No. 10-

IN THE
Supreme Court of the United States

CITY OF NEW YORK, et al.,

Petitioners,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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November 5, 2010

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QUESTION PRESENTED

By making the Energy Policy and Conservation Act the only statutory mechanism for establishing fuel economy standards, did Congress intend to preempt state and local governments from adopting incentive programs to promote the purchase of fuel-efficient vehicles?

LIST OF PARTIES

In the United States Court of Appeals the plaintiffs-appellees were the 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. The defendants-appellants were the 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.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

Page

STATUTES

Cited Authorities

PROPOSED LEGISLATION

OTHER CITED AUTHORITIES

Cited Authorities

OPINION BELOW

The decision of the Second Circuit Court of Appeals is reported at 615 F.3d 152 (2d Cir. 2010) and is reprinted in the Appendix ("App.") at 1a-13a. The district court's decision is reported at 633 F. Supp. 2d 83 (S.D.N.Y. 2009), and is reprinted at App. 14a-65a.

BASIS FOR JURISDICTION

The Second Circuit Court of Appeals rendered its decision on July 27, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2010).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

49 U.S.C. § 32919 (2010) (Energy Policy and Conservation Act ("EPCA"))

> (a) General. When an average fuel economy standard prescribed under this chapter [49 USCS §§ 32901 et seq.] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter [49 USCS §§ 32901 *et seq.*].

35 Rules of the City of New York § 1-78(a)(3) (2009)

> (ii) For a vehicle that is hacked up pursuant to section 3-03 of this title, excluding

> section 3-03(c)(10) of this title [i.e., excluding hybrid electric and clean diesel vehicles], the Standard Lease Cap shall be adjusted downward by $4 per shift ($28 per week) beginning on May 1, 2009, by $8 per shift ($56 per week) beginning on May 1, 2010, and by $12 per shift ($84 per week) beginning on May 1, 2011.

STATEMENT OF THE CASE

A. Regulatory Framework.

This litigation concerns the City of New York's proper exercise of its police powers to amend its taxicab lease rate regulations to promote the purchase of clean, fuel-efficient taxicabs.

1. The City of New York's Taxicab Regulations.

The City of New York ("the City") extensively regulated the operation of taxicabs for decades prior to the passage of the EPCA in 1975. New York City taxicab regulations have long restricted vehicle choices and equipment, with a consequent impact on the overall fuel economy of taxi fleets. In addition, the City has also long regulated the economic relationship between taxicab fleet owners and drivers, including the lease rates that fleet owners may charge for the use of their vehicles.

In December 2007, the City enacted rules that required new taxicabs, except those that are wheelchair accessible, put in service beginning on October 1, 2008, to achieve at least 25 City miles per gallon, and those

put in service beginning October 1, 2009, to achieve at least 30 City miles per gallon ("25/30 MPG Rules"). 35 Rules of the City of New York ("R.C.N.Y.") § 3.03(c)(10)-(11) (repealed 2009). The only vehicles that met the 25/30 MPG Rules contained hybrid or clean-diesel engines. The Metropolitan Taxicab Board of Trade ("MTBOT") successfully challenged the 25/30 MPG Rules in district court and the rules were enjoined. *See Metro. Taxicab Bd. of Trade v. City of New York,* 08-cv-7837 (PAC), 2008 U.S. Dist. LEXIS 94021 (S.D.N.Y. Oct. 31, 2008) (*MTBOT I*). The City responded by rescinding the 25/30 MPG Rules. Joint Appendix ("JA") at 502, *Metro. Taxicab Bd. of Trade v. City of New York,* 615 F.3d 152 (2d Cir. 2010) (No. 09-2901) (*MTBOT II*).

On March 26, 2009, the City enacted new regulations, 35 R.C.N.Y. § 1-78(a)(3) (the "Lease Cap Rules" or "Rules"), to create incentives for the purchase of hybrid electric and clean diesel taxicabs. The Rules permit owners of medallions used for hybrid electric taxicabs and clean diesel taxicabs to charge $3.00 per 12-hour shift more than the maximum allowable standard lease rates and limit owners of non-hybrid taxicabs, after a phase-in period of two years, to charging $12.00 per shift less than the maximum allowable lease rate, while leaving the lease rates for accessible vehicles unchanged. *See* 35 R.C.N.Y. § 1-78(a). The $3.00 per shift upward lease cap adjustment represents the additional cost to owners to purchase and modify a hybrid vehicle (compared to a non-hybrid vehicle), spread out over the three year life of the vehicle. *See* JA505. The $12.00 per shift downward lease cap adjustment represents an estimated $15.00 per shift average difference in fuel costs between a non-hybrid

and a hybrid vehicle ($15.00 offset from the $3.00 upward adjustment results in a $12.00 downward adjustment). *See* JA507. The $12.00 adjustment has the effect of placing 80 percent of the differential cost of fuel per shift between hybrids and non-hybrids on vehicle owners who lease out their vehicles (such as MTBOT), while also helping to equalize total per shift driver expenses as between drivers who lease hybrids and those who lease non-hybrid vehicles. *See* JA505-06, 519.

The City enacted these new rules in order to correct a structural problem with the standard vehicle lease arrangement that artificially insulates fleet owners from fuel costs and creates a disincentive for the purchase of hybrid vehicles. The previous regulatory scheme had for years required fleet owners to purchase large sedans and, more recently to purchase only Ford Crown Victorias. Even after the City permitted hybrid vehicles as an alternative, the leasing rules insulated fleet owners from the significant economic consequences of their decisions to continue purchasing Crown Victorias because drivers, rather than fleet owners, bear the cost of fuel. The new rules were intended to address the economic and environmental consequences that arose out of the existing lease rate structure. In amending the lease rates to differentiate between hybrid and non-hybrid vehicles, the City restructured the allocation of costs between taxicab fleet owners and taxicab drivers so that drivers would not bear the costs of the fleet owners' vehicle purchase decisions and so that fleet owners would have an incentive to purchase hybrid vehicles. These Rules neither set fuel economy standards nor interfere with federal regulation of the average fuel economy of automobile manufacturers such

that they would fall within the scope of the preemption provision in the EPCA.

2. The Energy Policy and Conservation Act.

Congress enacted the EPCA to address the energy crisis resulting from the 1973 Mideast oil embargo. *See* H.R. Rep. No. 94-340, at 1-3 (1975), as reprinted in 1975 U.S.C.C.A.N. 1762, 1763-65. The goals of the EPCA are to improve motor vehicle efficiency and to "decrease dependence on foreign [oil] imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94-516, at 117 (1975) (Conf. Rep.), as reprinted in 1975 U.S.C.C.A.N. 1956, 1957; *see also Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 305-06 (D. Vt. 2007). The United States Department of Transportation ("DOT") is charged with establishing federal fuel economy standards on a fleet-wide basis. *See* 49 U.S.C. §§ 32902(a), 32902(c). These average standards are known as "corporate average fuel economy" or "CAFE" standards. The CAFE standard is "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6). The Secretary of Transportation has delegated administration of the CAFE program to the National Highway Transportation and Safety Administration ("NHTSA"), an operating administration of DOT. *See* 49 C.F.R. §§ 1.50(f), 501.2(a)(8).

The EPCA contains an express preemption clause preempting states and localities from adopting or

enforcing laws or regulations related to fuel economy standards or average fuel economy standards. 49 U.S.C. § 32919(a). Pursuant to this preemption provision, Congress made the setting of fuel economy standards exclusively a federal concern. *Id.*

B. Proceedings Below.

In September 2008, Metropolitan Taxicab Board of Trade, et al. moved to enjoin the City's 25/30 MPG Rules, arguing that these rules were preempted by the EPCA and the Clean Air Act ("CAA"). On October 31, 2008, the District Court, Southern District of New York (Crotty, U.S.D.J.) found that the EPCA preempted the 25/30 MPG Rules because the rules, by their own language, clearly related to fuel economy standards by setting fuel economy standards for taxicabs. *See MTBOT I*, 2008 U.S. Dist. LEXIS 94021, at *27-28. On March 26, 2009, the City rescinded the 25/30 MPG Rules and enacted the challenged Lease Cap Rules. JA502.

