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## Federal Preemption under the Clean Air Act: A Loss for the Environment but not Necessarily a Victory for Diesel. Engine Manufacturers Association v. South Coast Air Quality Management District

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## CASE NOTE

**FEDERAL PREEMPTION UNDER THE CLEAN AIR ACT: A LOSS FOR THE ENVIRONMENT  
BUT NOT NECESSARILY A VICTORY FOR DIESEL**

*Engine Manufacturers Association v. South Coast Air Quality Management District*<sup>1</sup>

## I. INTRODUCTION

In what has been referred to as a landmark legal decision on emissions regulations,<sup>2</sup> the United States Supreme Court recently held that rules requiring the purchase or lease of alternative-fuel vehicles for public and private fleets may be preempted by the Clean Air Act ("CAA"). The Supreme Court overruled the 9th Circuit by holding that the Fleet Rules promulgated by a political subdivision of California (requiring operators of fleets of buses, taxis, heavy-duty trucks, and street sweepers among others, to purchase clean-fueled models when they replace vehicles) do not escape the preemption provision of § 209 simply because they address the purchase of new vehicles, rather than their sales or manufacturing. The crux of the case fell on the Court's analysis of the term "standard," whereby the Court rendered an overbroad interpretation, one inconsistent with the language of the CAA and its historical objectives. Rather than allowing the longstanding leadership and innovation of California to reduce one of the most polluted regions in the country through voluntary incentives and market demand, the Court prohibited requirements that private fleet operators purchase or lease cleaner engines that are commercially available.

## II. FACTS AND HOLDING

South Coast Air Quality Management District ("South Coast") is a "political subdivision of the state of California responsible for controlling air pollution in the Los Angeles area."<sup>3</sup> Between the months of June and October 2000, South Coast adopted six Fleet Rules.<sup>4</sup> The Fleet Rules at issue prohibited operators of fleets "of fifteen or more vehicles from purchasing certain types of new motor vehicles [due to] those vehicles' emissions characteristics,"<sup>5</sup> which "do not comply with stringent emissions requirements."<sup>6</sup> As defined by the Fleet Rules, the prohibition included all diesel-fueled vehicles.<sup>7</sup> In August 2000, Engine Manufacturers Association, a not-for-profit trade association representing manufacturers of diesel-fueled engines, sued South Coast, challenging the validity of the Fleet Rules by "claiming that the Fleet Rules are pre-empted by § 209(a) of the CAA which

<sup>1</sup> 541 U.S. 246 (2004).

<sup>2</sup> See Mike Osenga, *Diesel's Day in Court*, THE ONLINE COMPANION TO AUTOMOBILE INDUSTRIES MAGAZINE (June 2004), available at [http://www.ai-online.com/issues/article\\_detail.asp?id=493](http://www.ai-online.com/issues/article_detail.asp?id=493).

<sup>3</sup> *Engine Mfrs. Ass'n*, 541 U.S. at 248. South Coast is responsible for the development and implementation of a "comprehensive basinwide air quality management plan" which reduces the levels of emissions in order to maintain "state and federal ambient air quality standards." *Id.* at 249 (citing Cal. Health & Safety Code Ann. § 40402(e) (West 1996)).

<sup>4</sup> *Id.* The Fleet Rules govern both public and private operators of solid waste collection vehicles, street sweepers and shuttles and taxicabs and other airport passenger transportation vehicles. *Id.* In addition, the Fleet Rules regulate public operators of, passenger cars, light-duty trucks, medium-duty vehicles, public transit vehicles, urban buses and heavy-duty on-road vehicles. *Id.*

<sup>5</sup> Petitioners' Brief at \*2, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22068770.

<sup>6</sup> *Engine Mfrs. Ass'n*, 541 U.S. at 249. The rules also require that vehicles comply with the specifications established by the statewide regulatory body, California Air Resources Board ("CARB"), as part of a five-tiered program designed to require manufacturers to sell progressively cleaner vehicles. See *id.* n.3.

<sup>7</sup> *Id.* n. 1. The Fleet Rules require the purchase or lease of "alternative-fuel vehicles" or "alternative-fueled vehicles," each of which excludes vehicles that run on diesel fuel. *Id.* nn.1-2.

prohibits the adoption or attempted enforcement of any state or local standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”<sup>8</sup>

The district court granted the defendant’s summary judgment and upheld each of the Fleet Rules previously promulgated by South Coast.<sup>9</sup> The court reasoned that the Fleet Rules were not “standards” as specified in § 209(a) because the rules “regulate only the purchase of vehicles that are otherwise certified for sale in California.”<sup>10</sup> In its ruling, the court acknowledged the previous holdings of the First and Second Circuit Courts who held that § 209(a) pre-empted state laws mandating “zero-emission vehicles” for a certain percentage of manufacturer’s in-state sales.<sup>11</sup> However, the district court distinguished the earlier rulings by arguing that, “[w]here 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.”<sup>12</sup> The court’s interpretation of the word “standard,” which it held to only include regulations compelling manufacturers “to meet specified emission limits,” caused the court to make the distinction that purchase restrictions are not pre-empted by § 209, whereas sales restrictions would be.<sup>13</sup> As such, the pre-emption provision of § 209(a) does not invalidate the Fleet Rules, which are entirely outside the reach of the pre-emption provision.<sup>14</sup> “The Ninth Circuit affirmed on the [same] reasoning as the district court.”<sup>15</sup>

