

07-4342(L), et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE-JEEP, et al.,
Plaintiffs-Appellants,

v.

GEORGE CROMBIE,
Secretary of Vermont Agency of Natural Resources, et al.,
Defendants-Appellees.

On Appeal From the United States District Court
For The District Of Vermont

**PROOF BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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INTRODUCTION AND SUMMARY

This suit concerns the potential preemptive effect of two federal statutes on regulations proposed by the States of California and Vermont that would, if made effective, regulate greenhouse gas (GHG) emissions from motor vehicles. The proper interpretation of these statutory provisions is of crucial importance to the United States. This case does not, however, present an immediately ripe controversy and, in the view of the United States, the judgment below should be vacated, and the case should be remanded with instructions to dismiss.

The Clean Air Act expressly preempts state standards regulating emissions from new motor vehicles, including greenhouse gas emissions, but authorizes California to seek a waiver of that provision from the Environmental Protection

Agency (EPA). If the EPA grants a waiver to California, other states may adopt their own version of the California regulations, if certain criteria are met, without running afoul of the Clean Air Act. At the time this suit was filed, California had applied for a Clean Air Act preemption waiver, and Vermont had adopted similar regulations contingent upon EPA approval of the California waiver. Subsequent to the district court decision in this case, however, the EPA denied California's request. See 73 Fed. Reg. 12156 (Mar. 6, 2008). It is thus not controverted that Vermont, at the present time, lacks authority to implement its proposed regulations.

This suit, filed prior to the EPA waiver denial, sought a declaration that the Vermont regulations would be preempted by the Energy Policy and Conservation Act (EPCA), even if the EPA granted California's request for a Clean Air Act waiver. EPCA vests exclusive authority in the Department of Transportation to regulate motor vehicle fuel economy and provides that "a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards." 49 U.S.C. § 32919(a). Plaintiffs urged that the proposed Vermont regulations were tantamount to a regulation of fuel economy and were thus preempted by EPCA.

Plaintiffs ask this Court to review the district court's decision granting judgment to the State. As noted below, the court's analysis is flawed in important respects. More fundamentally, however, this case does not present a live controversy. Unless and until EPA reconsiders its waiver decision, Vermont's regulations are preempted by the Clean Air Act.

At the present juncture, therefore, a ruling on the preemptive scope of EPCA would be little more than an advisory opinion. Without the benefit of federal agency action and an administrative record, a decision on the merits of this case would require the Court to explore asserted hypothetical tensions between two federal statutes – the Clean Air Act and the EPA – both of which currently preempt the Vermont GHG regulations. That hypothetical resolution would have to deal not only with abstract questions of express or implied preemption, but also with speculative concerns about lead times for manufacturers under federal law or state statutes, and with questions about permissible enforcement measures. Moreover, while reconsideration by EPA is conjectural, NHTSA is required to develop new federal fuel economy standards under legislation enacted in December 2007, and the impact of that upcoming agency decision is, of course, not now ascertainable.

The plaintiff automobile manufacturers urge with considerable force that compliance with the Vermont regulations would pose considerable economic and technological challenges for the automobile industry, if those regulations were to become effective in the future. Plaintiffs are concerned that they should not be required to move towards compliance with proposed Vermont regulations that are a nullity as a result of federal law. Indeed, California has apparently threatened to compel compliance within 45 days of any subsequent EPA waiver (assuming that no changes are made to the proposed state GHG regulations or their enforcement schedule). Such concerns would likely be relevant to the permissible scope of any Vermont regulations that might become effective in the event EPA were ever to grant

a waiver under the Clean Air Act. They do not, however, render the present dispute ripe.

STATUTORY AND REGULATORY SCHEMES

1. Clean Air Act

The Clean Air Act authorizes EPA to regulate emissions of air pollutants from new motor vehicles, see 42 U.S.C. § 7521(a). The statute expressly preempts state emission standards regulating such motor vehicle emissions: “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.” 42 U.S.C. § 7543(a).

The Clean Air Act authorizes EPA to grant a waiver of that preemption provision upon application by California (which is the only state that regulated vehicle emissions prior to 1966) if California "determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). In order to grant such a waiver, the EPA Administrator must provide notice and opportunity for a public hearing, and the statute prohibits the granting of a waiver “if the Administrator finds that (A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.” *Ibid.* In turn, 42 U.S.C. § 7521(a)(2) requires that “[a]ny regulation * * * shall take effect after such period as the Administrator finds

necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.” Once a waiver is granted, other states may adopt California’s standards. See 42 U.S.C. § 7507.

