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Who Killed the Hybrid Car? State and Local Green Incentive Programs After Metropolitan Taxicab v. City of New York

Jonathan Skinner

University of Colorado Law School

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Who Killed the Hybrid Car? State and Local Green Incentive Programs After Metropolitan Taxicab Board of Trade v. City of New York in the Second Circuit*

Jonathan Skinner**

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I. INTRODUCTION

A hybrid vehicle typically combines a conventional internal combustion engine propulsion system with an electric propulsion system. This dual engine system allows the vehicle to achieve better fuel economy than a purely gasoline powered system. The added benefit of the dual engine system is reduced fossil fuel dependency, which can decrease an individual vehicle’s carbon footprint through lower emissions. Reduced emissions, in turn, lessen a vehicle’s impact on climate and local air quality. But beginning in 2007, when city governments across the United States pushed for hybrid integration into taxicab fleets, taxicab companies fought back with a seldom-invoked federal preemption provision in the Energy Policy and Conservation Act of 1975.1

The Supreme Court once recognized that “[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.”2 In exercising that power, “states and their instrumentalities may act, in many areas of interstate commerce . . . concurrently with the federal government.”3 These residual state rights to govern traditional and local matters were not wholly abdicated to the federal government, yet the limitations on local power are clear: “Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . .”4

In 1963, Congress stepped into traditional and local matters

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* The title was inspired by the documentary WHO KILLED THE ELECTRIC CAR? (Sony Pictures 2006).
** Law Fellow, Appeals & Legislation, City of Philadelphia Law Department. Duke University School of Law, J.D./LL.M.; University of California, Berkeley, B.A. I express my sincere appreciation for the hard work and valuable insight of the Stanford Environmental Law Journal staff. Also, special thanks to Scott Thompson. The views expressed in this article are the author’s alone and do not necessarily represent the views or position of the City of Philadelphia.
3. Id.
4. Id. at 443.
with the enactment of the Clean Air Act, but even after the Act’s initial ratification and all the subsequent amendments, states remain responsible for implementing plans to clean up polluted areas.⁵ This preserves the traditional function of the states in regulating local air quality, allowing each local government to consider its unique industries, geography, and concerns in responding to air degradation. The interplay between state and federal laws must be carefully defined so as to preserve the traditional roles of the states unless Congress clearly and directly intends to preempt traditionally local matters.⁶

In Metropolitan Taxicab Board of Trade v. City of New York,⁷ the Second Circuit ignored this principle of federal preemption and greatly expanded the Energy Policy and Conservation Act’s preemption provision⁸ to essentially allow Congress to preempt a field wholly unrelated to the act: municipal regulation of taxicabs. The court held that New York City’s green incentive plan aimed at shifting the cost structure in taxicab fee arrangements and encouraging the purchase of new hybrid vehicles was preempted by the Energy Policy and Conservation Act because the plan drew a distinction between hybrid and non-hybrid vehicles.⁹ As a result, taxicab drivers, who bear the burden of rising fuel prices, must continue to shoulder the inefficiencies of the leased automobiles, and city residents must continue to shoulder the environmental burden of dirty cars. And more significantly, cities across the United States are now wary of similar challenges to proposed green incentive plans and have halted innovative measures to address clean air and climate change in their respective municipalities.

In Part II, this Article introduces the basic concepts of federal preemption and the arguments in favor of state and local

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⁵. Air pollution prevention and control at its source “is the primary responsibility of the States and local governments,” but federal financial assistance and leadership is “essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.” 42 U.S.C. §§ 7401(a)(3)-(4) (2011).


⁸. The preemption provision reads: “[w]hen an average fuel economy standard prescribed under this chapter is in effect, a State or [local government] 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) (2011).

⁹. Id. at 157.
programs in the absence of explicit federal preemption. Part III
explores the historical and regulatory background that prompted
Congress to enact the Energy Policy and Conservation Act. It
briefly discusses the automobile manufacturing industry and the
regulatory mechanism originally designed to alleviate United
States dependence on foreign oil and promote greater fuel
efficiency in newly manufactured automobiles. In Part IV, the
Article presents the two groups who first challenged state or local
regulations under the preemption provision of the Energy Policy
and Conservation Act and the few district court cases and the only
circuit court case which directly discuss the Act’s preemption
 provision. The Article then discusses the Second Circuit’s holding
and some misgivings associated with the court’s reasoning. Next,
the Article lays out the framework of the City of New York’s
petition for writ of certiorari filed with the United States Supreme
Court following the Second Circuit’s decision in Metropolitan
Taxicab. Finally, the Article discusses the potentially broad and
damaging implications of the Second Circuit’s holding and
hopefully serves as a useful guide to avoid a similar result in other
cases.10

II. INTRODUCING PREEMPTION AND FEDERALISM

Statutory preemption is grounded in the Supremacy Clause,
which “invalidates state laws that ‘interfere with, or are contrary
to,’ federal law.”11 The Supreme Court has laid out three methods
by which a state or local law may be foreclosed: (1) by “express
language in a congressional enactment”; (2) by “implication from
the depth and breadth of a congressional scheme that occupies
the legislative field”; or (3) by “implication because of a conflict
with a congressional enactment.”12 Where there is an express
preemption provision, the Court begins its analysis with “the text
of the provision in question, and move[s] on, as need be, to the
structure and purpose of the Act in which it occurs.”13 However,

10. During the course of publication, the Supreme Court denied petition for
certiorari. This leaves open the possibility that other circuits will confront similar
challenges under the EPCA.
(1985) (quoting Gibbons v. Ogden, 22 U.S. 1 (1824)).
Congress' actual authority to regulate is not derived from the Supremacy Clause—that power must be prescribed elsewhere in the Constitution.\textsuperscript{14}

The Commerce Clause is perhaps the most flexible source of congressional authority contained in the Constitution.\textsuperscript{15} This flexibility comes with a caveat: the power to regulate must be connected to interstate commerce, which, admittedly, constrains little of Congress' authority.\textsuperscript{16} As vague as the caveat may be, the scope of federal legislation must be confined to its Constitutional source; otherwise Congress would have unfettered authority, usurping the power and purpose of state and local governance: "The sheer amount of regulation and the complexity of the issues involved would place far too heavy a burden on Congress under an exclusive system without overlap, and requires at least some residual state regulatory powers."\textsuperscript{17} In most cases, in order to preserve the virtues of federalism, the Supreme Court assumes "that the historic police powers of the States were not to be superseded by [a] Federal [a]ct unless that was the clear and manifest purpose of Congress."\textsuperscript{18}