The Supreme Court granted certiorari and vacated the judgment of the lower courts, remanding the case for further proceedings.<sup>16</sup> The Supreme Court held that the Fleet Rules set “standards” within the meaning of § 209(a) of the CAA.<sup>17</sup> The Court articulated that while “it appears likely that at least certain aspects of the Fleet Rules are pre-empted . . . [i]t does not necessarily follow, however, that the Fleet Rules are pre-empted *in toto*.”<sup>18</sup>

### III. LEGAL BACKGROUND

#### A. Clean Air Legislation

Clean air has been a public concern for centuries, dating back at least to 1306 when King Edward I of England, concerned with the smoke caused through burning sea coal, issued a ban on its use in London.<sup>19</sup> In the

<sup>8</sup> *Id.* at 251. (quoting 42 U.S.C. § 7543(a)(2000)). Section 209(a) of the Clean Air Act (“CAA”) states: “No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.” 42 U.S.C. § 7543(a).

<sup>9</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 251.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* See *Ass’n of Int’l Auto. Mfrs. v. Mass. Dept. of Env’tl. Prot.*, 208 F.3d 1, 6-7 (C.A.1 2000); *Am. Auto. Mfrs. Ass’n v. Cahill*, 152 F.3d 196, 200 (C.A.2 1998).

<sup>12</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 251-52 (citing *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 158 F.Supp.2d 1107, 1118 (C.D.Cal. 2001), vacated by *Engine Mfrs. Ass’n*, 541 U.S. 246).

<sup>13</sup> *Id.* at 252.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 309 F.3d 550 (9th Cir. 2002).

<sup>16</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 259. Justice Scalia wrote the opinion of the Court. *Id.* at 248. Justice Souter filed a dissenting opinion. *Id.* at 259.

<sup>17</sup> See *id.* at 255. See *supra* note 8 (quoting CAA § 209(a), 42 U.S.C. § 7543(a) (2000)).

<sup>18</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 258.

<sup>19</sup> James R. Fleming & Bethany R. Knorr, *History of the Clean Air Act, A Guide to Clean Air Legislation Past and Present*, American Meteorological Society, available at <http://www.ametsoc.org/sloan/cleanair/index.html> (last visited Dec. 28, 2004). See *EPA Air Pollution Control: Origins of Modern Air Pollution Regulations*, EPA, at <http://www.epa.gov/air/oaqps/eog/course422/apc1.html> (last updated Aug. 3, 2004) [hereinafter EPA].

United States, cities such as Chicago and Cincinnati began to enact clean air legislation during the industrial revolution.<sup>20</sup> Following the initiative of many states and local governments in enacting air pollution legislation, Congress identified air pollution as a national problem and passed the Air Pollution Control Act of 1955, becoming the nation's first air pollution law.<sup>21</sup> In 1963, in an effort to address the harmfully increasing levels of air pollution throughout the country, the Air Pollution Control Act<sup>22</sup> was replaced by what is today known as the Clean Air Act ("CAA").<sup>23</sup>

The CAA initially granted only limited powers to the federal government, authorizing the federal government to expand research efforts, allocate grants to state agencies and intervene directly in limited circumstances.<sup>24</sup> In an effort to "improve, strengthen, and accelerate programs for the prevention and abatement of air pollution."<sup>25</sup> "Congress declared that the central purpose of the [CAA] 'is to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.'"<sup>26</sup> Although the primary responsibility was placed on the states and local governments,<sup>27</sup> a moderate shift in focus, according federal authorities certain supervisory and enforcement powers,<sup>28</sup> occurred in 1965<sup>29</sup> and 1967 with the enactment of the Air Quality Act.<sup>30</sup>

In 1967, Congress also amended the CAA to impose federal preemption.<sup>31</sup> The § 209 preemption provision states in part, "[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 . . . [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 a condition precedent to the initial retail sale."<sup>32</sup> However, Congress permitted one exception to this preemption, the state of California.<sup>33</sup>

Through an Executive Order of President Nixon in 1970, the Environmental Protection Agency (EPA) was created, marking a "dramatic change in national policy regarding the control of air pollution."<sup>34</sup> Although federal involvement was previously advisory, the newly formed EPA was to emphasize "stringent enforcement"

<sup>20</sup> Fleming & Knorr, *supra*. During the Industrial Revolution, Chicago and Cincinnati became the first cities to enact clean air policies while other cities and regions slowly followed. *Id.*

<sup>21</sup> See EPA, *supra* note 19.

<sup>22</sup> Pub. L. No. 88-206, 77 Stat. 392 (1963).

<sup>23</sup> 42 U.S.C. §§ 7401-7671q (2000).

<sup>24</sup> See *Train v. Nat'l Res. Def. Council*, 421 U.S. 60, 63-64 (1975) (citing Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963)).

<sup>25</sup> Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963).

<sup>26</sup> Brief for Respondents Nat'l Res. Def. Council at \*6, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (No. 02-1343), available at 2003 WL 22766723 (quoting § 101(b)(1) of the CAA).