2. Energy Policy and Conservation Act

The Energy Policy and Conservation Act (EPCA) directs the Secretary of Transportation (who has delegated the authority to the National Highway Traffic Safety Administration (NHTSA)) to prescribe corporate average fuel economy (CAFE) standards for new motor vehicles. See 49 U.S.C. § 32902. EPCA requires the Secretary to prescribe CAFE standards “[a]t least 18 months before the beginning of each model year,” in order to ensure adequate lead time for manufacturers to design model changes and implement the technology required to achieve the CAFE standards.

The statute directs that “[e]ach standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.” 49 U.S.C. 32902(a). EPCA requires the Secretary to consider the following factors in determining the maximum feasible average fuel economy: “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.” 49 U.S.C. 32902(f). Congress recently amended the relevant provisions of EPCA to require CAFE standards ensuring at least 35 miles per gallon (mpg) for the combined fleet of passenger automobiles and light trucks by Model

Year (MY) 2020, and annual increases toward that goal with each model year beginning in MY 2011. See 49 U.S.C. § 32902(b)(2).

EPCA also preempts state regulation of motor vehicle fuel economy standards:

“When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.” 49 U.S.C. § 32919(a).

EPCA does not provide for waiver of its preemption provision.

Pursuant to EPCA, NHTSA has promulgated CAFE standards for passenger automobiles and light trucks. The current standards are set forth in Title 49 of the Code of Federal Regulations, in Parts 531 (passenger automobiles) and 533 (light trucks). The current CAFE standards for light trucks include newly developed, attribute-based calculations of the fuel economy target levels for each vehicle model, based on the vehicle’s size, which affects the ability of a manufacturer to improve fuel economy. See 71 Fed. Reg. 17566 (Apr. 6, 2006). In that 2006 administrative decision, NHTSA considered comments and undertook a formal analysis of the preemptive effect of federal law (including EPCA’s express preemption clause, as well as the effect of CAFE regulations) on state laws regulating GHG emissions. See 71 Fed. Reg. at 17654-17670. In that analysis, NHTSA explained that GHG regulations are “related to fuel economy standards,” 49 U.S.C. § 32919(a), and are thus preempted expressly by statute. NHTSA also explained that state regulation of carbon dioxide emissions “would frustrate the objectives of Congress in establishing

the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA.” 71 Fed. Reg. at 17667.

Congress recently directed NHTSA to develop CAFE standards for passenger automobiles using attribute-based standards as well. See 49 U.S.C. § 32902(b)(3)(A). A notice of proposed rulemaking is expected soon, as the agency undertakes to promulgate regulations setting new CAFE standards for passenger automobiles and light trucks for MY 2011-2015.

3. California and Vermont Greenhouse Gas Regulations

In 2004, the California Air Research Board (CARB) purported to adopt regulations limiting motor vehicle emissions of greenhouse gases (principally carbon dioxide). The state regulations purported to take effect in 2006 and to apply to vehicles beginning with those sold in California in MY 2009 (which begins later this year). See Op. 89-90. Vermont has adopted identical regulations.¹

CARB requested that EPA issue a waiver of Clean Air Act preemption, and that request was pending while this case was litigated below. While the case has been on appeal, however, EPA has denied the waiver, concluding that the CARB regulations “are not needed to meet compelling and extraordinary conditions.” 73 Fed. Reg. 12156 (Mar. 6, 2008).²

¹ We refer to the California and Vermont regulations as proposed regulations because they were putatively adopted by the states, subject to the contingency of obtaining a waiver from EPA, which has since been denied, and those regulations are currently ineffective and unenforceable.