Erwin Chemerinsky once noted, "discussions about federalism are the ones where the underlying values are least discussed and are the most disconnected from the legal doctrines."\textsuperscript{19} He urged courts to employ a "functional analysis" to identify the nature of state autonomy and answer the principal question of when and how to allocate power between the federal government and state governments.\textsuperscript{20} One of the asserted values of federalism is that it promotes the democratic ideal because state and local governments are closer to their citizens and therefore more accountable and responsive to local constituent needs.\textsuperscript{21} By

\begin{flushleft}
\textsuperscript{14} See, e.g., Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 GEO. WASH. L. REV. 91, 101 (2003) (arguing that the Supremacy Clause conditions the supremacy of federal statutes on their constitutionality and provides courts with the authority to strike down federal laws not made "in pursuance" of the Constitution).
\textsuperscript{16} Id. at 779.
\textsuperscript{17} Id. at 780-81.
\textsuperscript{19} Chemerinsky, supra note 6, at 501 (noting also that "[t]he Court's decisions about federalism rarely do more than offer slogans about the importance of autonomous state governments").
\textsuperscript{20} Id. at 534.
extension, unlike the federal government, states and cities can productively compete with one another in order to attract desirable citizens and businesses to aid in economic growth. A third value is that decentralized decision-making allows more opportunities for innovation and experimentation with social and economic policy than does one centralized bureaucracy.

Preserving this relationship is beneficial for the whole of the United States. In the context of climate change, competition among American municipalities has prompted some cities to promote environmental action. Mayor Nutter of Philadelphia, for instance, has announced his intent to make Philadelphia the greenest city in the United States by 2015. But these ambitious plans cannot succeed if federal preemption is broadly invoked and forecloses local experimentation. In order to preserve the virtues of local governance, Congress has a duty to clearly identify the scope and purpose of federal statutes. Without clearer language from Congress, courts must turn to the underlying values of the legislation to understand the specific concerns that Congress intended to address. For the Energy Policy and Conservation Act, these concerns go back almost forty years.

III. BACKGROUND: THE OIL EMBARGO AND ENERGY INDEPENDENCE

On October 6, 1973, the Yom Kippur War broke in the Middle East, in part prompting the Organization of Arab Petroleum Exporting Countries ("OPEC") to raise the posted price of oil by 70%, to $5.11 a barrel, and to cut production over time in five

"increases opportunity for citizen involvement in democratic processes"); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-92 (1995) ("[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized.").

22. See Gregory, 501 U.S. at 458 (stating that federalism "makes government more responsive by putting the States in competition for a mobile citizenry").

23. See id. (stating that federalism "allows for more innovation and experimentation in government"); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787-88 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("[T]he Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.").

percent increments. The United States was quickly drawn into the conflict when Congress approved $2.2 billion in aid for Israel. This act provoked Libya and the other members of OPEC to announce a total embargo on oil deliveries to the United States, sparking the first global “energy crisis.”

Just a month later, President Nixon launched Project Independence to achieve energy self-sufficiency by 1980, and declared that American science, technology, and industry could free the United States from dependence on foreign oil. Although the embargo was lifted in March 1974, its effects persisted: that year the price of oil quadrupled the prewar rate to nearly $12 a barrel. In May 1974, the Federal Energy Administration was created to replace the Federal Energy Office, which had been assigned the tasks of “allocating reduced petroleum supplies to refiners and consumers and . . . controlling the price of oil and gasoline.” On August 9, 1974, Gerald R. Ford became President; just two months later, he signed the Energy Reorganization Act. On December 22, 1975, President Ford signed the Energy Policy and Conservation Act (“EPCA”), which extended oil price controls into 1979, mandated automobile fuel economy standards, and authorized the creation of the United States Strategic Petroleum Reserve. In 1977, the cabinet-level Department of Energy was created to advance energy technology and promote related innovation in the United States.

A. The United States Automobile Industry From 1970 to 1985

At the beginning of the 1970s, American automobiles averaged

28. Id.
32. Id.
33. Id.
34. Id.
13.5 miles per gallon. But with the 1973 oil embargo, consumer demand for large, fuel inefficient vehicles dropped dramatically and the United States automobile industry quickly found itself vulnerable to changes in domestic demand. American buyers turned to the smaller, more efficient four cylinder imported vehicles from Europe and Japan. This led Detroit's Big Three (General Motors, Ford, and Chrysler) to introduce the smaller Chevrolet Chevette (1975), the Ford Fiesta (1976), and the Dodge Omni/Plymouth Horizon (1978) from Chrysler, reflecting the move towards front wheel drive transmissions. On June 26, 1977, the Secretary of Transportation, Brock Adams, announced new fuel economy standards, which he believed would demand lighter, smaller cars. By 1985, the average American fuel efficiency had risen to 17.4 miles per gallon.

B. EPCA Fuel Economy Standards

The EPCA is a forward-looking statute that creates the Corporate Average Fuel Economy ("CAFE") program. Under this program, at least eighteen months before the beginning of each model year, the United States Department of Transportation ("DOT") must consult with the Secretary of Energy and the United States Environmental Protection Agency ("EPA"), and then establish federal fuel economy standards for all passenger automobiles or light-duty trucks manufactured in that model year. The Secretary of Transportation has delegated authority to establish CAFE standards to the National Highway Traffic Safety Administration ("NHTSA"). When setting CAFE standards, the NHTSA must weigh four factors: "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." Specifically, the NHTSA used an analytic model to inform its consideration of the 2011

38. FRUM, supra note 35, at 321-22.
CAFE standards for passenger automobiles, which required the following inputs:

(1) a forecast of the future vehicle market, (2) estimates of the availability, applicability, and incremental effectiveness and cost of fuel-saving technologies, (3) estimates of vehicle survival and mileage accumulation patterns, the rebound effect, future fuel prices, the social cost of carbon, and many other economic factors, (4) fuel characteristics and vehicular emission rates, and (5) coefficients defining the shape and level of CAFE curves to be examined.  

Some of these inputs are provided with consultation from the EPA, as required by the EPCA. The EPA provides NHTSA with fuel economy data and also calculates the average fuel economy for each manufacturer.