<sup>27</sup> *Id.* See CAA § 101(a)(3) ("[T]he prevention and control of air pollution at its source is the primary responsibility of States and local governments.").

<sup>28</sup> See *Train*, 421 U.S. at 64. The states still retained discretion in determining the air quality standards and how long it would take them to meet those standards. *Id.*

<sup>29</sup> "In 1965, the Motor Vehicle Air Pollution Control Act was directed to establish auto emission standards." EPA, *supra* note 19.

<sup>30</sup> Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

<sup>31</sup> Petitioners' Brief at \*4, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22068770 (citing *Motor Vehicles Mfrs. Ass'n v. N. Y. Dep't of Env'tl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994)). "Preemption is 'necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles.'" *Id.* (internal citation omitted).

<sup>32</sup> 42 U.S.C. § 7543(a) (2000).

<sup>33</sup> Petitioners' Brief at \*5, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22068770. California representatives were "opposed to displacing [their] State's right to set more stringent standards" to meet their unique problems; therefore, Congress concluded that "California's unique problems and pioneering efforts justified a waiver of the preemption section to the State." *Id.* (internal citations omitted). The standards set by California were later permitted to be adopted by other states under the CAA Amendments of 1977. *Id.* at \*7-8.

<sup>34</sup> EPA, *supra* note 19.

of laws and was assigned the daunting task of guiding Americans in making a cleaner environment.<sup>35</sup> As the states were slow to implement air pollution measures, Congress also responded by “taking a stick to the States”<sup>36</sup> with the passage of the Clean Air Amendments of 1970.<sup>37</sup> Although recognized as a drastic measure<sup>38</sup> increasing federal authority, the Amendments nonetheless, explicitly preserved the original principle of the CAA, that “each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . .”<sup>39</sup>

Congress again revisited the CAA in 1990, adding a provision authorizing other States to receive a preemption waiver and adopt California standards.<sup>40</sup> In addition, Congress required states failing to adhere with national air pollution standards, “to force operators of fleets of cars and trucks to purchase a specified percentage of vehicles that ‘would be substantially cleaner than conventional vehicles.’”<sup>41</sup> The Amendments provided that a State, failing to attain specified air quality levels, must submit to the EPA a revised implementation plan requiring operators of specified fleets of ten or more to purchase a designated percentage of “clean-air vehicles.”<sup>42</sup>

### B. Federalism and the Preemption Doctrine

The Rehnquist Court’s notion of “dual federalism,” in which state and federal governments operate distinctly and separately, has been a central issue in recent years, particularly considering that for decades Congress has relied on a cooperative approach between state and the federal government.<sup>43</sup> Under “cooperative federalism,” common under environmental legislation, the responsibility of federal law implementation is delegated to the states.<sup>44</sup> The CAA, a “bold experiment in cooperative federalism,”<sup>45</sup> has traditionally maintained a balance between the authority of the federal government in creating national standards, while retaining discretion in the states to implement the federal plan.<sup>46</sup>

A key benefit of cooperative federalism is the ability of states to act as “laboratories for the nation,” serving as models for other states and the nation as a whole.<sup>47</sup> As Justice Brandeis so eloquently articulated, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”<sup>48</sup>

<sup>35</sup> *Id.*

<sup>36</sup> *Train v. Nat’l Res. Def. Council*, 421 U.S. 60, 64 (1975).

<sup>37</sup> *Id.* See Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (1970). The states were now required to attain air quality standards within a specified period. *Train*, 421 U.S. at 64-65.

<sup>38</sup> *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

<sup>39</sup> *Train*, 421 U.S. at 64, (quoting CAA § 107(a), 42 U.S.C. § 1857c-2(a) (1970) (current version at 42 U.S.C. § 7407 (2000))).

<sup>40</sup> CAA § 209(b), 42 U.S.C. § 7543.

<sup>41</sup> Petitioners’ Brief at \*9, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (No. 02-1343), available at 2003 WL 22068770 (internal citation omitted).

<sup>42</sup> *Id.* (quoting 42 U.S.C. § 7586).

<sup>43</sup> Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 27 ENVIRONS ENVTL. LAW & POL’Y J. 281, 311-12 (Fall 2003). See e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 815 (1998).

<sup>44</sup> *Id.* at 312.

<sup>45</sup> *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982).

<sup>46</sup> *Id.*

<sup>47</sup> Brief of Amicus Curiae of the State of California in Support of S. Coast Air Quality Mgmt. Dist. at \*13-14, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (No. 02-1343), available at 2003 WL 22766721 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) [hereinafter California Brief].