² To date, no petition has been filed challenging EPA’s March 6, 2008 decision denying California’s waiver request. Two petitions have been filed challenging an

ARGUMENT

I. THIS DISPUTE IS NOT JUSTICIABLE.

A. Article III of the Constitution limits the jurisdiction of the federal courts to live cases or controversies, and prohibits advisory opinions. See, e.g., Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) (Constitution prohibits courts from issuing “an opinion advising what the law would be upon a hypothetical state of facts”). The doctrines of ripeness, mootness, and standing all derive from the constitutional “case or controversy” requirement. See, e.g., DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006). And those doctrines all require a legally cognizable injury. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (Constitution’s “irreducible minimum” for standing requires that a plaintiff or petitioner “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision”) (citation and internal quotation marks omitted); Abbott Laboratories v. Gardner, 387 U.S. 136,

EPA letter dated December 19, 2007, in which EPA indicated its intention to deny California’s waiver request, and also indicated that the decision would be embodied in a later decision document. See State of California v. EPA, No. 08-70011 (9th Cir.); State of California v. EPA, No. 08-1063 (D.C. Cir.). EPA has moved to dismiss those petitions on the ground that the December 19 letter is not reviewable final agency action. See 42 U.S.C. 7607(b). The Ninth Circuit has denied EPA’s motion to dismiss, without prejudice to raising the jurisdictional issues in the briefs. California has also indicated it will separately challenge EPA’s decision as published in the Federal Register; such a petition is due May 5, 2008.

152 (1967) (ripeness requires that the claimed legal injury be “direct and immediate” rather than speculative).

The “basic rationale” for the ripeness doctrine “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.” Abbott, 387 U.S. at 148-149. The Supreme Court has reiterated that “[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). Likewise, standing requires plaintiffs to show that they have “suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167,180-181 (2000).

B. Under these principles, the present dispute is not justiciable. Vermont has always recognized that the authority to implement its proposed regulations was contingent on a decision by EPA to grant California a waiver from the preemption provisions of the Clean Air Act. EPA has now denied California’s application, removing the contingency on which this suit turned.

Plaintiffs continue to seek a declaration that the proposed Vermont regulations would be preempted by EPCA if a waiver were ultimately granted under the Clean Air Act. That contingency was somewhat speculative even when this suit was filed.

At this point, however, the posited harm is too speculative to render it appropriate for this Court to address the preemption argument at the present time. The question posed by plaintiffs' appeal is whether proposed Vermont regulations that are not now effective would be preempted by EPCA if the EPA's denial of a Clean Air Act waiver were ever ultimately reversed and if the agency, after further proceedings on remand, issued a waiver, either for California's GHG regulations as currently proposed or as they could subsequently be revised, including with respect to any effective date and enforcement time frame. Simply to frame the question strongly suggests the absence of a justiciable controversy.

Plaintiffs urge, with considerable force, that automobile manufacturers need several years to incorporate significant fuel-saving technological and design changes to upcoming vehicle models. Thus, NHTSA takes account of the redesign cycle (approximately 5 years) for specific vehicle models as part of the agency's efforts to maximize fuel economy increases while minimizing the associated costs.

Plaintiffs could properly present concerns about technological feasibility and lead time in any future EPA waiver proceeding concerning a California GHG regulation. As the district court observed, the "EPA clearly has the authority and flexibility to address lead time concerns in the waiver process." Op. 239. See 42 U.S.C. § 7521(a)(2) ("Any regulation * * * shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance

within such period.”); 42 U.S.C. § 7543(b)(1)(C) (EPA approval of waiver must be “consistent with section 7521(a)”).

Thus, even assuming that EPA’s waiver denial were ultimately reversed and that EPA ultimately granted a waiver, it cannot be assumed that EPA would fail to include assurances of adequate lead time. Nor can it be assumed that California or Vermont would at some uncertain future time seek to enforce regulations based on periods in which their regulations were a nullity, or that such an attempt would be permissible under federal law. Although it is not in the record in this case, we understand that California has reserved the possibility of enforcing compliance with its regulations (including retroactively requiring compliance during the period following EPA’s denial) within 45 days of any waiver grant (assuming that any EPA decision granting a waiver does not alter the lead time). See Pl. Br. 31-32 n.13. A threat by California to abuse power the state does not have, however, should not give rise to a justiciable controversy, especially when EPA, in what must be assumed to be the unlikely event that the agency reverses its decision, will not be able to approve a waiver if it determines that California's regulations do not provide adequate lead time. A determination regarding lead time would take into account any retroactive effect of the regulations, and would protect manufacturers from being penalized for any reliance on EPA’s waiver denial. In any event, if the States were to take such a position, the manufacturers would plainly be free to seek injunctive relief to contest the propriety of such precipitous action.