Individual vehicles and models are not required to meet the mileage standard. “Instead, EPCA requires that the average fuel economy of a manufacturer’s fleet of passenger cars (or light trucks) in a particular model year must meet the standard for those automobiles for that model year.” The required CAFE standard is based on “target levels of average fuel economy set for vehicles of different sizes and on the distribution of that manufacturer’s vehicles among those sizes.” Compliance is determined by “comparing a manufacturer’s harmonically averaged fleet fuel economy levels in a model year with a required fuel economy level[,] calculated using the manufacturer’s actual production levels and the targets for each [size] of the vehicles that it produces.” Manufacturers whose fleets fail to meet CAFE standards are liable for a civil penalty of $5 per each tenth of a

43. § 32902(k).
mile per gallon under the target value times the total volume of vehicles manufactured for a given model year.\textsuperscript{48}

As enacted, and substantively unamended, the EPCA includes a general preemption provision, which provides that "when an average fuel economy standard prescribed under this chapter is in effect, a State or [local government] 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."\textsuperscript{49} The provision was written to preempt state and local regulation of average fuel economy standards so that automobile manufacturers would not be required to comply with numerous differing standards within a multiplicity of state and local markets for automobiles.\textsuperscript{50} Imposing national uniformity for fuel economy standards applicable to automobile manufacturers would preemptively remove local burdens on interstate commerce and allow manufacturers to develop automobile designs for their fleets to be sold anywhere in the nation.

Currently, the minimum standard for every domestically manufactured passenger automobile is the greater of either 27.5 miles per gallon, or "ninety-two percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year... ."\textsuperscript{51} In December 2007, Congress increased the standard to at least thirty-five miles per gallon for the total fleet, beginning with model year 2020.\textsuperscript{52}

IV. THIRTY YEARS LATER

Over thirty years after the OPEC oil embargo and the enactment of the EPCA, the United States faces a growing concern with greenhouse gas emissions and global climate change.\textsuperscript{53} Although the EPCA was originally created to reduce United States dependence on foreign oil through improved fuel efficiency, there is also a strong relationship between improving fuel efficiency and

\textsuperscript{50} See S. REP. NO. 94-179, at 25 (1975).
\textsuperscript{53} See Massachusetts v. EPA, 549 U.S. 497, 504-05 (2007).
reducing carbon emissions. Carbon dioxide is a natural byproduct of automobile fuel combustion: the more fuel an automobile burns, the more carbon dioxide is emitted.\textsuperscript{54} Since the amount of carbon dioxide emissions is directly related to the amount of fuel combusted, requiring improvements in fuel efficiency has the effect of reducing tailpipe carbon dioxide emissions.\textsuperscript{55}

Currently, noncommercial automobiles are responsible for a majority of United States transportation petroleum use and nearly 60\% of all transportation-related greenhouse gas emissions.\textsuperscript{56} Moreover, in 2004, United States motor vehicles were responsible for nearly 50\% of the global concentration of greenhouse gases.\textsuperscript{57} And unless total fuel consumption dramatically changes, United States motor vehicles will continue to contribute significantly to global warming.\textsuperscript{58}

Congress also requires the NHTSA to consider EPA's motor vehicle emissions standards when setting fuel economy levels, ensuring environmental concerns are given appropriate weight when NHTSA balances its four factors.\textsuperscript{59} In fact, at the direction of President Obama, NHTSA and EPA issued a Notice of Intent and Technical Assessment Report on October 1, 2010, as the initial steps toward developing future fuel economy and greenhouse gas emissions regulations for light duty vehicles from model year 2017 and beyond.\textsuperscript{60} The national program is intended to cut down on fuel costs, reduce dependence on petroleum, and protect the environment by reducing greenhouse gas pollution that leads to


\textsuperscript{55} Nat'l Highway Traffic Safety Admin., Final Rule, supra note 42, at 49 ("By 2007, the average fuel economy of new passenger cars had increased to 31.3 mpg, causing the emission of CO2 to fall to 283.9 g/mi."); see also 49 C.F.R. §§ 523, 531, 533-34, 536-37 (2011).


\textsuperscript{58} Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change 287 (B. Metz et al. eds., 2007); see also Massachusetts, 549 U.S. at 525.

\textsuperscript{59} 49 U.S.C § 32902(f), (k) (2011).

\textsuperscript{60} Nat'l Highway Traffic Safety Admin., supra note 56.
climate change. The array of stakeholders committed to developing a single national program includes the Alliance of Automobile Manufacturers, BMW, Chrysler, General Motors, Jaguar, Land Rover, Mazda, Mitsubishi, Porsche, Toyota, Volkswagen, various medium and heavy-duty vehicle manufacturers, and the California Air Resource Board. No consumer or service industry groups have yet joined the program.

A. Manufacturer Challenges Under the Clean Air Act and the ECPA

Before manufacturers challenged state and local regulations under the EPCA, they tested a similar preemption provision under the Clean Air Act ("CAA"). Preemption under the CAA first appeared before the Supreme Court in Engine Manufacturers Association v. South Coast Air Quality Management District in 2004. Congress created Title II of the CAA to control emissions from new motor vehicles and made it a goal "to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention." With the enactment of the Air Quality Act of 1967, Congress amended Title II to preempt states from setting emission standards for new motor vehicles and engines.

In Engine Manufacturers, California imposed mandatory alternative fuel vehicle purchasing requirements for street sweepers, public transit vehicles, solid waste collection vehicles, and airport passenger transportation vehicles, among other vehicles. All the rules applied to public operators, whereas only three applied to private operators. Notably, hybrid-electric and dual-fuel technologies that use diesel fuel were not considered alternative fuel technologies for the purposes of the rules. Section 209(a) of the CAA states: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard

61. Id.
64. Motor Vehicle Air Pollution Control Act, 42 §§ 7521 to 7525, 7541 to 7545, 7547 to 7550, 7552 to 7554, 7571 to 7574, 7581 to 7590 (2011).
67. Id. at 248-49.
68. Id. at 251 n.1.
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relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."^{69} The Court, with Justice Scalia writing for the majority, found the California Rules to be preempted in part by Section 209(a) because the rules commanded a particular result and were accompanied by sanctions.^{70} Essentially, the Court focused on the appropriate meaning of enforcement and noted that mandatory rules fell within the scope of the preemption provision of the CAA.