<sup>48</sup> *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

The CAA has always placed the primary responsibility squarely on the states.<sup>49</sup> “The cooperative federalism embodied in the CAA” allows states wide latitude to meet the national ambient air quality standards and imposes heavy penalties if they fail.<sup>50</sup> While an expressed preemption provision under a federal statute would prohibit states from regulating a specified field, the Court has expressed that its task is to “identify the domain expressly preempted by that language.”<sup>51</sup> The Court has further articulated that the Congressional intent “is the touchstone of all preemption analysis.”<sup>52</sup> In all preemption cases, and particularly in those where “Congress has legislated . . . in a field which the States have traditionally occupied[. . .] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>53</sup> As the Court in *Huron Portland Cement Co.*<sup>54</sup> emphasized, “[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”<sup>55</sup> As such, pollution rules designed in the interest of public health are not to be presumed preempted unless Congress has clearly stated.<sup>56</sup> Nonetheless, the Bush Administration and the Rehnquist Court have used the preemption doctrine to consolidate federal power and undermine the benefits of cooperative federalism.<sup>57</sup>

Through its analysis of the statute, the Court must “look to the provisions of the whole law, and to its object and policy.”<sup>58</sup> Congress’ intent to give discretion to the states and local governments in fighting air pollution is echoed throughout the CAA.<sup>59</sup> Traditionally, regulating vehicle emissions was an area of control held by the state.<sup>60</sup> State regulations existed well before federal legislation, particularly in California who has regulated motor vehicle emissions since their inception.<sup>61</sup> Therefore, rather than being an area dominated by the federal government, emissions regulations began at state and local levels until 1967 when Congress enacted federal preemption.<sup>62</sup>

The legislative history of the provision demonstrates that Congress intended to prevent states from imposing requirements on manufacturers.<sup>63</sup> The auto industry sought to obtain a clear emissions standard which was consistent throughout the nation in order “to prevent a chaotic situation from developing in interstate commerce in new motor vehicles.”<sup>64</sup> In essence, the auto industry feared having to meet fifty different

<sup>49</sup> See *infra* notes 72, 79 and accompanying text.

<sup>50</sup> California Brief at \*2, *Engine Mfrs. Ass’n* (No. 02-1343).

<sup>51</sup> *Id.* at \*6 (citing *Medtronic v. Lohr*, 518 U.S. 470, 484 (1995) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 517 (1992)).

<sup>52</sup> *Id.* (citing *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

<sup>53</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), cited in California Brief at \*6, *Engine Mfrs. Ass’n* (No. 02-1343).

<sup>54</sup> *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

<sup>55</sup> *Id.* at 442, quoted in *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 262 (2004) (Souter, J., dissenting).

<sup>56</sup> Brief of Amicus Curiae of the State of California in Support of S. Coast Air Quality Mgmt. Dist. at \*7, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766721 (citing *Hillsborough County v. Automated Med. Labs.* 471 U.S. 707, 715-18 (1985)).

<sup>57</sup> Carlson, *supra* note 43, at 283. Over the last decade, 22 of the 35 preemption cases, including all 7 preemption cases in 1999, were held in favor of federal preemption, despite the Supreme Court’s pro-federalism reputation. *Id.* n.10 (citing Richard Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462-63 (2002)).

<sup>58</sup> *Pilot Life Ins. v. Dedeau*, 481 U.S. 41, 51 (1987).

<sup>59</sup> See 42 U.S.C. § 7407(a)(2000) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State.”).

<sup>60</sup> California Brief at \*9, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766721. In 1960, California set emissions standards by adopting the Motor Vehicle Control Act. *Id.* Vehicle emissions were regulated in seven states and the District of Columbia prior to federal regulations. *Id.*

<sup>61</sup> See *infra* note 72-73 and accompanying text.

<sup>62</sup> California Brief at \*9, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766721. CAA § 209(a) preempts the setting of standards imposing production mandates on manufacturers. 42 U.S.C. 7543(a).

<sup>63</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 261 (Souter, J., dissenting).

<sup>64</sup> *Id.* (Souter, J., dissenting) (quoting H.R. REP. NO. 728 (1967) (internal quotations omitted)). See *id.* (quoting S. REP. NO. 403 (1967) (“The auto industry was adamant that [. . .] a single national standard [was essential] to eliminate undue economic strain on the industry.”)).

standards, one for each state. This would create a situation where “states would bar manufacturers from selling engines that failed to meet [their individual state’s] specifications,” even if they met the specifications of other states.<sup>65</sup> Although this preemption was adopted, Congress allowed only California to adopt its own standards, essentially creating two standards.<sup>66</sup>

### C. Uniqueness of California

“[T]he Los Angeles South Coast Air Basin is the only region in the country [. . .] designated [by the EPA as] an ozone “‘extreme’ nonattainment” area”<sup>67</sup> and classified as a “serious” nonattainment area for particulate matter.<sup>68</sup> California drivers lead the country in miles driven.<sup>69</sup> Air contaminants emitted from diesel fuels contribute approximately 70% of the cancer risk posed by air pollution.<sup>70</sup> “Air pollution is an especially serious public health hazard in the Los Angeles area, and motor vehicle emissions constitute the largest single source of air pollution both nationally and in Los Angeles.”<sup>71</sup>

When Congress amended the CAA in 1967, adding the federal preemption provision, it carved out one exception by recognizing the unique situation in California.<sup>72</sup> Section 209 allows the EPA to grant a waiver for California, permitting the State to adopt and enforce its own new motor vehicle standards.<sup>73</sup> By allowing for the California exemption, the CAA “bolstered California’s longstanding leadership in regulating mobile source emissions.”<sup>74</sup> California, unique in the development of auto emissions regulation, expertise and sophistication, “has long led the country in developing technology-forcing regulations to reduce air pollution (witness the development of the catalytic converter and the hybrid engine).”<sup>75</sup>

California’s creative influence and innovation is further displayed in the states which have followed California’s example. States and urban areas facing similar air pollution problems as a result of vehicle use also demand solutions beyond the EPA’s standards.<sup>76</sup> As an example, New Yorkers drove over 100 billion miles last year.<sup>77</sup> As a result, New York adopted California’s standards in order to meet their air pollution problems.<sup>78</sup>

<sup>65</sup> *Engine Mfrs. Ass’n*, 541 U.S. 261 (Souter, J., dissenting).

