09-2901-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

METROPOLITAN TAXICAB BOARD OF TRADE; MIDTOWN CAR LEASING CORP.; BATH CAB CORP.; RONART LEASING CORP., GEID CAB CORP.; LINDEN MAINTENANCE CORP., and ANN TAXI INC.,

Plaintiffs-Appellees,

vs.

CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY TAXICAB AND LIMOUSINE COMMISSION ("TLC"); MATTHEW W. DAUS, in his official Capacity as Commissioner, Chair, and Chief Executive Officer of the TLC; PETER SCHENKMAN, in his official capacity as Assistant Commissioner for Safety and Emissions of the TLC; and ANDREW SALKIN, in his official capacity as First Deputy Commissioner of the TLC,

Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HON. PAUL A. CROTTY, No. 08-Civ-7837-PAC

AMICI CURIAE BRIEF OF APA WATCH AND AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIOATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amici curiae* APA Watch and American Road & Transportation Builders Association ("ARTBA") make the following disclosures: (1) No publicly held company owns 10% or more of APA Watch's or ARTBA's stock, and (2) Neither APA Watch nor ARTBA has a parent company.

Dated: November 30, 2009 Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae APA Watch and American Road & Transportation Builders Association ("ARTBA") file this brief with the consent of all parties. *Amici* are membership organizations whose members own fleets of vehicles subject to actions like those challenged here.

APA Watch, a nonprofit Virginia corporation located in McLean, Virginia, has participated as *amicus curiae* and commenter in appellate courts and agency proceedings, including matters on Clean Air Act preemption of state and local standards.

ARTBA, a nonprofit trade organization headquartered in Washington, represents the interests of the transportation construction industry in the national executive, legislative, and judicial branches. As an umbrella group for more than 5,000 members from all sectors and modes of the transportation construction industry (including public transit, airports, and waterways), ARTBA is the industry's primary advocate in environmental regulatory actions and litigation.

STATEMENT OF THE CASE AND FACTS

This litigation raises questions of preemption under the Energy Policy and Conservation Act ("EPCA") and Clean Air Act ("CAA"), specifically whether defendants-appellants City of New York, its taxi-

regulating agency, and various officers (collectively, "City") can limit the vehicles available to plaintiffs-appellees (collectively, "Taxis") to achieve the City's emission-related goals. *Amici* adopt the Taxis' Statement of the Case. Taxi Br. at 12-18. Although they support the Taxis' positions on EPCA, *amici* limit this brief to CAA preemption.[1]

Amici adopt the Taxi's Statement of Facts, Taxi Br. at 1-12, emphasizing that the City intended its action to lower emissions from taxis. *Id.* at 7-9. In addition, *amici* note that the City-approved 2010 vehicles for taxi service all are "ULEV"[2] or better under California's Low-Emission Vehicle ("LEV") regulations. 13 Cal. Code Regs. §1960.1(g)-(h). Significantly, the Crown Victorias favored by the Taxis are ULEVs.

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[1] Although the City can provide financial incentives to encourage hybrids outside of the lease-cap regulation, *amici* disagree that the City lawfully may set differential regulatory caps for hybrids *because of* their emission profiles. Taxis' Br. at 39. The Taxis' decision not to challenge the $3 differential leaves this Court without a case or controversy with respect to regulatory hybrid incentives.

[2] ULEV and SULEV mean "ultra-low-emission vehicle" and "super-ultra-low-emission vehicle." 13 Cal. Code Regs. §1960.1(h)(2)(n.3).

CITY-APPROVED VEHICLES FOR TAXI SERVICE[3]

Make	Model	Year	Emissions[4]
Ford	Crown Victoria Stretch	2010	Bin 4/ULEV
Ford	Escape Hybrid (2WD)	2010	SULEV
Toyota	Camry Hybrid	2010	SULEV
Toyota	Highlander Hybrid	2010	SULEV
Toyota	Prius	2010	SULEV

These data come from the Environmental Protection Agency ("EPA") and City websites and are included in the Addendum. The facts are judicially noticeable. FED. R. EVID. 201(b)(2), (f); *New York Indians v. U.S.,* 170 U.S. 1, 32 (1898) (appellate courts may take judicial notice of "records, or public documents … or other similar matters of judicial cognizance"); *Nebraska v. EPA,* 331 F.3d 995, 998 & n.3 (D.C. Cir. 2003) (data collected on agency website).

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[3] The list of City-approved vehicles for taxi service is available at http://www.nyc.gov/html/tlc/html/safety_emissions/taxicab_vehicles_in_use.shtml (last visited Nov. 30, 2009).

[4] EPA maintains an online "Green Vehicle Guide" that provides emissions data for vehicles by year, state, make, and model, available at http://www.epa.gov/greenvehicles/Index.do (last visited Nov. 30, 2009). The Guide uses a series of acronyms for emissions criteria, which are described online at http://www.epa.gov/greenvehicles/Aboutratings.do (last visited Nov. 30, 2009) and http://www.epa.gov/greenvehicles/-summarychart.pdf (last visited Nov. 30, 2009). The Guide outputs for the City-approved vehicles are reproduced in the Addendum, along with EPA's online descriptions of its emission-related acronyms.