On April 17, 2009, MTBOT filed an amended complaint in the district court alleging that the Lease Cap Rules are preempted by the EPCA and the CAA because the Rules are essentially a mandate to purchase vehicles with a certain MPG or emissions rating. *See* JA11. MTBOT also brought a motion for a preliminary injunction to enjoin the City's enforcement of the Rules. *See* JA18-19.

The district court held oral argument on MTBOT's motion on May 7, 2009, and then held an evidentiary hearing on May 20, 2009, to determine whether the economic effect of the Lease Cap Rules on fleet owners

would force them to purchase hybrid vehicles. *See* JA12-13. By Decision and Order, dated June 22, 2009, the District Court, Southern District of New York (Crotty, U.S.D.J.) found that the Lease Cap Rules are a *de facto* mandate requiring the plaintiffs to purchase hybrid vehicles and found such a mandate to be related to both fuel economy standards and the reduction of vehicle emissions, and thus sufficiently likely to be preempted under the EPCA and the CAA so as to warrant a preliminary injunction. App. 65a.

The United States Court of Appeals for the Second Circuit affirmed. App. 13a. The Court of Appeals limited its analysis of the scope of the EPCA's express preemption provision to the text of the statute. App. 8a-12a. The Court of Appeals explained that the "related to" language in the preemption provision is expansive and includes any law that contains a reference to the preempted subject mater or makes the existence of the preempted subject matter essential to the law's operation. App. 8a-9a. Applying this definition of "related to," the Court of Appeals concluded that the Rules "relate to" fuel economy standards because, in distinguishing between hybrid and non-hybrid vehicles, the Lease Cap Rules, in effect, rely on fuel economy, and on nothing else, as the criterion for determining the applicable lease cap. App. 9a-11a. The Court held that, because the Rules are based expressly on the fuel economy of a leased vehicle, they are preempted by the EPCA. App. 12a. The Court of Appeals did not reach the question of whether the preemption provision of the CAA would invalidate the City's new rules. App. 12a. Nor did the Court address the arguments set forth in the amicus brief filed by the United States.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision has devastating and far-reaching effects on the ability of states and municipalities to exercise their historic police powers to promote the use of clean, fuel-efficient vehicles. The Court of Appeals held that the EPCA preempts the exercise of New York City's police power regulation of the taxicab industry whenever the regulations expressly rely on a distinction between hybrid and non-hybrid vehicles. By finding that, in the City's taxicab lease rate regulations, "'hybrid' is simply a proxy for 'greater fuel efficiency,'" the Court of Appeals concluded that the regulations are "related to" fuel economy standards and are thus preempted by the EPCA. The decision places at risk of preemption countless state and local laws that provide incentives for the purchase and use of hybrid and other fuel-efficient vehicles, incentives that do not impinge on Congress' intent to make the setting of fuel economy standards exclusively a federal concern.

The environmental and health benefits of "clean" vehicle use are beyond debate. Moreover, Congress has encouraged states to undertake their own conservation programs to reduce energy consumption and has specifically enacted laws supporting state and local incentives promoting the purchase of hybrid or fuel-efficient vehicles. Yet the decision of the Court of Appeals now imperils such state and local efforts.

The Court of Appeals' decision is wrong and fails to follow established precedents of this Court. The EPCA was intended to preempt state regulation of fuel economy standards so that automobile manufacturers

would not be required to comply with myriad differing standards. There is no evidence that Congress intended preemption of local taxicab regulations that may influence a fleet owner's decision to purchase a certain type of vehicle. The Court of Appeals' overbroad reading of the "related to" language in the EPCA preemption provision ignores this Court's practical interpretation of this phrase and results in the erroneous displacement of state law. Despite this Court's attempts to clarify the analysis of "related to" preemption language, the Court of Appeals' interpretation of the EPCA preemption provision conflicts with the framework of analysis employed by the Fourth, Sixth, and Ninth Circuit Courts of Appeals and demonstrates confusion as to the applicable standard, or a degree of non-adherence with this Court's jurisprudence that should not be tolerated by this Court. Accordingly, this Court should grant *certiorari* and reverse the erroneous decision of the Court of Appeals.

A. The Court of Appeals' Preemption Analysis Is Incorrect and Is Inconsistent with the Preemption Jurisprudence of this Court.

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, __ U.S. __, 129 S. Ct. 1187, 1194 (2009). "In all pre-emption cases," courts start with the assumption that federal law cannot supersede historic state powers "unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194-95. To determine whether Congress clearly and manifestly intended to preempt state law, courts must consider the language, structure, purpose and history of the relevant federal

statute. *See, e.g., Altria Group, Inc. v. Good*, __ U.S. __, 129 S. Ct. 538, 543 (2008).

1. The Court of Appeals Failed to Properly Examine Congressional Intent as a Guide to the EPCA Preemption Provision's Reach.

In analyzing the scope of the preemption provision in the EPCA, the Court of Appeals 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. *See Altria*, 129 S. Ct. at 543 ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."). The Court of Appeals was required to consider both the objectives of the EPCA and the nature of the effect of the Lease Cap Rules on fuel economy standards in order to determine whether the Rules are "related to" fuel economy standards, as Congress intended that phrase to be read in the EPCA. *See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325 (1997) (to determine whether state law has forbidden connection to preempted subject matter, court looks to objectives of federal statute as guide to scope of state law that Congress understood would survive, as well as to nature of effect of state law on preempted subject matter). By examining only the text of the provision in question, the Court of Appeals reached an overbroad interpretation of "related to" that conflicts with this Court's holdings and violates the federalism safeguards that protect state sovereignty.

This Court has repeatedly instructed that, in interpreting a statutory provision that expressly preempts state law, the analysis begins with the presumption against preemption. *See Altria*, 129 S. Ct. at 543; *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (all decided on express preemption grounds). This principle applies "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied.'" *Wyeth*, 129 S. Ct. at 1194 (citations omitted). It applies to both the "'question whether Congress intended any pre-emption at all' and to 'questions concerning the scope of intended invalidation of state law.'" *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260-61 (2004) (Souter, J., dissenting) (citing *Medtronic*, 518 U.S. at 485).

Here, the field of regulation is taxicab services, a traditionally local matter. *See Buck v. California*, 343 U.S. 99, 102 (1952) (operation of taxicabs is local business, which Congress has left largely to the states). The regulations at issue here regulate taxicab lease rates and do not impose general requirements concerning fuel economy for vehicles either sold or purchased in New York City. The Rules change the existing schedule of lease rates in order to remove disincentives for the purchase of hybrid vehicles. The fact that the Lease Cap Rules create incentives for the purchase of hybrid vehicles does not convert the Rules into a preempted regulation of fuel economy standards. Because the regulation of taxicab services is a traditionally local matter, the Court of Appeals' analysis of the scope of

the EPCA preemption provision should have begun 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." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In enacting the EPCA, the clear and manifest purpose of Congress was to make the regulation of motor vehicle fuel economy standards the exclusive province of the federal government through establishment of the federal CAFE program. *See* 49 U.S.C. §§ 32,901-32,919 (2010). Congress established national uniformity as an important goal of the EPCA because myriad different fuel economy standards would impose a tremendous hardship on the automotive industry. *See* 49 U.S.C. § 32919(a) (preempting any state law or regulation related to fuel economy standards or average fuel economy standards). The evil that Congress sought to avoid was "any manufacturer being required to comply with differing State and local regulations with respect to automobile or light-duty truck fuel economy." S. Rep. No. 94-179, at 25 (1975) (internal quotation marks omitted). Congress did not enact the EPCA preemption provision in order to prevent local regulators from establishing incentive programs designed to encourage the purchase of commercially available hybrid and clean diesel taxicabs. "Neither before or since the enactment of the EPCA has Congress sought to bring the taxicab industry under federal regulatory control." Brief for the United States as Amicus Curiae at 11, *MTBOT II*, 615 F.3d 152 (2d Cir. 2010) (No. 09-2901). Because Congress did not clearly and manifestly express an intent to preempt local

taxicab regulations, the Court of Appeals erred in failing to apply the presumption against preemption in this case. *See Cipollone*, 505 U.S. at 516-17 (using presumption against preemption to support a narrow interpretation of an express preemption provision).