<sup>66</sup> 42 U.S.C. § 7543(b) (§ 209(b)). See 42 U.S.C. § 7507 (§177) (reiterating that states may not require manufacturers to create a motor vehicle engine different than the California standards).

<sup>67</sup> *Engine Mfrs. Ass’n*, 541 U.S. 259 n. 1 (Souter, J., dissenting) (citing 40 C.F.R. 81.305 (2004)).

<sup>68</sup> 61 Fed. Reg. 10,920, 10,955 (Mar. 18, 1996) (to be codified at 40 C.F.R. pt. 52); 58 Fed. Reg. 3334, 3337-38 (Jan. 8, 1993) (to be codified at 40 C.F.R. at 81). Under the 1990 Amendments to the CAA, EPA classifies regions as “marginal, moderate, serious, severe, or extreme nonattainment according to the severity of their ambient levels of individual pollutants.” 42 U.S.C. §§ 7502(a), 7511-14, cited in Brief for Respondents Nat’l Res. Def. Council at \*4, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766723.

<sup>69</sup> Carlson, *supra* note 43, at 291 (internal citations omitted).

<sup>70</sup> Brief of Amicus Curiae of the State of California in Support of S. Coast Air Quality Mgmt. Dist. at n.3, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766721.

<sup>71</sup> Brief of Amici Curiae American Academy of Pediatrics (Cal. Dist.), et al. in Support of Respondents at \*1, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766720.

<sup>72</sup> 42 U.S.C. § 7543(b).

<sup>73</sup> *Id.*

<sup>74</sup> Carlson, *supra* note 43, at 311.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *About the New York State Department of Transportation*, NY Dep’t of Transp., available at <http://www.dot.state.ny.us/reg/r2/juddroad/info/info.html> (last updated Sept. 23, 2004).

<sup>78</sup> Press Release, Governor Announces Cooperation on Clean Air Initiative (Jul. 24, 2003), available at [http://www.state.ny.us/governor/press/year03/july24\\_03.htm](http://www.state.ny.us/governor/press/year03/july24_03.htm).

Since the CAA does not limit qualifying states from adopting California's programs, other states such as Maine, Massachusetts, and Vermont have followed suit.<sup>79</sup>

#### IV. INSTANT DECISION

##### A. *The Majority*

In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, an 8-1 majority held that the Fleet Rules, in their entirety, do not escape the pre-emption provision of § 209(a) of the CAA simply because they address the purchase of vehicles rather than their manufacture or sale.<sup>80</sup> Such a distinction, the Court reasoned, is illogical as a manufacturer's right to sell federally approved vehicles is meaningless without a purchaser's right to buy them.<sup>81</sup> The majority began its discussion by analyzing the text of § 209(a) and the structure of the CAA.<sup>82</sup> The Court concluded that the interpretation of "standard" adopted by the lower courts, neither the manufacturer-specific interpretation nor the distinction between purchase and sales restrictions, was not textually supported.<sup>83</sup>

As the Court had previously stated, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."<sup>84</sup> As such, the Court used a dictionary to define "standard" as that which is "established by authority, custom, or general consent, as a model or example; criterion; test."<sup>85</sup> The Court distinguished the lower courts', and Respondents', interpretation of standard, which was limited to manufacturers as a production mandate,<sup>86</sup> by stating that they were confusing the difference between standards and enforcing standards.<sup>87</sup> The Court concluded that manufacturers *or purchasers* can be held responsible for ensuring compliance with emission standards.<sup>88</sup> While standards refer to vehicles or engines, it is the methods of enforcing standards that can be directed to manufacturers or purchasers and are proscribed by § 209.<sup>89</sup> Therefore, the Fleet Rules, which attempt to require "certain purchasers to buy only vehicles with particular emission characteristics, are an attempt to enforce a standard," were contrary to § 209.<sup>90</sup>

Furthermore, the Court reasoned that § 246 of the CAA requires states to adopt federally approved "restrictions on the purchase of fleet vehicles *to meet clean-air standards*."<sup>91</sup> These purchase requirements must comply with federal standards and may not be more, or less, stringent.<sup>92</sup> Thus, Justice Scalia stated that it is evident that "Congress contemplated the enforcement of emission standards through purchase

<sup>79</sup> *Id.*

<sup>80</sup> *Engine Mfrs. Ass'n*, 541 U.S. 246, 247 (2004). Justice Scalia authored the opinion, *id.* at 248, in which Justice Souter dissented, *id.* at 259.

<sup>81</sup> *Id.* at 255.

<sup>82</sup> *Id.* at 251-52.