The second notable preemption challenge to state and local regulations occurred in the fall of 2005. Perhaps emboldened by the decision in Engine Manufacturers, automobile manufacturers turned to other state and local regulations across the country. In 2005, the Alliance of Automobile Manufacturers, General Motors, Chrysler, and other automobile manufacturers challenged regulations adopted by the State of Vermont that establish greenhouse gas emissions standards for new automobiles. In doing so, they again relied on the preemption provisions of the CAA, and also invoked the preemption provision in the EPCA, which had not yet been tested in the courts.^{71}

Title II of the CAA provides a waiver for any state that could show it required alternative standards to meet compelling and extraordinary conditions, so long as the standards were consistent with the federal emission standards.^{72} The preemption provision represented a compromise between states and manufacturers: states wanting to preserve their role in regulating motor vehicles and manufacturers wanting to avoid economic disruption inherent in fifty different emissions standards.^{73} In this case, Vermont standards were identical to the California standards set forth in California’s AB 1493, which required the California Air Resources Board (“CARB”)^{74} to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles” no later than January 1, 2005.^{75}

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72. *Id.* at 303-04.
74. CARB is a statewide regulatory body that California law designates as “the air pollution control agency for all purposes set forth in federal law.” *CAL. HEALTH & SAFETY CODE* § 39602 (2010).
75. *CAL. HEALTH & SAFETY CODE* § 43018.5 (2010).
A similar case was brought by Central Valley Chrysler-Jeep against CARB in the Eastern District of California around the same time.\textsuperscript{76}

Both opinions were released after the Supreme Court decision in \textit{Massachusetts v. EPA}, which in part held that EPA's obligation to regulate carbon emissions was "wholly independent of DOT's mandate to promote energy efficiency."\textsuperscript{77} Although the standards were pending approval before the EPA, because California's AB 1493 fit within the statutory structure of the CAA and were pending approval for waiver under Title II, the courts refused to find the regulations preempted by the EPCA.\textsuperscript{78}

Similarly with the CAA, the EPCA preemption provision reads:

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.\textsuperscript{79}

The court concluded that the EPCA preemption provision must be "construed as narrowly as the plain language of the law permits,"\textsuperscript{80} and found that the regulations were "sufficiently unrelated to fuel economy standards."\textsuperscript{81}

Despite the initial success of engine manufacturers under the CAA, courts interpreted the preemption provisions of the CAA and the EPCA in a manner that balanced the traditional role of states in regulating motor vehicles and air quality against the efficiency of national uniform fuel economy standards. For the greater history of the EPCA, the only invested stakeholders appeared to be automobile manufacturers—this is because fuel economy standards are directed at manufacturers developing new vehicles for release into the United States marketplace. For that reason, standards must be released eighteen months before the beginning of the model year, to account for the research and

\begin{itemize}
\item \textsuperscript{76} See Cent. Valley Chrysler-Jeep, Inc. v. Goldstone, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).
\item \textsuperscript{77} Massachusetts \textit{v. EPA}, 549 U.S. 497, 532 (2007).
\item \textsuperscript{79} 49 U.S.C. § 32919(a) (2010).
\item \textsuperscript{80} \textit{Cent. Valley}, 529 F. Supp. 2d at 1175.
\item \textsuperscript{81} \textit{Green Mtn.}, 508 F. Supp. 2d at 398.
\end{itemize}
development time in designing and producing a new vehicle for a manufacturer's fleet. This provides full-line and limited-line manufacturers with the flexibility to respond to changing market and regulatory conditions. After Green Mountain and Central Valley, it seemed that unless state or local governments created mandatory obligations that fell outside the scope of the CAA and interfered with either the EPA's emission controls or NHTSA fuel economy standards, automobile manufacturers would not be successful in challenging state and local efforts to mitigate climate change.

B. A Summary and Critique of Service Industry Challenges Under the CAA and the ECPA

After more than thirty years of federalism-based stability, an unlikely group emerged and, for the first time, successfully challenged state and local green initiatives through the seldom-used EPCA preemption provision. In Boston, New York, Seattle, and later Dallas, taxicab service industry groups invoked the EPCA to protest state and municipal efforts to encourage green purchasing. In the Northeast, local governments were outraged that a 1975 law could be interpreted to preempt innovative efforts to promote hybrid taxicabs. But in the Northwest, a district court ruled that Congress could never have intended an absurd result and found that the preemption provision must be much more narrowly construed, particularly with respect to local matters, such as taxicab licensing and fee regulation. Because the courts found little assistance in their own circuits, they relied on the fact-specific narratives of each case to create a discussion about preemption and the EPCA. In order to understand the context of the courts' reasoning, a brief summary of preemption in the United States Supreme Court is required.

83. See Ass'n of Taxicab Operators v. City of Dallas, 2010 U.S. Dist. LEXIS 140240, at *11, *19 (N.D. Texas Aug. 30, 2010) (finding that CAA Sec. 209 preserves state and local authority over use and operations of vehicles, and that the local ordinance is a voluntary incentive program for purposes of the EPCA).
1. The United States Supreme Court's preemption analysis for "related to" preemption provisions.

Justice Souter wrote in 1995 that preemption turns on Congress' intent. The Court's analysis begins with the text of the provision and follows with the structure and purpose of the act as necessary. When the governing text is expansive and indeterminate, courts must examine the objectives of the statute as a guide to the scope of the state law that Congress understood would survive. Justice Thomas later explained that a "related to" provision yields a two-part inquiry: if a state or local law has either a (1) connection with or (2) reference to the federal subject matter, the state or local law is preempted. Under the first inquiry, the forbidden connection is revealed through an examination of the objectives of the federal statute—specifically, courts should look to (i) the scope of the federal law and (ii) the nature of the effect of the state law. Under the second inquiry, where a state's law "acts immediately and exclusively upon the subject matter," or where the existence of the federal subject matter is "essential to the law's operation . . . that reference will result in preemption.

2. Enforceable mandates and the elimination of consumer choice.

As in the City of Boston, the vast majority of leased taxicabs in New York are Crown Victoria, non-hybrid vehicles. The Crown Victoria models generally cost less than $10,000 and are often purchased from police department surpluses.

87. Id. at 656.
88. See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 324 (1997) (citation omitted). In a concurring opinion, Justice Scalia, joined by Justice Ginsburg, wrote that "related to" preemption provisions offer minimal clarity and are not meant to set forth "a test for pre-emption, but rather to identify the field in which ordinary field pre-emption applies." Id. at 336 (Scalia, J., concurring).
89. See id. at 325 (citing Travelers, 514 U.S. at 658-59).
90. Id.
averages thirteen miles per gallon. A hybrid vehicle, on the other hand, can cost nearly $30,000 after being customized to meet local taxicab regulations. This disparity in price leads most taxicab companies to purchase the cheaper but less efficient Crown Victoria vehicles for their fleet.

a. Metropolitan I.