Not only does the decision of the Court of Appeals fail to apply the presumption against preemption to a field of traditional state regulation, the decision conflicts with this Court's holdings that give a practical meaning to the otherwise boundless "relate to" language found in numerous express preemption provisions.[1] The EPCA language that preempts state laws "related to fuel economy standards or average fuel economy standards," 49 U.S.C. § 32919(a), on its face embodies the same limitless breadth as that found in the Employee Retirement Income Security Act (ERISA) that preempts state laws "insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a) (2010). But this Court has explained in the context of ERISA that the term "relate to" is "unhelpful" and "frustrating," requiring examination of the objectives of the federal legislation. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Thus, notwithstanding its broad scope, the term

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1. *See, e.g.*, Federal Cigarette Labeling Act, 15 U.S.C. § 1334(a) (preempting statements relating to smoking and health); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360(k)(a) (Medical Device Amendments) (preempting requirements relating to safety or effectiveness); Clean Air Act, 42 U.S.C. § 7543(a) (preempting standards relating to control of emissions); Airline Deregulation Act, 49 U.S.C. § 1305(a)(1) (preempting laws relating to air carriers' rates, routes, or services).

"relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Id. at 655*; *see also Dillingham*, 519 U.S. at 335 (Scalia, J., concurring) ("[A]s many a curbstone philosopher has observed, everything is related to everything else."). Faced with this broad language, the "pre-emption claims [must] turn on Congress' intent," not the uncritically literal application of "relate to." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (cautioning against an 'uncritical literalism' that would make preemption turn on 'infinite connections').

When it used the broad phrase "related to fuel economy standards," Congress cannot have intended that the phrase be applied to preempt local taxicab regulations promoting fuel-efficient vehicle use. The regulation of taxicab services is an area that had been the subject of pervasive local regulation for decades prior to passage of the EPCA in 1975. So long as the regulations do not set fuel economy standards and do not interfere with federal regulation of the average fuel economy of automobile manufacturers, there is no preemption under the EPCA. Surely Congress could not have intended to preempt every taxicab regulation that affects a fleet owner's vehicle purchase decisions, and, consequently, the fuel economy of its taxi fleet.

In its amicus brief to the Court of Appeals filed on behalf of DOT and the United States Environmental Protection Agency, the United States stated 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. Brief for the

United States as Amicus Curiae at 14, *MTBOT II* (No. 09-2901). The United States explained that the Lease Cap Rules would principally affect the cost considerations that underlie vehicle purchasing decisions made by taxicab fleet owners, a group that controls approximately 35 percent of all taxicabs in New York City: around 4,500 taxicabs, out of a total of just over 13,000. *Id.* Even if the Lease Cap Rules led fleet owners to purchase exclusively hybrid vehicles, because fleet owners already purchase hybrid vehicles at a rate of 28 percent, that would only be an increase of about 3,000 hybrid purchases. *Id.*

Federal laws passed subsequently to the EPCA further demonstrate that Congress does not view the EPCA's preemptive reach as extending to state and local incentive programs. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand" (citations omitted)). Through the Energy Policy Act of 1992, the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act and the Consumer Assistance to Recycle and Save program of 2009, each discussed *infra* at 21-23, Congress has approved and financially supported state and local measures to promote the purchase of fuel-efficient vehicles. The Court of Appeals erred in holding that the City violated federal law by setting taxicab lease rates that differentiate between hybrid and non-hybrid vehicles. Where the Lease Cap Rules are not proved to have a significant impact on the overall federal regulation of average fuel economy, it was not Congress' clear and

manifest intention to capture such rules within the EPCA preemption provision's reach. This Court should grant *certiorari* to correct this erroneous analysis of preemption under the EPCA.

2. This Court's Preemption Jurisprudence Required the Court of Appeals to Determine Whether the City's Rules Create a Preempted Mandate.

In order to determine the limits of "related to" language in express preemption provisions, this Court has examined whether the challenged state law has a "forbidden connection" to the preempted subject matter. *Dillingham*, 519 U.S. at 325. This forbidden connection is identified by looking at both the objectives of the federal law at issue as well as the nature of the effects of the state law. *Id.* In conducting this analysis, this Court has drawn a clear distinction between state laws that act as incentives and those that are actual or *de facto* mandates. *Dillingham*, 519 U.S. at 334; *Travelers*, 514 U.S. at 658-59. The Fourth, Sixth, and Ninth Circuit Courts of Appeals have all followed this framework of analysis. *See Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007); *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275 (6th Cir. 2008); *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008) (discussed *infra* at 18-19). The Second Circuit Court of Appeals did not. As a result, the Court of Appeals' decision in this case conflicts with the decisions of these other courts of appeals and results in exactly the type of overbroad reading of a "related to" preemption provision that this Court cautions against.

See Travelers Indem. Co. v. Bailey, __U.S.__, 129 S. Ct. 2195, 2204 (2009) ("There is, of course, a cutoff at some point, where the connection . . . would be thin to the point of absurd.").

In *Travelers*, this Court held that a state regulation requiring hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield ("the Blues") plan was not preempted because it did not "relate to" employee benefit plans within the meaning of ERISA. This Court found that "[a]lthough there is no evidence that the surcharges will drive every health insurance consumer to the Blues, they do make the Blues more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Travelers*, 514 U.S. at 659. This Court explained that for the surcharge, which essentially acted as an incentive for consumers to contract with the Blues, to be preempted by ERISA, it would have to force all health insurance consumers to do so. *Id.* at 664.

Similarly, in *Dillingham* this Court held that a California law allowing those contractors participating in state-certified apprentice programs to pay apprentices lower wages was not preempted by ERISA, even though it created indirect incentives for ERISA plans to obtain state certifications. Relying on *Travelers*, this Court found that California's law did not have a forbidden connection with or "relate to" ERISA plans where it "alters the incentives, but does not dictate the choices facing ERISA plans." *Dillingham*, 519 U.S. at 334. This Court explained that "it has not been

demonstrated here that the added inducement created by the wage break available on state public works projects is tantamount to a compulsion upon apprenticeship programs." *Id.* at 333.