CONSTITUTIONAL BACKGROUND

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. Art. VI, cl. 2. Courts have identified three ways that the Supremacy Clause can preempt state or local laws: express preemption, "field" pre-emption, and conflict pre-emption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). With respect to conflict preemption, the Supremacy Clause "nullifies" both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that prevent or *frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000); *accord Boyle v. United Technologies Corp.,* 487 U.S. 500, 507-08 (1988) (conflict preemption applies either where "significant conflict exists between an identifiable federal policy or interest and the [operation] of state law" or where "the application of state law would frustrate specific objectives of federal legislation") (interior quotations omitted, alteration in original). To emphasize, *impossibility is not required:* Frustration suffices.

In assessing preemption, courts consider two presumptions. First, preemption analysis begins with the federal statute's plain wording,

which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales* v. *Transworld Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). *Amici* discuss the first presumption – essentially, traditional tools of statutory construction – in Sections II.A-II.C, *infra,* and the second presumption in Section I.A, *infra.* In express-preemption situations like this one, these two presumptions often conflict.

LEGISLATIVE BACKGROUND

Two CAA elements provide relevant statutory background: CAA's cooperative-federalism planning process and its regulation of mobile sources as "motor vehicles" and "nonroad vehicles." As outlined below, amendments between 1963 and 1990 define the vehicular-emission authority of EPA, California, other states, and local government.

Cooperative Federalism

In 1963, Congress found "the prevention and control of air

pollution at its source is the primary responsibility of States and local governments." Pub. L. No. 88-206, §1(a)(3), 77 Stat. 392, 393 (1963). Starting with the 1970 amendments, the CAA created a state-federal partnership in which EPA imposes national ambient air quality standards ("NAAQS") and nationally applicable rules, while states develop rules to implement the federal requirements. *NRDC v. EPA,* 22 F.3d 1125, 1130-32 (D.C. Cir. 1994). Under this partnership, states prepare state implementation plan ("SIP") revisions, which EPA approves if they meet the statutory and regulatory criteria. *Id.* "Nonattainment areas" must demonstrate NAAQS attainment by modeling the necessary emission reductions and submitting SIP measures to achieve those reductions. 42 U.S.C. §7410, 7502, 7511a. The 1990 amendments introduced tiered nonattainment categories. 42 U.S.C. §§7511-7511f (ozone nonattainment areas).

Federal Regulation of Mobile Sources

In 1963, Congress entered the vehicular-emission field, requiring EPA's predecessor to "encourage" industry's "continued efforts" to develop devices and fuels to limit vehicular emissions. Pub. L. No. 88-206, §6, 77 Stat. at 399. In 1965, Congress expanded the federal role

with federal motor-vehicle emission standards. Pub. L. No. 89-272, §202, 79 Stat. 992 (1965). In 1967, Congress preempted "any [state or local] standard relating to the control of emissions" from new vehicles and engines. Pub. L. No. 90-148, §208(a), 81 Stat. 485, 501 (1967).[5]

Like the statute, the legislative history indicates clear, manifest congressional intent to preempt state and local vehicular-emission standards:

> The Congress is therefore presented directly with the question of the extent to which the Federal standards should supersede State and local laws on emissions from motor vehicles.... Rather than leave this question to the uncertainties involved in litigation, the committee has agreed... that State laws applicable to the control of emissions from new motor vehicles or new motor vehicle engines are superseded.

H.R. REP. NO. 90-728 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1956. Congress intended §209's broad preemption to protect not only manufacturers, but also users and consumers. *Id.* (preemption protects "manufacturers... and users"); S. REP. NO. 90-403, at 33 (1967) (preemption protects "general consumer").

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[5] In 1970, Congress recodified §208 as §209. Pub. L. No. 91-604, §8(a), 84 Stat. 1676, 1976-77 (1970). *Amici* refer to it as "§209."

California's unique air-quality problem and pioneering vehicular-emission standards led Congress to authorize the *State* of California to impose its own controls after obtaining waivers of federal preemption. Pub. L. No. 90-148, §208(b), 81 Stat. at 501. Although that provision applies to any state that adopted new-vehicle, non-crankcase emission standards prior to March 30, 1966, only California had done so. S. REP. NO. 90-403, at 6, 33.[6]

Since 1967, Congress amended relevant CAA provisions in 1970, 1977, and 1990. *See* Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2520 (1990). In *each* post-1967 amendment, Congress reinforced its clear distinction between federal preemption, waivers for California *state* standards, limited authorization for *other states* to adopt standards *identical* to California's, and *total preemption of local standards. See, e.g.,* 42 U.S.C. §§7416, 7543(c), (e), 7573, 7586.

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[6] March 30, 1966, was the promulgation date of the first federal motor-vehicle standards. 31 Fed. Reg. 5,170 (1966). In addition to setting exhaust-emission standards, the federal standards prohibited crankcase emissions entirely, *id.* at 5,171, rendering state crankcase standards prospectively irrelevant.

In 1970, Congress recodified the CAA without altering its mobile-source provisions materially to this litigation. The conference committee rejected the Senate's proposal to lift preemption of post-purchase controls for commercial vehicles and new noncommercial vehicles. S. REP. NO. 91-1196, at 32 (*reporting* S.4358, 91st Cong., 2nd Sess., §210(c) (1970)).

In 1977, Congress authorized states other than California (but not subdivisions) to adopt California's motor-vehicle standards, 42 U.S.C. §7507, and added §209(c) to extend CAA preemption to CAA-regulated components of "in-use" motor vehicles during their CAA-regulated "useful life." Pub. L. No. 95-95, §221, 91 Stat. at 762.