In December 2007, New York City ("NYC" or "the City") issued rules requiring that new taxicabs put into service on or after October 1, 2008, achieve at least 25 city miles per gallon of fuel and that those put into service beginning on October 1, 2009, achieve 30 city miles per gallon ("25/30 Rules"). Although the 25/30 Rules did not explicitly require new vehicles to be hybrids, the only cars that would satisfy the 25/30 Rules would be vehicles with hybrid or clean diesel engines. And because taxis have a mandatory retirement of three to five years in NYC, "essentially all taxis in the City would be hybrids by 2012." Metropolitan Taxicab filed a complaint in federal district court claiming that the EPCA preempted the 25/30 Rules. The court agreed, finding that "[a] fair reading of the 25/30 Rules leads to but one conclusion: the rules set standards that relate to an average number of miles that New York City taxicabs must travel per gallon of gasoline." Notably, however, Judge Crotty did not find that the CAA preempted the 25/30 Rules. The decision was not appealed.

Although Judge Crotty found no preemption, a contrary legal conclusion might be warranted. Though the 25/30 Rules did not specify the emissions profile of a new vehicle, the direct relationship between carbon dioxide emissions and fuel efficiency could lead a court to find that the two characteristics are necessarily connected. Following the Supreme Court's reasoning in Engine Manufacturers Association, it is likely that such a necessary
connection would cause the regulations to be preempted under Section 209(a) of the CAA for compelling the purchase of certain vehicles with particular emission characteristics.

b. Metropolitan II.\textsuperscript{101}

Instead of appealing the ruling, NYC issued new rules that regulated taxicab “lease caps,” the maximum dollar amount per shift for which taxis can be leased out by the owner, to provide incentives for reduced fuel usage and cleaner taxis.\textsuperscript{102} Under the new rules, the lease caps for hybrid and clean diesel taxis are raised by $3 per shift but reduced for non-hybrid, non-clean diesel vehicles.\textsuperscript{103} The rules would lower the per shift lease caps by $4 on May 1, 2009; by $8 on May 1, 2010; and by $12 on May 1, 2011.\textsuperscript{104} Metropolitan Taxicab amended their initial complaint to challenge the new rules and again moved for a preliminary injunction, citing the preemption provisions of both the EPCA and the CAA.\textsuperscript{105} The district court held that the new rules were likely to be preempted by both the EPCA and the CAA.\textsuperscript{106}

In the district court’s opinion, Judge Crotty emphasized the economic impact of the rules. The City stressed that the rules were designed to shift the cost structure of the taxicab industry in New York to force taxicab companies to internalize some of the cost of fuel. That is, because drivers are normally responsible for pump station costs, the companies have minimal incentive to purchase fuel-efficient vehicles. With lower lease caps for non-hybrid and non-clean diesel vehicles, the companies would now be financially affected by their own purchasing choices. One of Metropolitan Taxicab’s experts testified that the result of the lowered lease cap would reduce profits by 65% to 75% for each non-hybrid or non-clean diesel vehicle.\textsuperscript{107} The City did not challenge the estimated impact, but confirmed that fleet owners could still make a


\textsuperscript{102} Id. at 89.

\textsuperscript{103} N.Y.C. TLC § 1-78(a)(3)(ii) (2010).

\textsuperscript{104} Id.

\textsuperscript{105} Metropolitan II, 633 F. Supp. 2d at 86-87.

\textsuperscript{106} Id. at 103-05.

"reasonable rate of return."

The court understood the City's argument to mean that "any rate structure that yields more than $1 in profit does not 'compel' or mandate a result," but disagreed and found that the "Lease Cap Rules do not present viable options for Fleet Owners; that they instead operate as an effective mandate to switch to hybrid vehicles."

Under the CAA, the Metropolitan II court explained that the clear and only purpose of the lease cap rules "is to affect taxicab emissions by mandating the purchase of 'cleaner vehicles.'" Relying again on the assumption that the incentive program is effectively a regulatory mandate, the court declared that the rules "directly affect the level of emissions." And because section 209(a) of the CAA "specifically reserves emissions regulation for new vehicles to the federal government," any state or local rules that are aimed at reducing emissions—including, according to the court, the lease cap rules—would be preempted.

Here, the court improperly relied on the extreme end of an incentive program: a rate structure that yields $1 in profit. Neither the City's experts nor Metropolitan Taxicab's experts testified that the rate structure yielded a mere $1 in profit—in fact, taxicab companies would net at minimum a 25% profit under the City's program—and instead made a ruling based on a hypothetical extreme. Even if the court could properly consider this hypothetical, a profit of $1 still provides a choice. The EPCA's preemption provision precludes, as under the CAA, only directly enforceable standards, that is, standards that leave no choice to the consumer. The CAA preemption provision explains that the only state or local rules preempted are those that "attempt to enforce any standard relating to the control of emissions." The lease cap rules neither command nor control the development or manufacture of any motor vehicle emissions standard and certainly do not create an enforceable emissions profile. Justice Scalia even noted in Engine Manufacturers that "[v]oluntary programs . . . are significantly different from command-and-control regulation.

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108. Id. at 155.
110. Id.
111. Id. at 104.
112. Id. at 105.
113. Id.
Suffice it to say that nothing in the present opinion necessarily entails preemption of voluntary programs."115 Unlike with a mandatory purchasing scheme, voluntary incentive packages do not entail an enforceability component; that is, the purchaser’s right to buy remains intact.116 Here, the City could not compel any taxicab companies to purchase a hybrid vehicle: that choice remained an exercise of business judgment.

c. Ophir v. Boston.117

As in NYC, the City of Boston created a voluntary incentive program to promote hybrid vehicles called CleanAir Cabs.118 The program contained several financial incentives to encourage hybrid taxicab use. However, Boston did not obtain the results it desired.119 The city had hoped for at least one hundred new hybrid taxicabs, and after eighteen months, only thirty-two had been purchased.120 By August 2008, the plan was abandoned and Boston imposed mandatory purchasing rules.121

The Boston Taxi Owners Association quickly challenged the clean taxi mandate. Akin to the 25/30 Rules in Metropolitan I, Boston’s Rule 403 required “[e]very vehicle put into service as a taxi as of August 29, 2008, [to] be a new Clean Taxi vehicle . . .”122 This rule, the court found, unduly limits consumer choice.123 In doing so, the court referred to one of the four factors the NHTSA considers in setting fuel economy standards: economic practicability.

Through rulemaking, NHTSA interprets economic practicability to mean “standards should not be so stringent as to create ‘adverse economic consequences, such as an significant loss

116. See, e.g., id. at 255.
119. See Bierman & Collette, supra note 91, at B2.
120. Id.
122. Ophir, 647 F. Supp. at 87-88 (citing BOSTON, MASS. POLICE DEP’T RULE 403, § 3, II(a) (2010)).
123. Id. at 93-94.
of jobs or the unreasonable elimination of consumer choice.”