In *Egelhoff*, this Court struck down a Washington State law that directed a choice of beneficiary that conflicted with the choice provided in an ERISA plan. To determine whether the state law was related to an ERISA plan, this Court followed the framework of analysis set forth in *Dillingham* and examined both the objectives of the ERISA statute, as well as the nature of the effect of the state law on ERISA plans. *Egelhoff*, 532 U.S. at 147. Applying this analysis, this Court held that a state or local law has an impermissible connection with ERISA plans where it "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status[,] . . . rather than [allowing administrators to pay the benefits] to those identified in the plan documents." *Id.*

Following this framework of analysis, the Fourth, Sixth and Ninth Circuit Courts of Appeals recognized that the interpretation of "related to" in a preemption provision required them to determine whether the challenged laws mandated, or effectively mandated, something within the area that Congress intended to exclusively control. In *Retail Indus. Leaders Ass'n v. Fielder*, the Fourth Circuit held that a Maryland law was preempted by ERISA because it left employers with "no reasonable choices" except to change how they structure their employee benefit plans. 475 F.3d at 190-97 (state law has impermissible connection with an ERISA plan if it directly regulates or effectively mandates some

element of the ERISA plan). In *Associated Builders & Contractors v. Michigan Department of Labor & Economic Growth*, the Sixth Circuit held that a Michigan law was not preempted by ERISA because it did not mandate something within the scope of issues that ERISA prohibits the states from regulating. 543 F.3d at 280-85 (noting that compulsion is a necessary condition for ERISA preemption). In *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, the Ninth Circuit held that ERISA does not preempt a San Francisco ordinance where the ordinance offers employers "a meaningful alternative" that allows them to preserve the existing structure of their ERISA plans. 546 F.3d at 654-60 (upholding local ordinance because it does not require any employer to adopt an ERISA plan or other health plan, nor require any employer to provide specific benefits through an existing ERISA plan or other health plan). In contrast, here the Court of Appeals found that "the district court's conclusion that the [Lease Cap Rules] effected a mandate is irrelevant to our analysis." App. 12a. While the district court's conclusion that the Rules effectively mandate the purchase of hybrid vehicles is incorrect, the Court of Appeals should have reached this issue in order to determine whether the challenged Rules are preempted by the EPCA.

The Lease Cap Rules do not set fuel economy standards, establish manufacturer requirements, or create purchase requirements. They establish different maximum lease rates for hybrid and non-hybrid vehicles to provide incentives for reduced fuel usage and cleaner taxis. The Court of Appeals erred in failing to determine whether the Lease Cap Rules mandated, or effectively

mandated, something within the area that Congress intended to exclusively control, *i.e.*, the setting of fuel economy standards. Where the Lease Cap Rules neither mandate the purchase of hybrid vehicles nor require fleet owners to purchase vehicles that meet certain mileage standards, they lack the impermissible connection to fuel economy standards that Congress sought to preempt under the EPCA. This Court should grant *certiorari* to clarify that laws or regulations that do not bind the affected parties to any particular choice do not function as a regulation of a preempted area of law.

B. This Court's Review Is Needed Because the Court of Appeals' Decision Frustrates Congressional Intent and Prevents States and Municipalities from Promoting the Use of Clean, Fuel-Efficient Vehicles.

While the EPCA preempts the states from setting their own fuel economy standards, Congress has since passed laws encouraging and funding state and local incentive programs that promote the purchase of fuel-efficient vehicles such as hybrids. The Court of Appeals' erroneous ruling, that the City's lease rate incentive for hybrid taxis is preempted regardless of whether it functions as a *de facto* mandate, puts innumerable state and local incentive programs at risk and runs directly counter to congressional efforts to promote fuel-efficient vehicle purchases. This Court's immediate intervention is required in order to prevent other state and local governments from concluding that the EPCA preempts them from enacting clean-vehicle incentive programs and to prevent other federal courts from adopting the Court of Appeals' flawed approach.

1. Congress Has Long Encouraged State and Local Incentive Programs for Fuel-Efficient Vehicles.

Far from preempting state and local incentive programs for the purchase of fuel-efficient vehicles, Congress has actively legislated to encourage such initiatives. The Energy Policy Act of 1992, the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") and the Consumer Assistance to Recycle and Save ("CARS") program of 2009 (commonly known as "Cash for Clunkers") all post-date the 1975 passage of the EPCA and demonstrate congressional recognition and support of state and local efforts in this area.

Like the EPCA, the purpose of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered titles of U.S.C.), is to reduce dependence on foreign oil. *See* H.R. Rep. No. 102-474(I), at 132-33 (1992), as reprinted in 1992 U.S.C.C.A.N. 1954, 1955-56. The Energy Policy Act included a provision that invited state and local governments to design comprehensive plans to accelerate the introduction and use of alternative fueled vehicles, including hybrid electric vehicles. 42 U.S.C. § 13235 (2010). Through this provision, Congress offered federal financial assistance for qualifying state and local programs, with the goal of introducing substantial numbers of alternative fueled vehicles into the national market. In addition to federally-affiliated programs, the law also clearly contemplated that some state and local incentive programs would be undertaken outside the auspices of the Energy Policy Act. *See* 42 U.S.C. § 13235(c)(2)(C) (requiring the Secretary of Energy to include in his annual report "a description of Federal, State, and local

programs undertaken in the various States, *whether pursuant to a State plan under this section or not*, to provide incentives for the introduction of alternative fueled vehicles") (emphasis added).

With SAFETEA-LU, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (codified as amended in scattered sections of 23 U.S.C.), Congress explicitly authorized those states receiving federal highway funds to establish incentives for the use of fuel-efficient vehicles in high occupancy vehicle ("HOV") lanes, regardless of whether the vehicles otherwise meet the applicable occupancy requirements for HOV lanes.[2] *See* 23 U.S.C. § 166 (2010). State regulations or laws adopted under this provision would necessarily discriminate between vehicle models based on the vehicles' emissions characteristics or relative fuel efficiency. Congress makes clear that the states have the authority to determine whether to adopt HOV lane incentives and to determine the specific criteria upon which to base to the award of HOV lane incentives. *See* 23 U.S.C. § 166(b)(5); *see also* H.R. Rep. No. 109-203, at 852-53 (2005) (congressional intent is to allow states "broad discretion" to set stricter criteria for fuel economy when determining which vehicles qualify for state HOV lane exceptions).

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2. Most major highway projects in the United States are predominantly funded with federal highway funds, and as a condition of federal funding for a project, states must accept and agree to comply with the applicable terms and conditions set forth in title 23 of the United States Code relative to the project. *See* 23 U.S.C. § 106(a)(2); 23 C.F.R. § 630.112(a). Where HOV lanes are included in a project, such conditions include requirements concerning HOV lane access and the use of HOV lane access as an incentive for driving a low emission or energy-efficient vehicle. *See* 23 U.S.C. § 166(a)(2), (b)(5).

More recently, the CARS program, Pub. L. 111-32, Title XIII, 123 Stat. 1909; Pub. L. 111-47, 123 Stat. 1972 (2009), provided $3 billion in federal incentives for the purchase of fuel-efficient vehicles. The program supplied vouchers that vehicle owners could use to trade in older, less fuel-efficient cars and trucks for newer models with higher MPG ratings. Car owners remained eligible for a voucher under CARS even if they also benefitted from other existing types of incentives: "The availability or use of a Federal, State, or local incentive or a State-issued voucher for the purchase or lease of a new fuel-efficient automobile shall not limit the value or issuance of a voucher under the Program to any person otherwise eligible to receive such a voucher." CARS § 1302(c)(1)(E). Thus, the law expressly acknowledged the existence of state and local incentives for the purchase of fuel-efficient vehicles, and ensured that federal incentives would not displace such existing state and local efforts.

As these laws demonstrate, Congress has not expressed a concern that incentives for commercially-available fuel-efficient vehicles will upset national fuel economy standards. Quite the opposite, Congress has financially supported state and local incentive programs for fuel-efficient and alternative fueled vehicles. The Court of Appeals erred in concluding that Congress intended any state or local regulation that expressly relies on a distinction between hybrid and non-hybrid vehicles to be preempted by the EPCA. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 140-59 (examining later-enacted tobacco-specific legislation to determine scope of FDA's authority to regulate tobacco). The impact of this ruling on pending and existing state and local incentive programs promoting the purchase of commercially-available fuel-efficient vehicles is by itself a sufficient reason to grant *certiorari*.