For motor vehicles, the 1990 amendments clarified §177 and added the Clean-Fuel Fleet Program ("CFFP") for ozone nonattainment areas designated serious or worse. 42 U.S.C. §§7507, 7511a(c)(4)(B), 7586. The CFFP requires that "[e]ach State [containing] a covered area … shall submit … [a] plan revision … to establish a clean-fuel vehicle program for fleets under this section." 42 U.S.C. §7586(a)(1). The ozone nonattainment provisions allow states to "opt out" of CFFP by submitting a substitute SIP revision with equivalent emission

reductions. 42 U.S.C. §7511a(c)(4)(B).[7] For nonroad vehicles, the 1990 amendments authorized EPA to issue national standards preempted state and local nonroad vehicular-emission standards and other requirements, with exceptions for California and for other states' authority to adopt California's regime. 42 U.S.C. §7543(e)(1)-(2).

State Regulation of Mobile Sources

When §209's preemption was before the Supreme Court, the South Coast air district identified actions by nine states and the District of Columbia to show prior state entry into the field. Brief of Respondent SCAQMD *et al.,* No. 02-1343 (U.S.), at 17 n.2, 21-22 n.7, 2003 WL 22766722 (2003) (*citing* HEW, *Digest of State Air Pollution Laws* (1963 & 1967 eds.). With the possible exception of California, these state actions cannot carry the weight that the City places on them.

Colorado *intended* to adopt vehicle standards, 1963 Colo. Sess. Laws 150, but repealed that general regulatory authority, 1966 Colo. Sess. Laws 45, §19, after enacting a crankcase standard. 1965 Colo. Sess. Laws. 87; *cf.* H.R.J. Res. 1022, 44th Gen. Assem. (Colo. 1965) (all

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[7] New York opted out of CFFP by adopting California's LEV program. 67 Fed. Reg. 5,170, 5,185 (2002).

domestic and many foreign gasoline-powered vehicles had crankcase systems by the 1963 model year). New Jersey, New York, and Connecticut sought to enter *after the federal cutoff,* 1966 N.J. Laws 16 (dated Apr. 7, 1966); 1966 N.Y. Laws 856, 902 (dated July 28, and Aug. 1, 1966); 1967 Conn. Pub. Acts 676. The District of Columbia is a *federal* preserve. U.S. CONST. art. I, §8, cl. 17.

Four states (Indiana, Kansas, Michigan, and New Hampshire) acted between 1961 and 1963 to prohibit "annoying smoke" and/or "excessive fumes or smoke," *Digest,* at 92, 94, 115, 124 (1963 ed.), which Michigan expressly defined to exclude "normal operations," *id.* at 115. Variants of the other three "gross-emitter" statutes remain in force, IND. CODE §9-19-8-5, KAN. STAT. ANN. §8-1739, N.H. REV. STAT. ANN. §266:59, but they do not limit properly functioning vehicles. *People v. Madearos,* 230 Cal.App.2d 642, 645 (1964) ("vehicle … in normal operation necessarily … emits some smoke [and] ordinary … person would have no difficulty in determining whether … excessive exhaust fumes accompanied … operation of … vehicle").

LITIGATION BACKGROUND

Several decisions from this Court and the Supreme Court under

§209 are relevant to this appeal.

Allway Taxi v. City of New York

In *Allway Taxi v. City of New York,* 340 F. Supp. 1120, 1124 & n.7 (S.D.N.Y.), *aff'd* 468 F.2d 624 (2nd Cir. 1972), taxis challenged a City ordinance that imposed the CAA's air-pollution controls on taxi vehicles that pre-dated those CAA controls and reserved the City's right in the future to impose controls more stringent than EPA's CAA controls. The district court opined that state and local governments may impose controls on both unregulated and CAA-regulated vehicles upon re-sale, re-registration, or licensing and for commercial use.

Mtr. Veh. Mfrs. Ass'n v. N.Y. Dep't of Envtl. Conservation

In *Mtr. Veh. Mfrs. Ass'n v. N.Y Dep't of Envtl. Conservation,* 79 F.3d 1298 (2d Cir. 1996), and 17 F.3d 521 (2d Cir. 1994), this Court upheld New York's adoption of California LEV program, notwithstanding automakers' allegations that New York's failure to adopt lower-sulfur California fuels would indirectly require a "third vehicle." Although the automakers prevailed on leadtime issues, this Court upheld states' ability to adopt California vehicular standards without also adopting California fuel standards.

Am. Auto. Mfrs. Ass'n v. Cahill

In *Am. Auto. Mfrs. Ass'n v. Cahill,* 152 F.3d 196, 200 (2d Cir. 1998) ("*AAMA*"), after California eliminated a Zero-Emission Vehicle ("ZEV") mandate from its LEV program, automakers successfully challenged New York's mandating ZEV sales. With New York's mandate no longer identical to California's, §209 preempted New York's rules as "standards relating to the control of emissions." *Id.*

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.

In *Engine Mfrs. Ass'n v. SCAQMD,* 541 U.S. 246, 252-55 (2004) ("*SCAQMD III*"), the Supreme Court held that §209(a) preempts state and local purchaser-based fleet controls, but remanded on whether the challenge was facial or as applied, whether the challenged rules qualified as "internal state purchase decisions" (and, if so, whether that affected preemption), and whether §209(a) preempts state and local rules for leased or non-new vehicles. 541 U.S. at 259. On remand, the Ninth Circuit upheld the fleet rules vis-à-vis a purely facial challenge because the market-participant exception would allow the rules to apply to state and local entities (but not private or federal entities). *EMA v. SCAQMD,* 498 F.3d 1031 (9th Cir. 2007) ("*SCAQMD V*").

