to adopt a different, more restrictive regulatory regime, and it accomplished that goal. That is fatal under Section 177.

For example, CARB's LEV Program consists of two interrelated elements — standards establishing permissible emission levels for each of the four categories of low-emission vehicles, and standards setting the progressively lower average emission level that a manufacturers' fleet (of vehicles sold in the State each year) must meet over time. See Cal. Code Regs. tit. 13, §§ 1960.1(g)(1)-(2), § 1961(a)-(b). When CARB sought EPA approval of its LEV Program, it submitted the emission levels and the implementation mechanism together as a single interrelated program. See 58 Fed. Reg. at 4,166 (referring to amendments to California's "exhaust emission standards and test procedures" as the "California LEV program," and evaluating the disparate standards as one program for purposes of a single waiver request); see also 68 Fed. Reg. at 19,812 (using the same framework of analysis for LEV II amendments). EPA based its approval on the effect of the entire program; it did not review the emission levels alone. See generally 68 Fed. Reg. at 19,812; 58 Fed. Reg. at 4,166.

The District's Fleet Rules allow the purchase of only some of the vehicles that are permitted to be sold under CARB's LEV program, in most cases adopting an immediate prohibition of certain vehicles (typically diesel-fueled vehicles) instead of allowing manufacturers to phase in a mix of vehicles based upon yearly state-wide emission averages. The Fleet Rules also prohibit the purchase of all of the diesel-fueled trucks certified for sale under CARB's Heavy-Duty Vehicle Program. Thus, what the District has done is to take some, but not all, of the CARB emission regulations and combine them with a completely different implementation mechanism.

It is plain that the Fleet Rules are not "identical to the California standards for which a waiver has been granted for such model year," as Section 177 requires. EPA has granted a waiver to *both* the emission standards for the year *and* the fleet average emission standards that apply to the particular model year. The District's attempt to implement only a selected subset of the California standards precludes it from relying upon Section 177.

The district court emphasized that "[t]he Fleet Rules require purchasers to choose from among a subset of previously certified California vehicles." Pet. App. 23a. Several simple examples illustrate why this approach is not permissible under Section 177.

A State could decide on a different selective adoption of California's standards, choosing the CARB emission regulations but not the requirement of progressively lower fleet averages, and defend its decision on the same basis as the District — that it had adopted California standards.

Of course, the effect of such a rule would be quite different from the rules promulgated by CARB. Without the pressure of having to meet increasingly stringent emission levels, manufacturers would have no reason to produce and sell the cleaner vehicles. They could focus all of their efforts on vehicles

satisfying the least restrictive emission standards. That would have substantially different — and adverse — consequences for pollution levels.

On the other hand, a State could choose to adopt only the most restrictive of the CARB emission standards. Eliminating the gradual phase-in period provided by the CARB standards could create a situation in which manufacturers might not have sufficient production to meet demand for vehicles in that State.

Not surprisingly, the lower courts that have considered this question — other than the courts below — have concluded that any deviation from the exact rules adopted by California makes Section 177 inapplicable. See *Ass'n of Int'l Auto. Mfrs.*, 208 F.3d at 7-8 (ZEV sales mandates not identical to California standards are preempted); *American Auto. Mfrs. Ass'n*, 152 F.3d at 199-201 (same).

Under Section 177, a State may adopt standards that differ from the federal standards only if they "are *identical* to the California standards." 42 U.S.C. § 7507 (emphasis added). Here, of course, the Fleet Rules are not identical to the California standards. As noted above, their very purpose is to be more restrictive. Moreover, Section 177 expressly prohibits a State that adopts the California standards from limiting — whether directly or indirectly — the "sale of a new motor vehicle * * * that is certified in California as meeting California standards." *Ibid*. But that is precisely the function of the Fleet Rules, which limit the sale of various vehicles (including diesel-fueled vehicles) that do meet the California standards.

C. Section 246.

As discussed above (at pages 31-33), Section 246 does not generally authorize States to adopt purchasing restrictions; rather, it preserves against Section 209(a) preemption any fleet purchasing requirements that satisfy the procedural and

substantive standards set forth in Section 246. Because the Fleet Rules do not comply with these standards, they are preempted.

The Fleet Rules were not submitted to EPA for approval as part of California's state implementation plan revision, as required by Section 246. Indeed, California did not submit *any* fleet purchasing program in its implementation plan revision. California instead exercised its option under Section 182(c)(4)(B) of the Act, 42 U.S.C. § 7511a(c)(4)(B), to submit its LEV Program as a substitute in place of a Section 246 fleet purchasing program, and EPA approved the substitution finding that the LEV Program would achieve substantially greater emission reductions. See 64 Fed. Reg. 46,849, 46,851 (1999) (Table 1) (forecasting LEV program emission benefits in excess of those that would be achieved by the federal clean-fuel fleet program). Because the Fleet Rules were not even submitted to (let alone approved by) EPA, respondents cannot rely on Section 246.

Moreover, the Fleet Rules could not otherwise be authorized by Section 246 because the terms of the Fleet Rules are squarely inconsistent with the plain language of Section 246(d), which states that a plan revision establishing a fleet purchase program "shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator * * *." The Act defines "clean-fuel vehicle" as a vehicle that "has been certified to meet * * * the clean-fuel vehicle standards" applicable under the statute. 42 U.S.C. § 7581(7). Thus, federal law requires Section 246 fleet purchasing programs to preserve the fleet operator's freedom to choose from among all of the low-emission and diesel-fueled vehicles permitted to be sold. The Fleet Rules, however, do not allow a fleet operator to choose to purchase vehicles from among all of the low-emission vehicles permitted to be sold under California law. Rather the Fleet Rules prohibit operators from purchasing certain low-emission (and all diesel-fueled) vehicles that

comply with the applicable emission regulations and that are offered for sale in California.

In sum, the Fleet Rules fail to comply with numerous requirements of Section 246 and accordingly are not protected against preemption under Section 209(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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