The court explained that a state or local government could not dictate consumer choices, even if the class of purchasers was small, because “if one State or [local government] may enact such rules, then so may any other; and the end result would undo Congress’s carefully calibrated regulatory scheme.” And because NHTSA might consider consumer choice as a quality of one of the four balancing factors which it weighs in setting fuel economy standards, the court believed that any state or local regulation that so heavily directs consumer choice must be preempted.

Though the Ophir court found both Metropolitan I and Metropolitan II to be persuasive authority, the decision rests on factual similarities to Metropolitan I: New York City’s 25/30 Rules and Boston’s Rule 403 both unquestionably restrict consumer choice and are mandatory programs. Whether the mandatory programs are sufficiently related to fuel economy standards is an impact inquiry and will be discussed in a section infra. It remains to be answered whether the court would have reached a similar conclusion under Boston’s originally enacted voluntary CleanAir Cabs program.

3. Voluntary incentives: Green Alliance v. King County.

The court in Green Alliance faced a different regulatory plan than the programs in New York and Massachusetts. Here, King County capped the total number of taxicab licenses available in the county, but allowed new licenses to be recycled from a pool of previously issued licenses, unless the County determines “that there is a demand for additional taxi service.” If a greater demand is determined, the executive services director “may issue all or a portion of those [pooled] licenses through a request for proposals [“RFP”] process designed to test alternatives to the current local taxi industry model.” The RFP issued on March 6, 2008, targeted new taxicab licensees in the county and required

125. Id. at 94 (quoting Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255 (2004)).
126. Id. at 93.
128. KING COUNTY, WASH. CODE § 6.64.700(B) (2010).
129. Id. § 6.64.700(C)(2).
that the selected taxicab association agree to utilize hybrid electric vehicles “with a minimum rating of 40 miles per gallon in the city.”\textsuperscript{130} Green Cab was selected to receive the licenses issued under the RFP.\textsuperscript{131} Green Alliance and the Seattle Taxi Owners Association filed a lawsuit, requesting that the court invalidate the fuel efficiency requirements set forth in Rule LIC 8-3, as preempted by the EPCA.\textsuperscript{132}

In contrast to the regulatory mandates in the Northeast, the court found that King County implemented a voluntary incentive program, which “allows entities to opt in to a licensing program and adopt its requirements.”\textsuperscript{133} The court explained that “a rule incentivizing the purchase or use of hybrid vehicles is legitimate as long as it does not compel or bind parties to a particular choice,” and concluded that the EPCA did not apply.\textsuperscript{134} Moreover, the court seemed to suggest that the King County program had a \textit{de minimis} impact, “involving the issuance of a mere 50 taxicab licenses.”\textsuperscript{135}

4. \textit{Formulaic textualism: Metropolitan II in the Second Circuit.}

After Judge Crotty granted the preliminary injunction against NYC’s lease cap rules, the City sought review in the Second Circuit. In just four pages, the Second Circuit rejected the reasoning from the district court and held that the distinction between hybrid and non-hybrid vehicles essentially targets fuel economy standards and was therefore plainly “within the scope of the EPCA preemption provision.”\textsuperscript{156} The reviewing court found Judge Crotty’s attention to the economic impact of the rules to be misguided. Instead, the court discerned that NYC’s new rules are virtually a “complete overlap of the approved vehicles under the 25/30 MPG rule” and that under the City’s regulatory plan, hybrid is “simply a proxy for

\textsuperscript{130} Green Alliance Taxi Cab Ass’n, Inc. v. King County, No. C08-1048RAJ, 2010 WL 2643369, at *3 (W.D. Wash. June 29, 2010) (quoting King County Admin. Rule, LIC 8-3 § 6.4.4).

\textsuperscript{131} Id. at *2.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at *5.

\textsuperscript{134} Id. at *13-14 (referring to Metropolitan II, 633 F. Supp. 2d at 93) (noting that a preemption analysis is irrelevant if a particular rule is not a mandate because the rule “is not forcing [the regulated parties] to take any new action – much less a potentially preempted action”).

\textsuperscript{135} Id. at *5.

\textsuperscript{136} Metropolitan Appeal, 615 F.3d at 158.
WHO KILLED THE HYBRID CAR?

In short, the new rules "rely on fuel economy, and on nothing else, as the criterion for determining the applicable lease cap." The Second Circuit affirmed the district court's preliminary injunction and did not reach the preemption provision of the CAA.

Although the court correctly began with the EPCA's preemption language, the preemption language is ambiguous and unhelpful. Congress clearly intended to use expansive language, but "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for 'really, universally, relations stop nowhere.'" As stated above, in order for a state law to "relate to" the subject matter of the federal act, there must be some tangible connection with or impermissible reference to the preempted subject matter. As discussed further infra, the Second Circuit failed to follow through with either of these inquiries.

More fundamentally, the Second Circuit court misunderstood the subject matter that section 32919(a) was designed to preempt: fuel economy standards and not simply fuel efficiency. Before any court could properly determine the scope of the "related to" language, the court must properly understand the subject matter that is regulated under the EPCA. Here, Congress did not leave that undefined. Congress defined the average fuel economy standard as the "performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." Fuel economy is defined as the "average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator under section 32904(c) of this title." Section 32904 refers to the methods and procedures for calculating the average fuel economy standard, wherein the standard is prescribed for the manufacturer of a model. Thus, under an appropriate interpretation of the scope of section 32919(a), in order for a state or local regulation to relate to fuel economy standards or average

137. Id.
138. Id.
141. Id. § 32901(a)(11)
142. See id. § 32904(c).
fuel economy standards, it should somehow relate to the testing and calculation procedures involved in setting standards for automobile fleets produced by a manufacturer in that model year. A state or local regulation that draws a distinction in the consumer market between vehicles with greater or lesser fuel-efficiency has little, if any, bearing on the NHTSA's process of calculating fuel economy standards for automobile manufacturers. Thus, the appropriate inquiry under the EPCA's preemption provision is whether a state or local regulation is related to performance standards specifying a minimum level of average miles traveled by an automobile as determined by the Administrator applicable to a manufacturer in a model year. If the state or local regulation does not relate to the Administrator's determination, the regulation is not preempted by the EPCA.