SUMMARY OF ARGUMENT

As threshold matters, the "presumption against preemption" does not apply where the federal government entered the vehicular-emission field before state and local governments other than California, and §209 consistently preempted other states and local government from that field (Sections I.A-I.B), conflict preemption applies to the CAA (Sections I.C), CAA's general savings clause does not "save" the City's rules (Section I.D), *Allway Taxi* is *dicta* for CAA-regulated vehicles (Section I.F), and CAA's fleet provisions protect public fleets (Section I.G). On the merits, the City rules are conflict preempted and expressly preempted by §246 and §209 (Sections II.A-II.B), and the conflict preemption bolsters the express preemption as the only way to avoid absurd results (Section II.C).

ARGUMENT

I. THRESHOLD ARGUMENTS

This section addresses several statutory and constitutional issues that underlie the merits.

A. Presumption against Preemption Does Not Apply

When Congress legislates in a field traditionally occupied by the states, courts will not assume preemption "unless that was the clear

and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230. The City's reliance on *Santa Fe Elevator* is misplaced for two primary reasons: (1) CAA's plain language and legislative history express a clear, manifest intent to preempt any emission-related standards, rendering the presumption inapposite; and (2) §209(a) regulates in an area where states historically have *not* exercised police power.[8]

First, although the Supreme Court did not resolve the *Santa Fe Elevator* presumption in finding §209 to preempt purchaser-based standards, *EMA,* 541 U.S. at 256, this Court should resolve the issue in finding §209 and §246 to preempt purchase-mandate regulations imposed on third parties generally and fleets particularly. As demonstrated throughout this brief, traditional tools of statutory

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[8] The Supreme Court's recent preemption cases show a distinct, but uneven, waning of presumptions against preemption, particularly for express preemption. *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 557 (2008) ("although the Court's treatment of the presumption against pre-emption has not been uniform, the Court's express pre-emption cases since *Cipollone* have marked a retreat from reliance on it to distort the statutory text") (Thomas, J., dissenting); *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62-63 (2002) ("task of statutory construction must in the first instance focus on the plain wording of the [express preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent") (internal quotations omitted).

construction reveal unambiguous congressional intent to preempt any standard not federally approved pursuant to §177, §209(b), or §246.

Second, as demonstrated in the Legislative Background, *supra,* the states had not entered the vehicular-standard field when Congress acted. As the Supreme Court recently recognized, *Santa Fe Elevator* applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and not if there is a history of significant federal presence. *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (*quoting Rath Packing,* 430 U.S. at 525); *accord Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347 (2001). The presumption applies – even notwithstanding long-term federal regulation – because "respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt state-law causes of action." *Wyeth v. Levine,* 129 S.Ct. 1187, 1194-95 & n.3 (2009) (interior quotations omitted).

"The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation," *id.,* and requires that "Congress legislated here in a field which the States have *traditionally* occupied." *Locke,* 529 U.S. at 108 (*quoting Santa Fe*

Elevator, 331 U.S. at 230) (emphasis added). States must be *in the field* before presumptions apply. *Santa Fe Elevator* protects longstanding state and local laws, not dormant state or local police power.

Amici do not question the "traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles" as in *Huron Portland Cement. General Motors Corp. v. Tracy,* 519 U.S. 278, 306 (1997). But dormant Commerce-Clause cases present "an entirely different question from what States may do with the Act in place," *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould,* 475 U.S. 282, 290 (1986), particularly in express-preemption cases.

In analyzing presumptions against preemption, courts first must determine the relevant field. For example, *Locke* concerned the environment in the form of water quality, but analyzed the narrow *maritime-commerce* field, making clear that courts must analyze preemption using the narrow field at issue (here, vehicular-emission standards). *Locke,* 529 U.S. at 106-07; *accord Geier,* 529 U.S. at 910 (applying presumption to "common-law no-airbag suits," not to all tort law or to public health and safety); *Crosby v. Nat'l Foreign Trade*

Council, 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions, not to states' discretion to spend state funds). Here, the field is vehicular emission standards.

In 1967, Congress entered a field without a history of state involvement and carved out a special role for the one state that recently had pioneered in that field. By backdating its 1967 preemption provision to the promulgation of federal standards in 1966, Congress further undercut a latter-day claim to prior entry into the field. *Landsgraf v. USI Film Prod.,* 511 US 244, 267-68 (1994) ("Retroactivity… often serve[s] entirely… legitimate purposes, [*e.g.*,] to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary"); *Motor & Equip. Mfrs. Ass'n, Inc., v. EPA,* 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("states acting after 1965 were Johnnies-come-lately to the field"). As explained in the Legal Background, *supra,* other than the areas that Congress expressly carved out (*i.e.,* crankcase-emission standards, post-March 30, 1966 standards), states' entry consisted of three "gross-emitter" provisions for

"excessive fumes or smoke," which is not *traditional* state regulation of new-vehicle emissions. *Madearos,* 230 Cal.App.2d at 644-45 (quoted *supra*). Such minor, time-limited, aborted, or non-vehicular efforts cannot trigger a presumption against §209's preemption.

Instead, the presumption needs significant, contemporaneous state involvement in the preempted sphere. For example, *Santa Fe Elevator,* 331 U.S. at 230, cited a 1944 decision where 21 states (of 48) regulated warehouses and 47 states had adopted the Uniform Warehouse Receipts Act. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration. *Id.* Here, other than California, there is no evidence, much less compelling *Davies Warehouse* evidence, that Congress considered itself as entering a field that the states *already* occupied.