According to the district court, a case is not unripe “merely because a law has not yet taken effect, where there is no real dispute that it will apply to the party challenging it and where the party must begin now to prepare to comply with the law.” DE#165, at 14 (citing New York v. United States, 505 U.S. 144, 175 (1992)). However, even at the time the court made that observation, the present case could not aptly be analogized to New York, where a validly enacted federal law required present action to ensure compliance with the law’s future effective date. In finding this rationale applicable, the district court assumed that the EPA would grant a waiver of Clean Air Act preemption. See, e.g., Op. 5 (“The Court and the parties have proceeded with this case on the assumption that EPA will grant California’s waiver application.”); id. at 235 (“The parties agreed that, for purposes of this litigation, EPA would be deemed to have granted California’s application for waiver from federal preemption under the CAA * * *.”); DE#165, at 16 n.6 (noting that “California’s waiver applications ‘are almost always approved’”) (quoting Motor Vehicle Mfrs. Ass’n v. New York State Dep’t of Env’tl. Conservation, 17 F.3d 521, 534 (2d Cir. 1994)). This fundamental premise of the district court’s analysis of plaintiffs’ asserted harm – that EPA would grant California’s waiver request – has now been eliminated.³

³ In Lincoln Dodge, Inc. v. Sullivan, 2007 WL 4577377 (D.R.I. Dec. 21, 2007), a district court denied a motion to dismiss a similar case on ripeness grounds, notwithstanding EPA’s announced intention to deny California’s waiver request. The court in that case concluded the dispute was ripe because of the hardship imposed on automobile manufacturers, given the lead time and significant costs of compliance with the regulations. See id. at *5. However, the district court there failed to discuss the chain of events necessary before Rhode Island’s regulations could come into

Moreover, even if plaintiffs' posited harm were sufficient to provide standing, prudential considerations require a court to evaluate not only "the hardship to the parties of withholding court consideration," but also "the fitness of the issues for judicial decision." Texas, 523 U.S. at 300, 301 (quoting Abbott, 387 U.S. at 149); see also, e.g., Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Env'tl. Conservation, 79 F.3d 1298, 1305 (2d Cir. 1996); Simmonds v. INS, 326 F.3d 351, 359 (2d Cir. 2003); Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005).

Where, as here, "resolution of the dispute is likely to prove unnecessary" or if "the court's deliberations might benefit from letting the question arise in some more concrete * * * form," the prudential considerations underlying the ripeness doctrine strongly indicate a case is not fit for review. State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987), quoted in Cronin v. FAA, 73 F.3d 1126, 1131 (D.C. Cir. 1996). As discussed, it is conjectural whether any court will ever be required to resolve the question presented on appeal. Moreover, if that contingency ever did arise, a reviewing court a reviewing court at an appropriate time would have the benefit of the EPA's reasoning as well as the most current views of NHTSA regarding the interrelationship of the two statutes. It would,

effect in light of EPA's announced intention to deny California's waiver request, and failed to consider EPA's ability to address lead time concerns in the waiver process. The Lincoln Dodge court also erroneously assumed that the issue presented would not be changed by future factual development. See id. at *4.

moreover, be addressing proposed state regulations as they might exist years hence rather than regulations that may have long been overtaken by events.

II. THE DISTRICT COURT ERRED ON THE MERITS OF ITS PREEMPTION ANALYSIS.

Because the case is not justiciable, the merits of the district court's ruling are not properly at issue. We note, however, that the court misapplied principles of preemption analysis in several fundamental respects. The district court failed to consider, much less place "some weight" on, the views of the agency with authority to implement the federal fuel economy program. Geier v. American Honda Motor Co., 529 U.S. 861, 883 (2000); see also ibid. ("Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."); Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) ("agency is uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted); see also id. at 506 (Breyer, J., concurring) (agency has "special understanding of * * * whether (or the extent to which) state requirements may interfere with federal objectives"). This failure further demonstrates the error of the district court's willingness to address a largely abstract controversy on a de novo basis.

In 2006, NHTSA published an extensive analysis of EPCA's preemptive effect on the proposed California GHG regulations, and also considered whether the state regulations would conflict with the federal CAFE regulations. NHTSA is currently planning a new rulemaking to promulgate CAFE standards for both passenger vehicles and light trucks from MY 2011 through MY 2015. Because that rulemaking may well again address preemption, it would be that new action by the agency that would be relevant to any future determination of EPCA's preemptive effect on state GHG regulations (if such a determination were to become ripe for judicial resolution). The pendency of such potentially relevant agency action further confirms the need to await a ripe controversy before reaching out to decide the questions urged by the parties in this case.