2. The Court of Appeals' Ruling Recklessly Places Hundreds of Fuel-Efficient Vehicle Incentives at Risk.

Cutting emissions of greenhouse gases and traditional pollutants and reducing dependence on petroleum are pressing national challenges to which state and local governments have creatively and enthusiastically responded. States have aggressively pursued a wide variety of plans to improve air quality, increase the use of renewable energy, promote energy efficiency and combat global climate change. Reducing emissions of greenhouse gases has been a particularly important goal for the City of New York, as its coastal location and low elevation leave it vulnerable to rising sea levels that will accompany global climate change in the decades to come. The City has committed itself to reducing citywide carbon emissions by 30 percent below 2005 levels by 2030, and the City was a plaintiff in *Massachusetts v. EPA*, 549 U.S. 497 (2007), successfully challenging the federal government's failure to regulate greenhouse gas emissions.

Making improvements in fuel efficiency and reducing emissions from motor vehicles are critical components of this larger environmental effort. Cars and light trucks account for roughly 20 percent of United States carbon dioxide emissions. U.S. EPA # 430-R-10-006, 2010 U.S. Greenhouse Gas Inventory Report, 3-12 (2010), *available at* http://www.epa.gov/climatechange/emissions/usinventoryreport.html. Cities and states across the country have taken the initiative to reduce pollution and conserve energy resources. They have created incentives for the use of cleaner, more fuel-efficient vehicles in both the private and public sectors by enacting or proposing hundreds of incentive programs for hybrid electric passenger vehicles alone.

State and local laws and regulations promoting the use of commercially-available clean, fuel-efficient vehicles are ubiquitous. Governments in all fifty states and the District of Columbia have adopted alternative fueled vehicle incentives. *See* U.S. Dep't of Energy Alternative Fuels & Advanced Vehicle Data Center: Federal & States Incentives & Laws, http://www.afdc.energy.gov/afdc/laws/ (last visited Nov. 2, 2010). These programs take on many forms and function through a variety of mechanisms, but all draw distinctions between vehicle models based on engine technology or relative fuel efficiency. Some types of incentives include sales tax[3] and income tax[4] incentives

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3. *See*, *e.g.*, Conn. Gen. Stat. § 12-412(67)-12-412(68) (2010) (removing sales tax from alternative-fuel vehicles and conversion equipment); H.B. 2726, 2010 Leg., Reg. Sess. (Haw. 2010) (proposing exemption for plug-in hybrid vehicles from rental surcharge); H.B. 2668, 96th Gen. Assemb., 1st Sess. (Ill. 2009); Md. Code Ann., Transp. § 13-815 (2010) (excise tax credit of up to $2,000 for purchase of plug-in hybrid vehicles); H.B. 2813, 186th Gen. Ct., Reg. Sess. (Mass. 2009) (proposing sales tax exemption for hybrids); Or. Rev. Stat. § 316.116 (2010) (tax credit for purchase or modification of plug-in hybrid vehicles); H.B. 2180, 61st Leg., Reg. Sess. (Wash. 2009) (proposing temporary tax exemption for plug-in hybrid vehicles).

4. *See*, *e.g.*, Colo. Rev. Stat. § 39-22-516 (2010) (income tax credit up to $6,000 for purchase or conversion of hybrid electric vehicle); Conn. Gen. Stat. §12-217i (2010) (income tax credit for ten percent of incremental cost of purchasing alternative fueled vehicle); Ga. Code Ann. § 48-7-40.16 (2010) (tax credit of up to $5,000 for purchase of low-emission or zero-emission vehicles); H.B. 1654, 2010 Leg., Reg. Sess. (Haw. 2009) (proposing $2000 tax credit for taxi fleet owners to purchase hybrid vehicles); Iowa Admin. Code r. 701-40.67(422) (2010) ($2000 income tax deduction for hybrid vehicles); La. Rev. Stat. Ann. § 47:6035 (2010) (income tax credit for fifty percent of cost

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for the purchase of hybrid vehicles or conversion kits, sales rebates for purchase of hybrid vehicles,[5] exemptions allowing hybrid vehicles to drive in HOV lanes regardless of the number of occupants in the vehicle,[6] free parking or reduced parking rates for hybrid vehicles,[7] exemption of hybrid vehicles from emissions

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of converting vehicles to electricity or other alternative-fuel); VA. CODE ANN. § 58.1-438.1 (2010) (income tax deduction for purchase of clean-fuel vehicles); W. VA. CODE § 11-6D-5 (2010) (tax credit up to $50,000 for purchase of alternative-fuel vehicles).

5. The California Air Resource Board's Clean Vehicle Rebate Program offers $5,000 cash rebates for plug-in hybrid electric vehicles. California Center for Sustainable Energy, http://energycenter.org/index.php/incentive-programs/clean-vehicle-rebate-project (last visited Nov. 2, 2010); *see also* 36 Fla. Admin. Weekly 2393 (May 21, 2010) (offering $5,000 cash rebate for plug-in hybrid conversion kits).

6. *See*, *e.g.*, ARIZ. REV. STAT. § 28-2416 (2010); CAL. VEH. CODE § 5205.5 (Deering 2010); COLO. REV. STAT. § 42-4-1012; GA. CODE ANN. § 32-9-4 (2010); S.B. 295, 2010 Leg., Reg. Sess. (Haw. 2009); MD. CODE ANN., TRANSP. § 25-108 (2010) (for qualified plug-in hybrids); S.B. 1920, 186th Gen. Ct., Reg. Sess. (Mass. 2009); 15 N.Y.C.R.R. §§ 9028.00, 9047.00 (2010); VA. CODE. ANN. § 33.1-46.2 (2010).

7. *See*, *e.g.*, Albuquerque, N.M. Code of Ordinances § 8-5-1-5 (2010) (allowing hybrids and other fuel-efficient vehicles free parking at city meters); Aspen, Colo. Mun. Code § 24.24 (2010) (allowing hybrid vehicles to park in any Residential Permit Zone or High Occupancy Vehicle (HOV) Zone space and exempting such vehicles from two-hour parking restrictions); Ferndale, Mich. Code of Ordinances § 18-90 (2010) (granting free on-street parking on all city streets and free parking in municipal parking lots to hybrid vehicles and high mileage

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inspections[8] and licensing fees,[9] retirement extensions for hybrid taxis and other for-hire vehicles,[10] taxi lease rate incentives,[11] and exemptions from highway tolls.[12]

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vehicles); HAW. REV. STAT. § 29-71 (2010) (requiring parking lots that have at least one hundred parking spaces to designate one per cent of spaces exclusively for electric vehicles); Huntington, N.Y. Town Code §§ TC3-6, TC3-21 (2010) (providing free parking at meters and requiring parking lots to designate space for hybrid vehicles); San Antonio, Tex. Code of Ordinances § 19-226 (2010) (providing free parking at city meters).

8. *See*, *e.g.*, IDAHO CODE ANN. § 39-116B (2010); MD. CODE ANN., TRANSP. § 23-202 (2010) (exempting plug-in hybrids from emissions inspections for the first three years after registration).

9. *See*, *e.g.*, Aspen, Colo. Mun. Code § 24.24 (2010) (city pays hybrid owners a $100 rebate on annual state licensing fee); reduced license tax on alternative-fuel vehicles in Arizona. ARIZ. REV. STAT. §§ 28-5801, 28-5805 (2009).

10. The City of Dallas permits hybrid and alternative-fuel taxicabs and shuttles to be up to seven years old, while regular vehicles may only be up to five years old. Dallas, Tex. City Code § 45-7.2.1(a) (2010); *see also* N.Y. City Admin. Code § 19-535 (permitting an additional 1-2 years for clean air taxicabs).

11. The City of San Francisco allows owners of hybrid taxicabs to charge an additional $7.50 per ten-hour shift, above the lease cap for non-hybrid taxicabs. S.F. Mun. Code, Police Code § 1135.2 (2010).

12. *See*, *e.g.*, FLA. ADMIN. CODE ANN. 14-100.004 (2010) (exempting hybrid vehicles from express lane tolls); H.F. 1956, 86th Sess. (Minn. 2009) (proposing to exempt hybrid vehicles from tolls and allowing them to use HOV lanes).