B. Presumption against Repeal by Implication Applies

Nowhere in its post-1967 amendments or their legislative histories did Congress evince any intent either to weaken §209's protection of automobile consumers and users or to authorize *local* vehicular-

emission standards. To the contrary, all post-1967 CAA amendments draw the same deliberate distinctions between broadly preempting *both state and local authority* and – when making *any* exceptions – making exceptions only for *states*. *See* Legal Background, *supra*. Without affirmative intent to repeal the express preemption Congress created in 1967, fleet rules can survive only if the original preemption is *"irreconcilable"* with the CAA as amended. *Morton v. Mancari,* 417 U.S. 535, 550 (1974). Far from irreconcilable, the post-1967 amendments *reinforce* the clear and manifest preemption enacted in 1967.

C. Conflict Preemption Applies to the Clean Air Act

The Supreme Court recently recognized that statutes with express-preemption clauses and savings clauses nonetheless can trigger conflict preemption for the "non-saved" provisions. *Geier,* 529 U.S. at 873; *Buckman,* 531 U.S. at 352. Because the Clean Air Act expressly preempts state and local emission-control standards and saves authority for various other forms of emission controls, *Geier* and *Buckman* make conflict preemption available under the CAA.

Indeed, for areas of "uniquely federal interest," the "conflict with federal policy need not be as sharp as that which must exist for

ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." *Boyle,* 487 U.S. at 507-08 (interior quotations omitted); *cf. Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 448 (1960) (dormant Commerce Clause requires "actual conflict" to find an "intent to supersede the exercise by the state of its police power"). The automakers' viability is an area of uniquely federal interest, *In re Chrysler LLC,* 405 B.R. 84, 104 (S.D.N.Y.), *aff'd* 576 F.3d 108 (2d Cir.), *cert. dismissed,* 130 S.Ct. 41 (2009), and states have not traditionally occupied either that area or vehicular emissions. *See* Legislative Background, *supra,* at __-__.

D. §116 Does Not Save City's Actions

The City argues that its regulation is not an emission-control standard. City Br. at 52. Although §116 saves certain state authority, that CAA savings clause applies only to (1) emission standards and limitations not preempted by §209, §211(c)(4), and §233, and (2) certain other requirements for controlling or abating air pollution. 42 U.S.C. §7416. The City has argued itself outside §116's reach.

In addition to clarifying §177's express preemption and adding §246's preemptive CFFP, the 101st Congress recognized §116's limits:

> [§116] refers to emissions standards or the abatement or control of air pollution. To assure that a court would not find the accident prevention authorities established here outside the boundaries of the powers specifically enumerated in section 116, subsection (k) of the new section 129 preserves in the broadest way the authority of State and local governments to regulate in the same area.

S.REP. NO. 101-228, at 250 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3634. When saving state and local authority outside §116's limited scope, Congress did so expressly. 42 U.S.C. §§7661e(a), 7651c(f)(3), 7412(d)(9), 7412(i)(5)(A), 7412(r)(7)(H)(x), 7412(r)(11), 7429(h)(1), 7511b(f)(4). If §116 applied universally, these "mini savings clauses" become superfluous, which this Court cannot attribute to Congress. *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (cardinal principle to avoid construction that renders clauses, sentences, or even words superfluous). Assuming *arguendo* that they are not emissions-control standards, the City's actions fall outside §116's protection.

E. §101(a)(3) Does Not Apply to Vehicular Standards

The City emphasizes §101(a)(3)'s recognition of air pollution as primarily a state and local responsibility. City Br. at 50 (*citing* 42 U.S.C. §7401(a)(3)). After recognizing that state-local responsibility *in 1963,* Pub. L. No. 88-206, §1(a)(3), 77 Stat. at 393, Congress expressly

preempted state and local vehicular-emission standards *in 1967*. Pub. L. No. 90-148, §208(a), 81 Stat. at 501. Thus, §209's specific exception postdates §101(a)(3)'s general provision.

In the field of vehicular-emissions standards, the specific 1967 statute clearly departs from – and *supplants* – the general 1963 statute. *Mancari,* 417 U.S. at 550-51 ("specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). Where specific statutes *postdate* general ones, this carries even more force. *Morales,* 504 U.S. at 384-85 (canon is "particularly pertinent" if specific preemption provision post-dates a general provision that is a "relic of the … no pre-emption regime"). For vehicular-emission standards, §101(a)(3) is a "relic" of the "no pre-emption regime."[9]

F. *Allway Taxi* Is *Dicta* for CAA-Regulated Vehicles

Although *Allway Taxi* suggests that cities may regulate

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[9] That Congress recodified §101 (and §209) does not alter the unchanged text's meaning. *Fourco Glass Co. v. Transmirra,* 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed"); *Waterman S.S. Corp. v. U.S.,* 381 U.S. 252, 269 (1965) ("action of the subsequent Congress would not supplant the contemporaneous intent of the Congress which enacted the... Act").

noncommercial vehicles at licensing and commercial vehicles at any time, that is *dicta* for CAA-regulated vehicles. Because taxis did not face actual or imminent exposure to extra-stringent City regulation of CAA-regulated vehicles, *Allway Taxi,* 340 F. Supp. at 1124 & n.7, the finding is unnecessary. While the City had imposed controls on *unregulated* vehicles, it had not exercised its purported authority to impose additional standards on *CAA-regulated* vehicles. *Id.* Without threatened enforcement, there was no case or controversy.