<sup>83</sup> *Id.* at 253.

<sup>84</sup> *Id.* at 252 (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

<sup>85</sup> *Id.* at 253 (quoting WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2455 (1945)).

<sup>86</sup> *Id.* "[A] production mandate[e] that require[s] *manufacturers* to ensure that the vehicles they produce have particular emissions characteristics, whether individually or in the aggregate." *Id.* (quoting Brief of S. Coast Air Quality Mgmt. at \*13, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22766722) (emphasis in original).

<sup>87</sup> *Engine Mfrs. Ass'n*, 541 U.S. at 253.

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 255.

<sup>91</sup> *Id.* at 254 (emphasis in original). See 42 U.S.C. §§ 7581-7590 (2000).

<sup>92</sup> *Id.*



requirements.”<sup>93</sup> If not, there would be little use in imposing such a limitation if states are free to implement their own purchase standards with entirely different specifications.<sup>94</sup>

Following the Court’s textual analysis, the majority declined to read into § 209, or the structure of the CAA, a distinction between purchasing and sales.<sup>95</sup> The Court emphasized that it is not logical to treat sales and purchase restrictions differently for the purpose of making one prohibited under the CAA while the other escapes preemption.<sup>96</sup> “The manufacturer’s right to sell federally approved vehicles is meaningless in the absence of a purchaser’s right to buy them.”<sup>97</sup> Although the Fleet Rules at issue may only cover certain purchasers, the Court feared that another state may enact similar rules.<sup>98</sup> When this occurs, the “end result would undo Congress’s carefully calibrated regulatory scheme.”<sup>99</sup> However, the Court refrained from preempting the Fleet Rules completely, stating only that while “it appears likely that at least certain aspects of the Fleet Rules are pre-empted[,] . . . [i]t does not necessarily follow, however, that the Fleet Rules are pre-empted *in toto*.”<sup>100</sup>

### B. Justice Souter’s Dissent

In dissenting, Justice Souter argued that the Fleet Rules are not pre-empted by CAA § 209, and that the Court’s holding prohibits one of the most polluted regions in the country from requiring fleet operators to buy clean engines that are “commercially available.”<sup>101</sup> While Justice Souter concedes that the majority’s opinion, as does his own, have both strengths and weaknesses, a reading which more closely interprets § 209(a) in terms of legislative intent and the presumption against preemption is the more proper approach.<sup>102</sup> Justice Souter criticizes the majority for not addressing two principles, which he argues render a more accurate interpretative reading of § 209(a) and can easily be read to give effect to both the police powers of the states and the legislative history of the CAA.<sup>103</sup> First, Justice Souter pointed out that there is a presumption that the police powers of the states are not to be superseded by a federal act unless it is the clear purpose of Congress.<sup>104</sup> This presumption is pertinent, and clearly applicable from the language of the CAA, which states that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of state and local governments.”<sup>105</sup>

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* at 254-55.

<sup>95</sup> *Id.* at 255.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 258 (emphasis in original).

<sup>101</sup> *Id.* at 259 (Souter, J., dissenting). “The Los Angeles South Coast Air Basin is the only region . . . that has been designated an ozone ‘extreme nonattainment’ area . . . .” *Id.* at n.1 (Souter, J., dissenting) (quoting Brief for the United States as Amicus Curiae Supporting Reversal at \*7, *Engine Mfrs. Ass’n*, 541 U.S. 246 (No. 02-1343), available at 2004 WL 22068761 (citing 40 CFR 81.305 (2004))).

<sup>102</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 266 (Souter, J., dissenting).

<sup>103</sup> *Id.* at 259-60 (Souter, J., dissenting).

<sup>104</sup> *Id.* at 260 (Souter, J., dissenting) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

<sup>105</sup> *Id.* (Souter, J., dissenting) (citing 42 U.S.C. § 7401(a)(3) (2000)). *See* *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”), quoted in *Engine Mfrs. Ass’n*, 541 U.S. at 260 (Souter, J., dissenting).

Second, Justice Souter argued that the legislative history of § 209(a) shows that the intent of Congress was to stop states from limiting what manufacturers could sell through imposing regulatory requirements.<sup>106</sup> Congress was addressing the automobile industry's concerns that a clear and consistent national standard concerning emission controls was important to prevent "a chaotic situation from developing in interstate commerce in new motor vehicles."<sup>107</sup> and calming the concerns of the industry that states "would bar manufacturers from selling engines that failed to meet specifications that might be different in each State."<sup>108</sup> Analyzing the 1967 Amendments, Justice Souter emphasized that the CAA should be understood to regulate vehicles prior to sale (what manufacturers can produce) leaving vehicle purchasers entirely unregulated.<sup>109</sup> As such, the standards that § 209(a) preempts are production mandates imposed on manufacturers and not regulations governing a buyer's choice. Thus § 209(a) has no preemptive application to the fleet purchase requirements at issue.<sup>110</sup>

In addition, Justice Souter points out that the Fleet Rules only require operators to purchase cleaner engines if cleaner engines are commercially available; thus, if no one is selling cleaner engines, operators of fleets are free to purchase any vehicle they desire.<sup>111</sup> Subsequently, manufacturers would understand that a market exists for cleaner engines and in a market of free competition, "if one auto maker began producing them, others might well be induced to do the same."<sup>112</sup>