Incentive programs are an important means by which state and local governments can improve air quality and increase fuel efficiency without directly regulating fuel economy standards. Such programs have historically been an area of federal-state-local partnership, not the subject of preemption disputes. For instance, the United States Department of Energy ("DOE") Alternative Fuels and Advanced Vehicles Data Center ("AFDC") tracks many of these incentive programs and provides the public with detailed information on federal, state and local incentives for alternative fueled vehicles. AFDC: Federal and State Incentives and Laws, http://www.afdc.energy.gov/afdc/laws/ (last visited Nov. 2, 2010). DOE even provides a factsheet designed to help cities adopt successful "green taxi" programs, in which it touts lease rate incentives for hybrid vehicles as a means for putting more fuel-efficient taxicabs on the road. DOE, *Hybrid Taxis Give Fuel Economy a Lift*, DOE/GO-102009-2776 (April 2009), *available at* http://www.afdc.energy.gov/afdc/pdfs/45148.pdf.

The purpose and design of these programs is to put "greener" vehicles on the road without mandating their production or purchase. These programs, like the City's challenged lease rate incentives, seek to encourage the purchase of vehicle models that are already commercially available. Consistent with congressional intent, incentive programs have helped to put greater numbers of hybrid electric and other alternative fueled vehicles on the road over the past two decades. AFDC: Data, Analysis & Trends, Vehicles, http://www.afdc.energy.gov/afdc/data/vehicles.html (last visited Nov. 2, 2010).

This case presents a question of urgent national importance. One of federalism's chief virtues is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As a result of the Court of Appeals' overly broad ruling, local laws or regulations, including incentive programs that distinguish between vehicle models on the basis of fuel efficiency, have now been placed at risk of preemption challenges. While state and local incentive programs for fuel-efficient vehicles have never before been considered preempted by the EPCA, this is a new area of developing law and the Second Circuit is the first federal court of appeals to interpret the EPCA preemption provision.[13] As other cities attempt to "green" their taxi fleets, taxi owners have begun to challenge these local efforts in federal

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13. The preemption clause in EPCA has been interpreted by other federal district courts, most notably in *Central Valley Chrysler–Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) and *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007). The courts in both of these cases held that state regulation of carbon emissions from motor vehicles under the Clean Air Act did not necessarily implicate preemption under the EPCA. The court in *Green Mountain* held that EPCA § 32919 preempts only laws that control or supersede a core EPCA function such as *setting* fuel economy standards. 508 F. Supp. 2d at 354. The *Central Valley* court similarly held that EPCA § 32919 should be construed as narrowly as possible and limited only to measures *establishing* fuel economy standards. 529 F. Supp. 2d at 1174-76.

courts. Cases at the district court level in the First,[14] Fifth[15] and Ninth[16] Circuits have cited the decisions in this case. Prompt resolution of the question presented is vital for the preservation of state and local governments as laboratories for innovation in the development of permissible incentive programs promoting fuel-efficient vehicle use.

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14. The City of Boston's rule requiring that all new taxicabs be hybrid electric was permanently enjoined in *Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009), a decision in which the district court cited extensively to *MTBOT I* and *II*. *See Ophir*, 647 F. Supp. 2d at 90-92. Boston subsequently changed its regulation to provide a $10 per shift lease rate incentive for new vehicles and an additional $8 per shift for hybrid vehicles. The district court initially enjoined that rule from the bench but later required that the parties present evidence on whether the incentive is a *de facto* mandate – similar to the evidentiary hearing held in *MTBOT II*. *See Ophir v. City of Boston*, No. 09-cv-10467-WGY (D. Mass. Feb. 25, 2010) (order granting request for evidentiary hearing). Prior to the evidentiary hearing, Boston again revised its lease rate incentives to provide only an incentive for new taxicabs, and the case was dismissed on Sept. 20, 2010.

15. In *Association of Taxicab Operators, USA v. City of Dallas,* No. 3:10-CV-769-K (N. Dist. Tex. Aug. 30, 2010), front-of-the-line privileges for compressed natural gas taxicabs at Dallas Love Field airport were challenged as preempted by the CAA. Upholding the regulation, the district court cited *MTBOT II* for the holding that incentive programs are not preempted by the Clean Air Act. It distinguished the Second Circuit's *MTBOT II* opinion on the basis that only the $12 disincentive was actually before the court. *Ass'n of Taxicab Operators* at 14.

16. In *Green Alliance Taxi Cab Ass'n v. King County*, No. C08-1048RAJ, 2010 U.S. Dist. LEXIS 72409 (W.D. Wash. June 29, 2010), King County awarded fifty new taxi licenses under a competitive selection process, one requirement of which was that the licensee agree to utilize hybrid electric vehicles with fuel economy rating of 40 MPG in the city. The award of licenses was challenged

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CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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as preempted by the EPCA. The district court granted summary judgment in favor of King County, distinguishing the County's action as a voluntary incentive program, in contrast to the regulatory actions of Boston and New York City in *Ophir* and *MTBOT I* and *II*, which the *Green Alliance* court considered mandates or *de facto* mandates. 2010 U.S. Dist. LEXIS 72490 at *12-13.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 27, 2010

Docket No. *09-2901-cv*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

615 F.3d 152 (2d Cir. 2010);
2010 U.S. App. LEXIS 15303; 40 ELR 20193

January 22, 2010, Argued
July 27, 2010, Decided

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,

MIDTOWN OPERATING CORP., SWEET IRENE TRANSPORTATION CO. INC., OSSMAN ALI, and KEVIN HEALY,

Plaintiffs,

v.

CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his offical capacity as Mayor of the City of New York; THE NEW YORK CITY TAXICAB & LIMOUSINE COMMISSION; 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 of the TLC for Safety & Emissions; ANDREW SALKIN, in his official capacity as First Deputy Commissioner of TLC,

Defendants-Appellants.

JUDGES: Before: WALKER, STRAUB, and LIVINGSTON, Circuit Judges.

OPINION BY: JOHN M. WALKER, JR.

OPINION

JOHN M. WALKER, JR., *Circuit Judge*:

The Taxicab & Limousine Commission of New York City ("TLC") and several New York City officials (collectively, "the City") appeal the grant of a preliminary injunction by the United States District Court for the Southern District of New York (Paul A. Crotty, *Judge*), that enjoined the enforcement of the City's revisions to the maximum lease rates for taxicabs that effectively shifted fuel costs from drivers of fleet taxis to fleet owners to incentivize the use of hybrid-engine and fuel-efficient vehicles. The district court held that the new rules likely related to fuel economy standards and new vehicle emissions and were thus preempted under the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. § 32919(a), and the Clean Air Act ("CAA"), 42 U.S.C. § 7543(a). *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 633 F. Supp. 2d 83, 105-06 (S.D.N.Y.2009).

Appendix A

BACKGROUND

In December 2007, the City issued rules requiring that new taxicabs that were put into service on or after October 1, 2008 achieve at least 25 city miles per gallon of fuel, and those that were put into service beginning October 1, 2009 achieve 30 city miles per gallon (the "25/30 MPG rule"). In September 2008, the plaintiffs, including the Metropolitan Taxicab Board of Trade and several taxi fleet operators, sued the City, seeking to enjoin the 25/30 MPG rule on the basis that it violated preemption clauses in the EPCA and the CAA.[1] The district court granted a preliminary injunction after determining that the 25/30 MPG rule related to fuel economy standards and was thus preempted by the EPCA. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, No. 08 Civ. 7837, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008).[2] The City did not appeal that decision.

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1. The EPCA states, in relevant part: "[A] State or apolitical subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a).

The CAA states, in relevant part: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a).