A court's discussing the merits of issues for which the plaintiff lacks standing is simply *dicta* because the court lacks jurisdiction. *Port Washington Teachers' Ass'n v. Board of Educ. of Port Washington Union Free School Dist.,* 478 F.3d 494, 502 (2d Cir. 2007). "A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case." *U.S. v. Troup,* 821 F.2d 194, 197 (3rd Cir. 1987) (alterations in original); *Orff v. U.S.,* 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101-02 (1998) ("[f]or a court to pronounce upon the meaning [of] federal law when it has no jurisdiction to do so is… for a court to act

ultra vires"). As *dicta, Allway Taxi* cannot control on how CAA preemption applies to CAA-regulated vehicles.

Even if it were not *dicta, Allway Taxi* could not control for CAA-regulated vehicles for two reasons. First, in 1977, §209(c) abrogated *Allway Taxi* as to CAA-regulated vehicles. 42 U.S.C. §7543(c). Second, in 2004, the Supreme Court held that the *Allway Taxi* "manufacturer-specific interpretation" has no support in CAA, §209 protects consumers, and that the *Allway Taxi* "minimal interference with interstate commerce" test "would undo Congress's carefully calibrated regulatory scheme." *Compare SCAQMD III,* 541 U.S. at 252-55 *with EMA v. SCAQMD,* 158 F.Supp.2d 1107, 1110 (C.D. Cal. 2001) (*quoting Allway Taxi*). As explained in Section II.B, *infra,* the *Allway Taxi dicta* is wrong because §209(a)'s preemption runs throughout CAA-regulated vehicles' CAA-regulated useful life.

G. §246 Applies to Public Fleets

The City cannot bootstrap from its non-emissions licensing authority over taxis to argue that taxis constitute public or quasi-public fleets. *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 617-19 (1986) (municipal function of issuing taxi franchises does not

enable conditioning franchise renewal on federally preempted criteria); *Frost v. Railroad Comm'n of State of California,* 271 U.S. 583, 593-94 (1926) (states cannot use licensing authority to extract otherwise-preempted concessions). Taxis are not public or quasi-public fleets.

Even if the City could make the public-fleet argument, it would not exempt the City from the CFFP, which by its terms applies to fleets of ten or more vehicles owned or operated by a *person*. 42 U.S.C. §7581(5). "Person" expressly includes a "municipality [or] political subdivision," which expressly includes a "city, town,… or other public body created… pursuant to State law." *Id.,* §7602(e)-(f). Further, Congress defined "covered fleet" expressly *to exclude* law enforcement vehicles. *Id.,* §7581(5). Unless it contemplated vigilantes, Congress clearly and manifestly intended §246 to cover public fleets. Contrary to the Ninth Circuit's suggestion, *EMA,* 498 F.3d at 1044, state and regional governments cannot regulate public fleets.

II. MERITS ARGUMENTS

Regardless of their justification, the City's rules qualify as preempted emission controls. Courts have long rejected the "aberrational doctrine" that "state legislatures [can] nullify nearly all

unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). As the district court found and the Taxis demonstrate, the City acted "because of" emissions, not merely "related to" emissions. *See also AAMA,* 152 F.3d at 200. That more than suffices.

In Sections II.A and II.B respectively, *amici* argue for conflict preemption under §246 and express preemption under §209. In addition, as explained in Section II.C, far from constituting two alternate bases for preemption, §246's conflict preemption actually compels the preemptive reading of §209 as a means of harmonizing the entire statute. *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (courts must "interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole") (interior citations omitted). The three arguments converge to a common conclusion that CAA preempts the City's actions.

Moreover, given that unambiguous preemption, the City cannot use its unquestioned authority over non-emission aspects of the taxi industry to extract emissions-related concessions:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Frost, 271 U.S. at 593-94.[10] The City simply cannot condition the right to own or drive taxis on surrendering (without compensation) the vehicular autonomy and emission credits protected by §177, §209, §246, and the Takings and Supremacy Clauses of the federal Constitution.

A. §246 Conflict Preempts Fleet Rules

As explained in Sections I.C-I.D, *supra,* nothing in §209's express preemption in §209 and §116's savings clause prevents finding conflict preemption under §246. *Geier,* 529 U.S. at 873; *Buckman,* 531 U.S. at 352.[11] Because it provides regulated fleets with offsetting benefits, in addition to authorizing state and local fleet regulations, §246 plainly

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[10] *Frost* prohibited states' conditioning use of public roads on private carriers' voluntarily submitting to otherwise-inapplicable regulation. 271 U.S. at 592-94.

[11] Indeed, if this Court accepts the City's disavowal of emissions-based motivations, City Br. at 52, §116 would not apply by its plain terms. *See* 42 U.S.C. §7416; Sections I.D, *supra.*

preempts state and local efforts to regulate fleets without providing those benefits. *SCAQMD III,* 541 U.S. at 257 ("fleet purchase standards [§246] mandates must comply strictly with federal specifications, being neither more lenient nor more demanding"). Where Congress has required a carrot-and-stick salad, the City cannot serve only sticks.