NHTSA concluded that federal law both expressly and impliedly preempts state laws regulating emissions of carbon dioxide from motor vehicles covered by federal fuel economy standards. See 71 Fed. Reg. 17566, 17654-17670 (Apr. 6, 2006), remanded on other grounds, Center for Biological Diversity v. NHTSA, 508 F.3d 508 (9th Cir. 2007) (pet. for reh'g filed Feb. 6, 2008); see id. at 513 n.1 (noting that the court in that case did not address the issue of preemption). NHTSA determined that a state requirement limiting carbon dioxide emissions from motor vehicles is related to average fuel economy standards under EPCA and thus expressly preempted. In reaching this conclusion, NHTSA followed established precedent on interpreting preemption provisions and on the broad scope of the central phrase "related to" in EPCA's preemption provision, 49 U.S.C. § 32919(a). See, e.g., Morales v. Trans

World Airlines, Inc., 504 U.S. 374, 383-384 (1992). The district court, however, avoided direct application of EPCA’s preemption provision and gave a narrow meaning to the statutory phrase “related to.” See Op. 120-130. NHTSA also concluded that federal law impliedly preempts state regulation of carbon dioxide emissions because of a conflict with NHTSA’s standards.

NHTSA explained that, “as a matter of basic chemistry, the burning of a gallon of gasoline produces about 20 pounds of [carbon dioxide].” 71 Fed. Reg. at 17659. The agency determined that carbon dioxide “emissions are always and directly linked to fuel consumption because [carbon dioxide] is the ultimate end product of burning gasoline.” Ibid.⁴ NHTSA explained that the amount of carbon dioxide emissions is “the controlling independent variable” in the calculation of fuel economy. Id. at 17661. Indeed, for purposes of CAFE standards compliance, automobile manufacturers use a formula developed by EPA, which “calculates fuel economy based on carbonaceous emissions from the vehicle.” 71 Fed. Reg. at 17660; see also Op. 99 & n.49. Thus, “compliance with federal fuel economy standards is based primarily on [carbon dioxide] emission rates of covered vehicles.” Ibid. Conversely, the method of calculating greenhouse gas emissions adopted by California and Vermont is essentially equivalent to fuel economy measurements: “Just as in the case

⁴ Although combustion in a motor vehicle engine is imperfect, and thus also results in the emission of other substances, including carbon monoxide and hydrocarbons, those other emissions have declined in their significance as the Clean Air Act has required manufacturers to reduce such emissions, with the result “that fuel economy has become virtually synonymous with [carbon dioxide] emission rates.” 71 Fed. Reg. at 17659-17660. Unlike other motor vehicle emissions, carbon dioxide cannot be meaningfully reduced other than by reducing fuel usage.

of compliance with federal fuel economy standards, compliance with [California's] regulation is largely a function of tailpipe [carbon dioxide] emissions.” Id. at 17666. NHTSA determined that “the only technologically feasible, practicable way for vehicle manufacturers to reduce [carbon dioxide] emissions is to improve fuel economy.” 71 Fed. Reg. at 17656.

Although the district court recognized the direct relationship between fuel economy and carbon dioxide emissions (see, e.g., Op. 122-124), the court ignored the logical consequence that this relationship results in preemption of state GHG regulations. Instead, to avoid preemption, the court improperly relied on provisions in the Vermont regulations that overall do not vary the relationship between fuel economy and GHG emissions. For example, the court acknowledged that “one way a motor vehicle manufacturer may choose to comply with the GHG regulations is to improve the average fuel economy of its fleet,” but concluded that “the GHG regulations embrace much more than a simple requirement to improve fuel economy, cloaked in the rhetoric of reducing carbon dioxide emissions.” Id. at 122. The court identified other compliance mechanisms, including “credits for air conditioning, * * * alternative fuels, or * * * plug-in hybrid vehicles.” Id. at 126. Thus, in the court’s view, “[c]ompliance with the regulation is not achieved solely by improving a fleet’s fuel economy.” Ibid. The court recognized that those other compliance mechanisms “would not enable a manufacturer to comply with the regulation without [also] improving fuel economy,” but the court sidestepped the fact that manufacturers must improve fuel economy in order to comply with the regulations by observing that “the

fact that manufacturers may have to increase fuel economy to some degree in order to comply does not per se convert an emissions standard to a fuel economy standard.” Id. at 124. The court also emphasized the differing carbon content of various fuels, and the effect of plug-in hybrids or electric vehicles. id. at 124-125.