Moreover, the impact of a de facto mandate only remotely affects the future consumer market for fuel-efficient vehicles, which is just one criteria that NHTSA may consider. The United States filed an amicus brief with the Second Circuit on behalf of the EPA and the DOT, stating that the lease cap rules "are not likely to have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers." The rules merely target the cost considerations that underlie vehicle-purchasing decisions of a small percentage of the overall taxicab market in New York City. They do not require any particular decision.

But even if the court were to accept that regulatory mandates, if aggregated across the country, could potentially impact the NHTSA's economic analysis, a voluntary incentive program that leaves two profitable choices is not a de facto mandate. Ultimately, the purchaser still has a right to buy. The City has not usurped that right by mandating a particular option, but merely attempts to encourage a greener choice, while leaving two profitable outcomes. Through restructuring the relationship between taxicab owners and taxicab drivers, the City simply pushes the industry to internalize the direct costs of a purchasing decision. This restructuring bears no relationship to the automobile

143. See id. § 32919(a).
145. See id. at 14.
manufacturing industry, nor does it interfere with the NHTSA's duty to set fuel economy standards.

The court also erroneously believed that NYC's technological distinction was "simply a proxy for 'greater fuel efficiency,'"\textsuperscript{146} which the court conflates with fuel economy standards. Though dual engine technology often correlates with a particular vehicle's fuel efficiency, of the eleven SUV-hybrids that were available in 2010 and had listed combined miles per gallon, only three models achieved a minimum 30 miles per gallon and six had a combined rating below 25 miles per gallon.\textsuperscript{147} It cannot be said that the technological distinction necessarily stands in for greater fuel efficiency because seven SUV-hybrids available in 2010 could not satisfy the 25/30 Rules of 2007, which the court found so problematic.

Because a mere handful of district courts have discussed the preemption provision of the EPCA, the Second Circuit's fundamental errors and misconceptions have the potential to echo across the country. Of course, other district courts and circuits may reject the Second Circuit's reasoning, but an eventual circuit split could ultimately lead to argument before the Supreme Court.

V. THE FUTURE OF LOCAL GREEN INITIATIVES

On November 5, 2010, NYC filed a petition for a writ of certiorari to correct the Second Circuit's reading of the EPCA's preemption provision and to protect state and local government green vehicle incentive programs. Although the certiorari was ultimately denied, below are the arguments presented in the petition.

A. NYC's Petition for Certiorari

On writ of certiorari to the Supreme Court, NYC challenged the Second Circuit's determination that Congress intended to preempt state and local governments from adopting incentive programs to promote the purchase of fuel-efficient vehicles.\textsuperscript{148}

\textsuperscript{146} Metropolitan Appeal, 615 F.3d at 158.


First, NYC argued that the Second Circuit incorrectly applied the Supreme Court's preemption analysis by ignoring the express purpose and legislative history of the EPCA and failing to discuss the Supreme Court's line of "forbidden connections" cases. Second, NYC argued that the decision frustrates the intent of Congress and endangers hundreds of state and local fuel-efficient vehicle incentive programs.

1. The Second Circuit's preemption analysis is inconsistent with the preemption jurisprudence of the Supreme Court.

NYC asserted that the Second Circuit "erred by failing to consider the structure, purpose and history of the statute in order to determine what Congress intended the reach of the EPCA preemption provision to be." In reading the EPCA, NYC argued that the preemption provision permits regulations that do not set fuel economy standards and that do not interfere with federal regulation of the average fuel economy of automobile manufactures. This reading is consistent with the intent of the EPCA to "preempt state regulation of fuel economy standards so that automobile manufactures would not be required to comply with myriad differing standards." The Second Circuit's reading of the provision, conversely, casts too wide a net into a field which the states have long occupied: the regulation of lease rates for taxicab vehicles.

To determine the limits of the EPCA preemption provision, NYC pointed to the Supreme Court's line of "forbidden connection" cases, which the Second Circuit largely ignored. Essentially, the "forbidden connection" cases "draw[] a clear distinction between state laws that act as incentives and those that are actual or de facto mandates." The cited cases address a similar "related to" preemption provision in the Employee Retirement

149. See id. at 9-20.
150. See id. at 20-28.
151. Brief for Petitioner-Appellant at 10, Metropolitan Appeal, 615 F.3d 152 (2d Cir. 2010).
152. See id. at 14.
153. Id. at 8-9.
Income Security Act ("ERISA") context, under which "meaningful alternative[s]" that do not "dictate the choices" or "bind[]" ERISA plan administrators" preserve the existing structure of ERISA and are not preempted.\textsuperscript{155} Here, NYC argued that although the district court addressed the distinction between voluntary incentive programs and legislative mandates, it incorrectly concluded that the hybrid rules operated as a \textit{de facto} mandate to purchase new hybrid vehicles; moreover, the Second Circuit ignored the distinction altogether and should have reached the issue.

\textbf{a. Additional arguments against preemption.}

The City could also have challenged the Second Circuit's holding under the second prong of Justice Thomas' test. Under that prong, where a state's law acts "immediately and exclusively" upon the subject matter, or where the existence of the federal subject matter is "essential to the law's operation . . . that 'reference' will result in preemption."\textsuperscript{156} An impermissible reference seems to be the underlying rationale for the Second Circuit's finding that NYC's lease cap rules are preempted by the EPCA, that is, the NYC rules rely on CAFE standards to be enforceable, despite the argument that hybrid engine technologies do not rely on precisely calculated fuel economy standards.\textsuperscript{157} Nevertheless, through both prongs of the test, a reviewing court must be wary to extend the "related to" limiting term to its indefinite extreme.\textsuperscript{158} As with the forbidden connection line of cases, the impermissible reference inquiry requires a meaningful relationship with the preempted subject matter.\textsuperscript{159}

It could be argued that the 25/30 Rules impermissibly rely on fuel economy standards because the existence of a fuel economy standard is essential to carrying out the City's Rules. That is, unless NHTSA sets fuel standards for automobiles, the City might not be able to identify which vehicles satisfy its own conditions. However, the hybrid/non-hybrid distinction found within the lease cap rules requires no such federal action. As introduced above, referring to a vehicle's engine technology is not a proxy for fuel economy standards. Restructuring the owner/driver relationship in the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} See \textit{id.} at 17-19 (citations omitted).
\item \textsuperscript{156} \textit{Dillingham}, 519 U.S. at 325 (citations omitted).
\item \textsuperscript{157} See \textit{Metropolitan Appeal} at 156-57.
\item \textsuperscript{158} \textit{Travelers}, 514 U.S. at 655.
\item \textsuperscript{159} \textit{id.} at 661; \textit{Dillingham}, 519 U.S. at 325.
\end{itemize}
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taxicab industry neither immediately nor exclusively acts on the NHTSA’s role in setting fuel economy standards, nor is a fuel economy standard essential to the lease cap rule’s operation. Simply put, the lease cap rules make no reference to fuel economy standards or average fuel economy standards, let alone an impermissible reference that would result in federal preemption. In fact, Congress actively promotes and supports state and local programs designed to promote fuel-efficient vehicles.

b. Congress acknowledges and supports state and local incentive programs that promote fuel-efficient vehicles.