Specifically, Congress' carefully balanced CFFP requires (and the City denies) that state and local governments provide fleets regulatory flexibility and emission credits:

- **Credits for Extra-Stringent Vehicles:** §243(e)(2) defines "clean-fuel vehicle" as meeting the *least-stringent* California standard applicable to that vehicle class, and §246(f) requires states to provide credits to fleet operators that exceed CFFP requirements by purchasing either more clean-fuel vehicles than §246 requires or vehicles certified to standards more stringent than §246 requires. 40 C.F.R. §88.304-94(c)(1)(ii)-(iii) (same). The City fails to provide credits to taxi owners who purchase extra-stringent ULEVs over otherwise-lawful clean-fuel vehicles (*e.g.,* California-certified LEVs).
- **Indirect Sales Limitations.** Although §177 prohibits *indirect*

limits on the sale of clean-fuel vehicles (*i.e.,* California LEVs), the City restricts purchasing clean-fuel vehicles less stringent than a ULEV. Significantly, §177's indirect-sales provision expressly applies to all of Title II (*e.g.,* §209 in Part A and §246 in Part C), whereas §209's preemption and waiver expressly apply only to Part A (*i.e.,* neither §246 nor §177).[12] The City's reading violates §177's express command against construing Title II to authorize indirect limits on selling new, California-certified vehicles. 42 U.S.C. §7507.

- **Fuel Neutrality:** Although §241(2) defines "clean alternative fuel" to include reformulated gasoline ("RFG") and §246(d) leaves fuel choices to fleet operators, the City's regulation discriminates against RFG-fueled vehicles.

For all these reasons, §246 and §177 conflict preempt the City's attempt to regulate the Taxis without providing §246's required benefits.

Any other reading frustrates the carefully balanced CFFP by

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[12] As explained in Section II.C, *infra,* §177's and §209's differing scopes bolster the argument that §209 preempts CFFP-noncompliant fleet requirements.

allowing §182(c)(4)(B) opt-out states to circumvent §246 with replacement fleet measures that withhold §246's protections. Indeed, the Supreme Court recognized that fleet rules conflict with the CFFP. *SCAQMD III,* 541 U.S. at 254 & n.6, 257-59. Even the Ninth Circuit, on remand, recognized that §246 can support preemption. *SCAQMD V,* 498 F.3d at 1044. Because conflict preemption requires only frustrating the federal purpose, *Geier,* 529 U.S. at 873-74, notwithstanding any pretextual state or local purpose, *Perez*, 402 U.S. at 651-52, §246 clearly preempts the City's attempts to regulate Taxi emissions.

B. §209(a) Preempts Fleet Rules

In doubly broad language, §209(a) preempts "*any* [state or local] standard *relating to* the control of emissions" from new motor vehicles. 42 U.S.C. §7543(a). Both emphasized terms convey *expansive* preemption. *Massachusetts v. EPA,* 549 U.S. 497, 528-29 (2007) ("any" means "of whatever kind" or "whatever stripe"); *Harrison v. PPG Indus., Inc.,* 446 U.S. 578, 588-89 (1980) (rejecting limiting interpretation because CAA used the "expansive" term "any"); *Morales,* 504 U.S. at 385 (rejecting construction that "simply reads the words 'relating to' out of the statute"). Moreover, consistent with the

legislative history,[13] the Supreme Court recently confirmed that §209 protects both manufacturers and consumers from state and local standards. *SCAQMD III,* 541 U.S. at 252-55. Preemption here is plain.

Although the City argues for narrow preemption and broad exceptions, precisely the opposite applies. Congress narrowly defined the *state* programs that fall outside preemption (*i.e.,* emission standards, other than crankcase emission standards, adopted prior to March 30, 1966). Under traditional tools of statutory construction, Congress left no room to fashion additional exceptions:

> Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.

TRW, 534 U.S. at 28 (citations omitted). Because no exemptions apply, §209 preempts the City's rules.

Where the City treats vehicles disparately by emissions criteria

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[13] Where (as here) the statutory language is plain and direct, any contrary meaning must be shown by legislative history that is more plain and direct. *Aaron v. SEC,* 446 U.S. 680, 697 (1980); *U.S. v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 240-41 (1989) (when statutory language is unambiguous, courts need not consult legislative history). As explained, however, the legislative history supports the Taxis.

(even by fuel type, without quantitative emission limits), the City imposes a "standard." *See SCAQMD III,* 541 U.S. at 253 (standard includes quantitative limits, use of a specified type of pollution-control device, or any "other design feature related to the control of emissions"); 42 U.S.C. §7521(a)(3)(ii) (including fuel type as factor defining emission standards for vehicle classes). Here, for emissions-based reasons, the City restricted the Taxis to ULEVs or better, which §209(a) preempts. *SCAQMD III,* 541 U.S. at 258 (using South Coast Rule 1194's "ULEV-or-better" requirement as a preemption example).

Further, Congress broadly preempted not emission standards, but "any standard *relating to* the control of emissions." *See* 42 U.S.C. §7543(a) (emphasis added). A reading that preempts only quantitative emission rates not only ignores controlling Supreme Court precedent but also "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate [emissions],'" *Morales,* 504 U.S. at 385, rather than prohibiting their adopting or enforcing any standard that *relates to* the control of emissions.

Acknowledging that "relates to" preemption cannot "extend to the

furthest stretch of indeterminacy," *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995), courts pragmatically review such cases for state requirements with a "forbidden connection" to federal law, considering the federal objectives and the state provision's effect on those objectives. *Egelhoff v. Egelhoff,* 532 US 141, 147 (2001). Given that the City's rules and §209 both concern vehicular emissions and that §209 protects users and consumers, the City's rules clearly have a "forbidden connection" to, and "more than an indirect, remote, or tenuous effect" on, emissions from taxis and taxi fleets (*i.e.,* the subjects of §209 and §246).