Finally, the dissent promotes a more practical reading of "standards" better aligned with the Congressional intent, to prevent states from forcing manufacturers to produce particular engines as a condition precedent to their sale.<sup>113</sup> The majority's broad interpretation, as Justice Souter reiterates, is inconsistent with the structure of the CAA, specifically § 246 which requires states to establish fleet purchase requirements in areas especially struggling with intractable pollution.<sup>114</sup> The Fleet Rules at issue, he argues, established precisely the type of purchase requirements § 246 requires and the majority claims are preempted by § 209(a).<sup>115</sup>

## V. COMMENT

The Court's interpretation of "standard" is contrary to, and ignores the definition in the CAA. Instead of rendering an overly broad definition through the use of a dictionary, the Court should have used the best guidance it had concerning the meaning Congress intended, namely the CAA itself. As the Court previously articulated in *Desert Palace, Inc. v. Costa*, the close proximity of provisions in a statute "presents a classic case for application of the normal rule of statutory construction, that identical words used in different parts of the same act are intended to have the same meaning."<sup>116</sup> Section 209(a) was adopted at the same time § 202 was

<sup>106</sup> *Id.* at 262 (Souter, J., dissenting). In the hearings preceding the passage of the amendments, "the auto industry was adamant that . . . [there be] a single national standard in order to eliminate economic strain on the auto industry." *Id.* (Souter, J., dissenting) (internal citations omitted).

<sup>107</sup> *Id.* (Souter, J., dissenting) (internal citation omitted).

<sup>108</sup> *Id.* (Souter, J., dissenting). Congress allowed California to adopt its own standards, but only California. *Id.* n.3 (Souter, J., dissenting). See 42 U.S.C. § 7543(b)).

<sup>109</sup> *Engine Mfrs. Ass'n*, 541 U.S. at 262 (Souter, J., dissenting). See 42 U.S.C. § 7521 regarding vehicles prior to sale and eligible to be sold, and 42 U.S.C. § 7422 for prohibited acts by manufacturers.

<sup>110</sup> *Id.* (Souter, J., dissenting).

<sup>111</sup> *Id.* at 263 (Souter, J., dissenting).

<sup>112</sup> *Id.* (Souter, J., dissenting).

<sup>113</sup> *Id.* (Souter, J., dissenting).

<sup>114</sup> *Id.* at 263-64 (Souter, J., dissenting). Section 246 requires states to establish fleet purchasing requirements for "covered fleet operator[s]" in ozone and carbon monoxide "nonattainment areas." 42 U.S.C. § 7586.

<sup>115</sup> *Engine Mfrs. Ass'n*, 541 U.S. at 265 (Souter, J., dissenting).

<sup>116</sup> 123 S.Ct. 2148, 2155 (2002) (quoting *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)).

reenacted as part of the National Emission Standards Act.<sup>117</sup> Section 202 authorizes and directs the EPA to adopt standards for national vehicle emissions and further makes clear that the established standards are numeric limits on pollutants that may be emitted from the tailpipe of a new vehicle.<sup>118</sup>

The EPA, the administrative agency granted the power to adopt national vehicle emissions standards, has consistently applied this definition. In one instance, the EPA's position was that the term "standards" as used in CAA § 209, "connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle."<sup>119</sup> However, the EPA's interpretation is absent from the Court's opinion. The Court did not give deference to the EPA's interpretation of the statute, even considering it is the responsibility of the EPA to grant South Coast a § 209(b) waiver prior to them implementing the Fleet Rules. One possible reason for this is that the Bush administration was siding with the oil companies and diesel engine manufacturers.<sup>120</sup> Absent from the Bush Administration's brief is any reference to the EPA. Obviously, such a reference would contradict the assertion that the Fleet Rules were standards. Such an omission on the other hand, emphasizes that the intent of "standards" was in fact one of quantitative limits. Furthermore, the Court articulates the fear that by allowing South Coast to act as a leader and adopt a policy apart from the rest of the country may cause other states may follow. Although this fear may be contrary to the Rehnquist Court's recent view of federalism, such a prognosis should not be viewed as a fear at all. Rather it is the essence of what the CAA hoped to instill, an effort by states "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."<sup>121</sup>

The Fleet Rules should not be considered "standards" because they do not require manufacturers to produce cleaner engines. Rather, the Fleet Rules should be construed as requirements on fleet owners to purchase the cleanest vehicles available.<sup>122</sup> As Justice Souter points out, the Fleet Rules only require the purchase of cleaner engines if they are "commercially available."<sup>123</sup> The Fleet Rules do not force fleet owners to purchase cleaner engines if no one is selling them, nor do they establish a numeric production mandate on manufacturers. If manufacturers wish to continue to produce the same engines, there is no imposition on them to change. What the Fleet Rules provide, however, is a ready market for cleaner vehicles. Manufacturers would certainly see an existing market for cleaner engines and once one manufacturer begins to produce them, market demand would give a continuous incentive for other manufacturers to follow.<sup>124</sup>

The CAA encourages states to create "economic incentives and requirements to reduce vehicle emissions."<sup>125</sup> As encouraged, the Fleet Rules provide a pool of customers in the market for cleaner engines, thus creating inducements for manufacturers to produce them. Consistent with the innovation and creativity

<sup>117</sup> Brief for Respondents Nat'l Def. Res. Council at \*18, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22766723.