The court failed to recognize that strategies such as use of “alternative fuels,” and “plug-in hybrid vehicles,” are among the technological means a manufacturer may use to improve the fleet average fuel economy, and EPCA specifically takes account of those approaches. See, e.g., 49 U.S.C. §§ 32901(a)(1),(10) (defining fuel and alternative fuel), 32904(a)(2) (defining electric vehicle and directing Administrator to calculate equivalent petroleum-based fuel economy values), 32905 (establishing incentives and calculating fuel economy for alternative-fuel vehicles). The district court acknowledged that, in formulating the state greenhouse gas emissions standards, California considered the same factors that NHTSA considers in setting CAFE standards, but came to a different conclusion. See Op. 89 (“CARB examined virtually the same factors that NHTSA examines when it sets a CAFE standard: technological feasibility and economic impact, including cost to manufacturers, cost to consumers, and job loss”). Yet the court failed to realize that the overlap in considerations creates the potential to frustrate the purpose of the federal regulatory scheme.

The district court also mistakenly believed that an EPA waiver under the Clean Air Act would effectively immunize the California/Vermont standards from preemption analysis under EPCA. See Op. 104-119. However, an EPA decision

granting a waiver would not transform California or Vermont law into federal law. The Clean Air Act makes clear that waiver of preemption under that statute operates only to relieve "application of this section," the preemption provision of the Clean Air Act. 42 U.S.C. § 7543(b)(1) (emphasis added); see also 42 U.S.C. § 7543(b)(3) ("compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter") (emphasis added). State GHG regulations, even if subject to an EPA waiver, would remain regulations "adopt[ed] or enforc[ed]" by "a State or political subdivision of a State" and therefore would be subject to preemption by EPCA. 49 U.S.C. § 32919(a). Moreover, as NHTSA explained in 2006, the agency would not consider the currently proposed state regulations to be "other motor vehicle standards of the Government" because they are preempted by EPCA, and because of the equivalence of the proposed state GHG regulations and fuel economy standards. See 71 Fed. Reg. at 17669. In any event, EPA has now denied the waiver application, rendering any such theory speculative and improper.

* * * *

For the reasons already discussed, this appeal is not an appropriate avenue to review the ultimate merits of plaintiffs' claims. Because the case has become plainly nonjusticiable while on appeal, thus depriving the plaintiffs of the opportunity to obtain review of the deeply flawed decision below, the appropriate course is to vacate the district court's decision and remand with instructions to dismiss. See, e.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 71 (1997); United States v.

Munsingwear, Inc., 340 U.S. 36, 39 (1950)); Van Wie v. Pataki, 267 F.3d 109, 115 (2d Cir. 2001); Russman v. Board of Educ., 260 F.3d 114, 121-123 (2d Cir. 2001); see also, e.g., Alaska Right to Life PAC v. Feldman, 504 F.3d 840 (9th Cir. 2007) (vacating, and remanding with instructions to dismiss, unripe dispute).⁵

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated, and the case should be remanded with instructions to dismiss the complaint.

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⁵ This case does not involve a defendant's voluntary cessation of allegedly wrongful conduct. Rather, this case "become moot due to circumstances unattributable to any of the parties." U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 23 (1994) (internal quotation marks omitted); see also, e.g., New York Public Interest Research Group v. Whitman, 321 F.3d 316, 327 (2d Cir. 2003).

CERTIFICATE OF SERVICE

I hereby certify that I have, this 16th day of April, 2008, served two copies of the foregoing Proof Brief For The United States As Amicus Curiae by sending them by First Class Mail, postage prepaid, to counsel listed below. The Proof Brief will be filed by Federal Express for delivery the next business day.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that the foregoing Proof Brief For The United States As Amicus Curiae complies with the type-volume limitation of FRAP 32(a)(7)(B). The brief is printed in Times New Roman font in 14 point typeface. As counted by Corel WordPerfect 12, the brief contains 5,136 words.

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