Arguing against reading "relates to" so broadly that it renders §209's "words of limitation" a "mere sham," the City simply reads the words "relating to" out of §209. City Br. at 60. A *stronger* statutory link provides some needed perspective:

> [Intentional discrimination] implies that the decisionmaker… selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979). Whatever the scope of "relates-to" preemption in difficult cases, this is an easy case: the City

would violate §209(a) if Congress had used "because of" instead of "relating to." *A fortiori,* the City's actions violate §209(a) as written.

For California waivers, §209(b) requires that standards be consistent with §202(a), 42 U.S.C. §7543(b)(1)(C), which imports an element of conflict preemption into §209's express preemption. Significantly, §202(a)(1) expressly requires that "standards shall be applicable to such vehicles and engines for their useful life (as determined under [§202(d)])," and §202(d) expressly incorporates §207, 42 U.S.C. §7521(a)(1), (d). Imposing additional controls on CAA-regulated vehicles during their CAA-regulated useful life is inconsistent with §202(a) and §209(c). 42 U.S.C. §7543(b)(1)(C). State or local standards that deny these protections or impose additional emission-related controls during vehicles' federally regulated useful life are inconsistent with §202(a) and §209(c), which would make them ineligible for a waiver of preemption. *Am. Motors Corp. v. Blum,* 603 F.2d 978, 981 (D.C. Cir. 1979). As such, the City's actions plainly violate §209's express preemption.[14]

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[14] The City rules' resemble the rejected 1970 Senate amendments. "Few principles of statutory construction are more compelling than the

(Footnote cont'd on next page)

C. Courts Must Read §209(a) and CFFP in Harmony

If this Court finds that §246 conflict preempts state and local fleet rules that deny §246's benefits, *see* Section II.A, *supra,* that conflict preemption bolsters §209's express preemption. In essence, conflict preemption sets up a dichotomy where §246 either preempts otherwise-allowed regulations or allows otherwise-preempted regulations. The City supports the former; the Taxis and *amici* support the latter.

1. §246 Allows Otherwise-Preempted Rules

The Supreme Court found §246 to support §209's preemption, although a "notwithstanding" clause "might have been nice." *SCAQMD III,* 541 U.S. at 257-58. *Amici* respectfully submit that the relationship between §177, §209, and §246 obviates a "notwithstanding" clause.

By their terms, §209(a) preempts state and local adoption of emission-control standards subject to "this part" (*i.e.,* CAA Title II, Part A (§§202-219), 42 U.S.C. §§7521-7554), and §209(b) provides California a waiver of the preemption of "this section" (*i.e.,* §209, 42 U.S.C. §7543).

(Footnote cont'd from previous page.)

proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted).

Because the CFFP resides in Part C of Title II (§§241-250), 42 U.S.C. §§7581-7590, states adopting CFFP-compliant fleet regulations do not violate §209(a). But state and local fleet regulations *outside §246* necessarily cannot rely on §246, and thus fall under §209(a)'s express preemption. Moreover, because §177 prohibits states' relying on §177 or Title II indirectly to limit sales of California-certified vehicles, 42 U.S.C. §7507, §177 prohibits any fleet rules that do not comply with §246.

2. §246 Does Not Preempt Otherwise-Allowed Rules

It is untenable to read §246 as, for the first time in 1990, preempting fleet rules that §209 allowed, prior to 1990. *SCAQMD III,* 541 U.S. at 257-58 ("[§246] is impossible to reconcile with the *dissent's* interpretation") (emphasis in original). Under this reading, ozone *attainment* areas remain free to regulate fleets in any way, but CFFP's "covered areas" – the worst ozone nonattainment areas – are preempted. Well past anomalous, that reading is "impossible."

As indicated, *supra,* this Court must read CAA as "an harmonious whole." *Brown & Williamson,* 529 U.S. at 133; *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-81 (1969) (subsequent statute interpreting prior statutes are "entitled to great weight in statutory construction"). To

read §209 and §246 in harmony, fleet rules must fall under *both* sections, with §246 as a specific exception to §209's general preemption. Any other reading either (a) frustrates the intricately balanced CFFP by allowing §182(c)(4)(B) opt-out states to circumvent §246 with replacement fleet measures that deny §246's protections or (b) even worse, argues that Congress intended to preclude non-CFFP fleet rules in *nonattainment* areas, but not in *attainment* areas.

CONCLUSION

For the foregoing reasons, this Court should affirm the injunction.

Dated: November 30, 2009

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BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the foregoing *amici curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 7,000 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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Pursuant to Circuit Rule 25(a)(6), I certify that I have scanned for viruses the PDF version of the foregoing *amicus curiae* brief that I submitted as an email attachment to civilcases@ca2.uscourts.gov and that no viruses were detected.

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I hereby certify that on this 30th day of November 2009, I caused two copies of the foregoing *amici curiae* brief and the accompanying addendum to be served on the following counsel by U.S. Priority Mail:

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I further certify that, on the same day, pursuant to Circuit Rule 25.1(a)(3), I copied the parties' counsel (Ms. Paulson and Ms. Saylor) on the electronic submission of a "pdf" copy of the foregoing brief to the Clerk and caused ten copies and one original of the foregoing *amici curiae* brief and the accompanying addendum to be served on the Court via Federal Express, next business-day delivery.

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