Postdating the 1975 enactment of the EPCA, Congress passed the Energy Policy Act of 1992,160 the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”),161 and the Consumer Assistance to Recycle and Save Program of 2009 (“CARS” or “Cash for Clunkers”).162 The passage of these acts explicitly demonstrates Congress’ continued recognition and support of state and local efforts to promote fuel-efficient vehicles.163 Moreover, in recognition of the importance of cutting greenhouse gas emissions, state and local governments have even partnered with federal agencies to build incentive programs. For example, the United States Department of Energy tracks incentive programs in the various states and “provides a factsheet designed to help cities adopt successful ‘green taxi’ programs,” even encouraging lease rate incentives for hybrid vehicles.164 As a result of federal encouragement, many state and local governments have begun promoting fuel-efficient vehicle use by developing consumer incentive programs, all of which are now at risk because of the Second Circuit’s broad interpretation of the preemption provision of the EPCA.

2. Shutting down our laboratories of innovation.

The Supreme Court has recognized that the Supremacy Clause may entail preemption of state or local law either by express

163. Brief for Petitioner-Appellant at 21, Metropolitan Appeal, 615 F.3d 152 (2d Cir. 2010).
164. Id. at 28.
provision, by implication, or by a conflict between federal and state law.\(^{165}\) And where Congress derogates state regulation, the analysis begins with the presumption that Congress does not intend to supplant state law, "particularly in those [cases] in which Congress has ‘legislated ... in a field which the States have traditionally occupied.’"\(^{166}\) The Court works 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."\(^{167}\)

Local governments have traditionally regulated the networks of transportation within their boundaries in order to protect the general health, safety, and welfare of their citizens.\(^{168}\) They manage transportation to ease mobility and promote efficiency, safety, and air quality.\(^{169}\) Each city is a complex system that requires flexibility in providing innovative solutions for each set of problems. New York adopted its lease cap rules to correct the "structural problem with the standard vehicle lease arrangement that artificially insulated fleet owners from fuel costs,"\(^{170}\) the effect of which may encourage some taxicab companies to purchase more fuel-efficient vehicles. Local governments encourage greener and cleaner vehicles through a variety of plans, including tax incentives, sales rebates, parking incentives, high-occupancy vehicle lane exemptions, and a host of other incentives.\(^{171}\) In order to preserve that flexibility, state and local governments must have some degree of certainty before undertaking new programs. Without the regulatory space for experimentation, innovation may be shut down altogether.


\(^{169}\)See City of Chicago et al. as Amici Curiae Supporting Petitioners, Metropolitan Appeal petition for cert. at 20.

\(^{170}\) Brief for Petitioner-Appellant at 4, Metropolitan Appeal, 615 F.3d 152 (2d Cir. 2010).

\(^{171}\) See id. at 24-27.
Several local governments, including Boston, Dallas, and Seattle have been sued for similar taxicab regulations, which promote hybrid or electric vehicles. And many others are considering a variety of creative solutions to reducing our country’s dependence on fossil fuels, which contribute to greenhouse gas emissions and threaten national security. For example, the City of Chicago charges a higher license fee for residents who own larger passenger vehicles. Portland works with local utilities and automobile manufacturers to promote electric vehicles, notably by installing charging infrastructure throughout the region and adopting some exclusively electric vehicle parking spaces in the city streets. The Philadelphia Parking Authority’s rules for taxicab age parameters and taxicab mileage parameters carve out separate requirements for hybrid vehicles. And Salt Lake City offers free parking at city meters for low-emission and fuel-efficient vehicles.

Because virtually every green vehicle incentive program draws distinctions based on technological characteristics of an automobile, or relates in some way to a vehicle’s fuel efficiency, adopting the Second Circuit’s holding would nullify hundreds of state and local rules and regulations around the country. In fact, on November 19, 2010, the Minneapolis City Council unanimously passed a resolution to halt the enforcement of its taxicab fuel efficiency requirements found in Minneapolis Code of Ordinance § 341.300 in light of the Second Circuit’s decision and has been unable to pursue new regulations aimed at incentivizing the utilization of fuel efficient and environmentally sustainable taxicabs. Even in Seattle, where the district court found the

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172. See infra IV.B.
174. See CHI., ILL., MUNICIPAL CODE § 3-56-050 (2010).
177. See SALT LAKE CITY, UTAH, CODE § 12.56.205 (2011).
hybrid licensing program was not preempted by the EPCA, the 2008 ordinance authorizing rules mandating vehicle size, fuel efficiency, and emissions requirements for new taxicabs has not been adopted in light of the new ruling.\footnote{179}

Broadly holding that mere reference to a vehicle’s environmental attributes is enough for federal preemption endangers the EPCA’s goal for encouraging innovation. With respect to local transportation and local air quality, state and local autonomy matters; experiments are needed and encouraged, not only to address local problems, but also to educate other governments about working solutions.

VI. CONCLUSION

Nothing in the language of the EPCA or the historical context of its passage indicates that Congress chose to displace the regulation of taxicab licensing and lease fee caps, which, historically, has been a matter of local concern. To read the preemption provision as displacing all state and local laws affecting consumer choice for greener and cleaner vehicles on the theory that they indirectly relate to fuel economy standards would effectively read the limiting language of section 32919(a) out of the statute, and violate basic principles of statutory interpretation. “Preemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with [the subject matter of federal regulation], as is the case with many laws of general applicability.”\footnote{180}

Adopting a broad and absolute interpretation of section 32919(a) endangers hundreds of state and local incentive programs aimed at encouraging consumers to purchase greener and cleaner vehicles with only a tenuous relationship to NHTSA’s authority to set fuel economy standards. Particularly, the hybrid vehicle is particularly vulnerable because the car’s unique dual engine system popularly suggests greater fuel efficiency. The Second Circuit’s expansive ruling ignores the functional roles of the federal and local governments preserved by the CAA and the


EPCA, and discourages local governments from "try[ing] novel social and economic experiments without risk to the rest of the country,"181 placing countless laboratories for innovation at risk of shutting down.