2. The district court, having "limited its review to the stated purpose of the rules, as published in the City Record," rejected the plaintiffs' argument under the CAA. *Metro.*

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Appendix A

On March 26, 2009, the City repealed the 25/30 MPG rule, and issued new rules that regulated taxicab "lease caps" - the maximum dollar amount per shift for which taxis can be leased - to provide incentives for reduced fuel usage and cleaner taxis. Under the new rules, the lease caps for hybrid and "clean diesel" taxis are raised by $ 3 per shift.[3] 35 RCNY § 1-78(a)(3)(i). At the same time, the new rules reduce the lease caps for non-hybrid, non-clean diesel vehicles, nearly all of which are Ford Crown Victorias, in three phases. The new rules lower the per shift lease caps on the Crown Victorias, except those that are wheelchair accessible, by $ 4 on May 1, 2009; by $ 8 on May 1, 2010; and by $ 12 on May 1, 2011. The current baseline lease caps from which these adjustments are made are: $ 105 for all day shifts; $ 115 for night shifts on Sunday, Monday, and Tuesday; $ 120 for night shifts on Wednesday; and $ 129 for night shifts on Thursday, Friday, and Saturday. 35 RCNY § 1-78(a)(1). After the third phase is implemented, the lease cap difference between hybrids and Crown Victorias

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Taxicab, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *14. The district court held that the plaintiffs had failed "to show how the 25/30 Rules are a standard relating to the control of emissions from new motor vehicles." *Id.* (internal quotation marks omitted).

3. A hybrid vehicle for purposes of the new rules is a "commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner." 35 RCNY § 3-03.1(b). We use the term "hybrid" to encompass both hybrid vehicles as defined under the new rules and vehicles propelled by a "clean diesel" engine.

would be $ 15 per shift, reflecting the $ 3 upward adjustment for the hybrid lease caps and the $ 12 downward adjustment for the Crown Victoria lease caps. The new rules are designed to effectively shift fuel costs from taxi drivers, who currently pay for fuel, to fleet owners, who currently make vehicle purchasing decisions without the need to internalize fuel costs.

The plaintiffs amended their initial complaint to challenge these new rules and moved for a preliminary injunction against the enforcement of the Crown Victoria lease caps, again citing the preemption provisions of both the EPCA and the CAA. For obvious reasons, the plaintiffs did not challenge the $ 3 upward adjustment of the lease caps for hybrid taxis, which benefitted them, and that adjustment went into effect on May 1, 2009.

At an evidentiary hearing on the plaintiffs' motion, experts for both sides testified on the economic impact of the new rules on taxi fleet owners. The testimony of the plaintiffs' expert James Levinsohn tended to demonstrate that fleet owners would earn between $ 5,500 and $ 6,500 less per year for each Crown Victoria leased under the eventual $ 12 downward adjustment in comparison to leasing a hybrid under the $ 3 upward adjustment. The plaintiffs' expert estimated the current annual profit of leasing a Crown Victoria to be $ 8,518 per car per year. Thus, the lease cap reduction would lower profits by 65% to 75% for each Crown Victoria. The City did not challenge this estimated impact on plaintiffs' profits. The City's expert testified, however,

that fleet owners could still make a "reasonable rate of return" on their purchase of a Crown Victoria notwithstanding the $ 12 downward adjustment.

On June 22, 2009, the district court granted a preliminary injunction on the grounds that the plaintiffs were likely to succeed on their claims that the new rules were preempted under the EPCA and the CAA. The district court accepted the plaintiffs' expert's view of the economic impact of the new rules on fleet owners' profits and concluded that such a severe disparity in the expected profits from leasing a hybrid as compared to a Crown Victoria would leave the fleet owners with no rational alternative to leasing the former and thus amounted to a *de facto* mandate to purchase hybrid vehicles. The district court found such a mandate to be related to both fuel economy standards and the reduction of vehicle emissions, and thus sufficiently likely to be preempted under the EPCA and the CAA so as to warrant a preliminary injunction.

The City appeals the grant of the preliminary injunction.

DISCUSSION

This Court reviews the grant of a preliminary injunction for abuse of discretion. *See Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008)(per curiam); *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)(per curiam). "A district court abuses its discretion when it rest its

decision on a clearly erroneous finding of fact or makes an error of law." *Almontaser*, 519 F.3d at 508. In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) "either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor," *id.*; and 3) that the public's interest weighs in favor of granting an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "When, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008) (brackets and internal quotation marks omitted). In this case, the City's sole challenge to the preliminary injunction is that the plaintiffs are not likely to succeed on their preemption claims.

I. Preemption Under the EPCA

The EPCA preemption clause states:

> [A] State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a).

"Since [preemption] claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. TravelersIns. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (citations omitted). In the context of judging the scope of the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1144(a), the Supreme Court has held that determining whether a state law relates to a preempted subject matter requires examining whether the challenged law contains a "reference" to the preempted subject matter or makes the existence of the preempted subject matter "essential to the law's operation." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.,N.A., Inc.*, 519 U.S. 316, 324-25, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997). If the law contains such a reference or makes the existence of preempted subject matter essential to the law's operation, then that state law is preempted by the federal law. *See id.* at 325 ("Where a State's law acts immediately and exclusively upon ERISA plans . . ., or where the existence of ERISA plans is essential to the law's operation . . ., that 'reference' will result in [preemption].").[4]

4. Even if there is no reference to or essential incorporation of the preempted subject matter, courts must still ask whether the law nevertheless contains requirements that "amount[] to 'connection[s] with'" the preempted subject matter. *Dillingham*, 519 U.S. at 328 (second alteration in original) (quoting *Travelers*, 514 U.S. at 658). However, because we find that the City's new rules contain a reference to fuel economy standards or make fuel economy standards essential to the operation of those rules, we need not specifically address whether the new rules have a connection with fuel economy standards.

As a threshold matter, we may rely on ERISA preemption precedents such as *Travelers* and *Dillingham* because the pertinent language in that statute is virtually identical to the text in the preemption provision of the EPCA, which preempts state laws that are "related to fuel economy standards." Compare 29 U.S.C.§ 1144(a), with 49 U.S.C. § 32919(a). Although the same "relate[] to" provision arises in different preemption statutes, we discern no basis for concluding that the meaning of the language in each provision was not intended to be the same. *Cf. Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2203, 174 L. Ed. 2d 99 (2009) (noting generally that, "[i]n a statute, 'the phrase "in relation to" is expansive'" and applying that statutory reading to the interpretation of a private settlement agreement). We note that the City itself relies on *Travelers* in challenging the district court's ruling. *See* Appellants Br. at 57, 60. For purposes of assessing preemption under the EPCA, the Supreme Court's discussions of the phrase "relate to" in ERISA cases is directly applicable.

Thus, our first inquiry in determining whether the new rules relate to "fuel economy standards," 49 U.S.C. § 32919(a), is whether they contain a reference to fuel economy standards or make fuel economy standards essential to the operation of those rules. *Dillingham*, 519 U.S. at 324-25. We conclude that they do.

The new rules expressly rely on a distinction between hybrid and non-hybrid vehicles. 35 RCNY § 1-78(a)(3) (providing for the upward and downward lease cap

adjustments on hybrid and non-hybrid vehicles, respectively). The requirement that a taxi be a hybrid in order to qualify for the upwardly adjusted lease cap does nothing more than draw a distinction between vehicles with greater or lesser fuel-efficiency. The equivalency of the term "hybrid" with "greater fuel efficiency" for purposes of the new rules is self-evident. First, the EPCA specifically requires the separate consideration of "dual fueled" vehicles, including hybrids, in the determination of national fuel economy standards. *See* 49 U.S.C. § 32901(a)(1)(J) (defining "electricity" as one form of "alternative fuel"); *see also id*. § 32905(b) (requiring the Administrator of the Environmental Protection Agency to measure the fuel economy of certain "dual fueled" automobile models in part with reference to the fuel economy of that model when operating on "alternative fuel"). Second, imposing reduced lease caps solely on the basis of whether or not a vehicle has a hybrid engine has no relation to an end other than an improvement in fuel economy across the taxi fleets operating in New York City.