<sup>118</sup> See CAA § 202(g)(1) for light-duty truck emissions standards expressed in grams per mile, CAA § 202(b)(1)(A) for light-duty vehicles emissions standards expressed in grams per mile, and CAA § 202(a)(3)(B) for heavy-duty vehicles emissions standards expressed in grams per break horsepower. 42 U.S.C. § 7521 (2000).

<sup>119</sup> *Motor & Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1111 (D.C. Cir. 1979). See e.g., 36 Fed. Reg. 17,458 (Aug. 31, 1971), 42 Fed. Reg. 3,192, 3,193 (Jan. 17, 1977), and 43 Fed. Reg. 9,344, 9,346 (Mar. 7, 1978) (setting out difference between standards as numerical values and enforcement procedures), cited in Brief of Amicus Curiae of the State of California in Support of South Coast Air Quality Management District at \*22, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22766721.

<sup>120</sup> See Brief for the United States as Amicus Curiae Supporting Reversal at \*2, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2004 WL 22068761.

<sup>121</sup> Brief for Respondents Nat'l Res. Def. Council at \*6, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22766723 (quoting § 101(b)(1) of the CAA).

<sup>122</sup> See Respondents NDRC's Brief at \*19-20, *Engine Mfrs. Ass'n* (No. 02-1343); see also *Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1093 (D.C. Cir. 1996) (recognizing that Congress distinguished between standards and requirements in the Act).

<sup>123</sup> *Engine Mfrs. Ass'n*, 541 U.S. at 263 (Souter, J., dissenting) (citing Fleet Rule 1196(e)(1)(C)).

<sup>124</sup> See *id.* (Souter, J., dissenting); see also Respondents NDRC Brief at \*19-20, *Engine Mfrs. Ass'n* (No. 02-1343), available at 2003 WL 22068770.

<sup>125</sup> See 42 U.S.C. §§ 7408(f), 7511a(g)(4)(A).

California has exhibited in the past, the Fleet Rules use economic incentive measures to address a critical environmental concern. An incentive encouraging production of cleaner vehicles through market demand, rather than by mandate, could encourage further innovation and environmental protection.<sup>126</sup> While such innovation is critical in California, which resists conventional air quality solutions due to land use being built around the automobile, it can also “increase national capacity to address intractable environmental problems.”<sup>127</sup>

As discussed, the Court created bad public policy in preventing the encouragement and economic incentive for manufacturers to freely produce cleaner engines in response to the market demand created by the Fleet Rules. In addition, by rendering the term “standards” ambiguous, the Court should have referred to the previous provisions of the statute and given deference to the EPA rather than using a dictionary to render an overly broad definition. However, aside from all this, the Court also left important questions unresolved and gave little guidance in how to resolve which rules are preempted under the CAA.

The Court did not conclude that the Fleet Rules were preempted in their entirety. In contrast, the Court held that some of the rules may be characterized as internal state purchase decisions and remanded the issue for the lower courts to decide. Rather than discussing the qualifications of internal state purchase decisions, Justice Scalia stated, “it appears likely that at least certain aspects of the Fleet Rules are pre-empted.”<sup>128</sup> While it appears that the holding prohibits rules requiring private fleet owners to purchase clean-fueled vehicles, the Court left open the possibility that the Fleet Rules may be valid as applied to public fleets. Furthermore, it left open whether or not preemption applies to lease arrangements which may be beyond the purchase of new vehicles. This view is consistent with South Coast’s response after the decision in which a spokesman stated that although disappointed by the decision, it would continue to implement the rules.<sup>129</sup>

## VI. CONCLUSION

Although the Court rendered a broad interpretation of “standard” and concluded that certain aspects of the Fleet Rules are preempted by the CAA, it left the door open to the district court by not holding the rules to be preempted completely. As such, the district court, on remand, should construe the Court’s holding narrowly. The district court should allow the Fleet Rules to be applied to public fleets, interpreting the rules as internal state purchase decisions. Allowing South Coast and the state of California to address air pollution prevention in such a unique and innovative way, creates market demand for the manufacture of cleaner engines, sets a positive environmental precedent for the rest of the Country, and places the primary responsibility in the hands of state and local government as the CAA intended.

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<sup>126</sup> See Brief of Amicus Curiae of the State of California in Support of S. Coast Air Quality Mgmt. Dist. at \*22-24, *Engine Mfrs. Ass’n* (No. 02-1343), available at 2003 WL 22766721 (internal citations omitted).

<sup>127</sup> *Id.* at \*24.

<sup>128</sup> *Engine Mfrs. Ass’n*, 541 U.S. at 258.

<sup>129</sup> See Osenga, *supra* note 2. In response to the Court’s decision, Barry Wallerstein, Executive Officer of South Coast said, “We are determined to continue to implement the rules for publicly owned fleets. We will also consider asking the state and the U.S. Environmental Protection Agency to allow us to continue to regulate privately owned fleets.” *Id.*