Indeed, the City is unable to identify any plausible alternative reason for the imposition of such an engine-based rule. The City argues that the new rules "correct[] a structural problem with the standard vehicle lease arrangement that artificially insulates fleet owners from fuel costs." Appellants Br. at 1. This proffered reason, however, still aims at the improvement of fuel economy, which underlies the "structural problem" relied upon by the City. This argument, moreover, ignores the City's mechanism for its structural correction, which is to shift

costs solely on the basis of a vehicle's level of fuel efficiency, i.e., whether the vehicle is a hybrid. Indeed, the City's current list of approved vehicles includes every car approved for use under the now-repealed 25/30 MPG rule. The City's list of approved vehicles under the new rules, with the exception of wheelchair accessible vehicles (which are exempt from the lease cap adjustments) and the Crown Victoria, are either hybrids or achieve at least 25 miles per gallon. *See* New York City Taxi & Limousine Commission, Taxicab Vehicles in Use, *available at* http://www.nyc.gov/html/tlc (follow "Safety & Emissions" hyperlink; then follow "Taxicab Vehicles In Use" hyperlink) (last visited June 1, 2010). The virtually complete overlap of the approved vehicles under the 25/30 MPG rule and the new rules underlines further that, in furtherance of the City's regulatory purpose, "hybrid" is simply a proxy for "greater fuel efficiency." In sum, the new rules are not applicable to gasoline costs in general, nor are they neutral to the fuel economy of the vehicles to which they apply. Rather, they are directly related to fuel economy standards because they rely on fuel economy, and on nothing else, as the criterion for determining the applicable lease cap.

Because the parties appear to have assumed before the district court that the new rules did not directly reference fuel economy standards or incorporate those standards into the new rules' operation, they and the district court focused on whether the new rules effectively mandate the use of fuel efficient vehicles through their economic impact. In that context, the district court rejected the City's argument that the new

rules are permissible because they only provide an incentive, rather than create a *de facto* mandate, for the purchase of hybrid vehicles. Appellants Br. at 7, 28. This attention to economic impact was misguided, however, because the rules in question directly regulate the relevant preempted subject matter.

II. The Plaintiffs' Preliminary Injunction

Although we find the district court's conclusion that the rules effected a mandate irrelevant to our analysis, the district court's preliminary injunction was appropriate. The City does not challenge the district court's determination that the plaintiffs face irreparable harm absent injunctive relief, nor does it challenge the preliminary injunction on either the balance of hardships or public interest prongs of the preliminary injunction standard. The sole issue before us is whether the plaintiffs have established a likelihood of success on the merits. *Leavitt*, 524 F.3d at 414.

The City's new rules, based expressly on the fuel economy of a leased vehicle, plainly fall within the scope of the EPCA preemption provision. The plaintiffs, therefore, have demonstrated a likelihood, indeed a certainty, of success on the merits, and we affirm the district court's preliminary injunction on this ground. Because preemption under the EPCA is sufficient to affirm the preliminary injunction, there is no need to reach the question of whether the preemption provision of the CAA would invalidate the City's new rules.

Appendix A

CONCLUSION

We AFFIRM the district court's order granting the preliminary injunction.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED JUNE 22, 2009

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

08 Civ. 7837 (PAC)

633 F. Supp. 2d 83; 2009 U.S. Dist. LEXIS 52658; 70 ERC (BNA) 1236; 39 ELR 20140

June 22, 2009, Decided
June 22, 2009, Filed

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,

-against-

CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY TAXICAB & 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 & Emissions of the TLC; and ANDREW SALKIN, in his official capacity as First Deputy Commissioner of the TLC,

Defendants.

Appendix B

JUDGES: PAUL A. CROTTY, United States District Judge.

OPINION BY: PAUL A. CROTTY

OPINION

OPINION & ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

This case involves a dispute between New York City taxicab fleet owners and the City's Taxicab & Limousine Commission ("TLC"), relating to new TLC regulations that promote the purchase of hybrid taxicabs by reducing the rates at which taxicab owners may lease their vehicles to taxi drivers—thus reducing the owners' overall profit—if the vehicle does not have a hybrid or clean-diesel engine. The questions in this case are whether the TLC's new rules are a mandate to taxicab owners to purchase only hybrid or clean-diesel vehicles, and whether such a mandate is preempted by federal law.

The history of this case is relevant: on October 31, 2008, the Court preliminarily enjoined New York City's requirement that all new taxicabs meet a specific miles-per-gallon ("mpg") rating. The mpg regulation required taxicab owners in New York City to purchase vehicles with hybrid or clean-diesel engines, or wheelchair-accessible vehicles. The Court found that the federal

Energy Policy and Conservation Act ("EPCA") preempted the local imposition of mpg standards. The City immediately announced it would pursue an alternative strategy. Mayor Bloomberg stated that, "The courts are not the only way we can reach our goal of a cleaner fleet of taxi cabs. Greening the taxi fleet is a major priority, and we are going to use every mechanism at our disposal to make New York a cleaner, healthier city."[1]

The City pursued a regulatory framework that would encourage taxicab fleet owners to buy hybrid taxicabs in increasing numbers and discourage them from purchasing long bodied, conventionally powered taxicabs, which the City had approved for use in 2001. Under the City's new rules, if an owner purchases a taxicab with a hybrid or clean-diesel engine (hereinafter, "hybrid"), the rate at which the vehicle can be leased to a driver for a 12-hour shift is increased by $ 3. By contrast, if an owner leases out a non-hybrid, non-wheelchair accessible vehicle (i.e. a Crown Victoria), the maximum lease rate an owner may charge a driver is reduced by $ 4 immediately, $ 8 in May 2010, and $ 12 in May 2011. The new rules substantially reduce profits for the owner who continues to choose non-hybrid taxicabs, and Plaintiffs challenge the disincentive aspect of the new regulations.

The City explained its desire for the new regulation:

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1. Bill Sanderson, *Fed Red Light on Mike in "Green Cab" Fight*, N.Y. Post, Nov. 1, 2008, at 2.

> Last month, we hit a speed bump in our efforts to turn New York City's yellow cabs green when the courts upheld an archaic law, preventing us from reducing greenhouse gases and improving air quality . . . By offering incentives that will encourage more taxi fleet owners to purchase hybrids, we have found another avenue to reach our goal of greening our yellow cabs, improving our air quality, and reducing our carbon emissions.

See Press Release, Office of the Mayor, Mayor Bloomberg Announces New Incentive/Disincentive Program to Reach Goal of Green Taxi Fleet (Nov. 14, 2008). The same press release quoted TLC Commissioner Matthew Daus as stating:

> Our goal from the beginning was to get fuel efficient taxis on the road using whatever appropriate methods required to achieve our goal. The new program will incentivize the purchase of cleaner vehicles, while ensuring taxi drivers are not penalized because a taxicab owner is reluctant to make the wiser purchase of a hybrid vehicle. The 1,551 hybrid taxicabs already on the road have saved their drivers lots of money, while contributing to cleaner air. This incentive package will help us take these advances to the next level, and help our city become a cleaner, healthier place.

Id.

Appendix B

After several months of study, the TLC promulgated the new regulations. The regulations: (1) eliminated the prior requirement that determination of lease rates and changes thereof be based on costs, and substituted policy concerns as the key criterion for determining lease rates; (2) described the incentives for hybrids (higher lease rate) and the disincentives for conventionally powered taxicabs (lower lease rates, in increasing amounts over the next two years); and (3) did not grandfather taxis purchased by owners subsequent to 2001, when the City began mandating taxicabs with Crown Victoria dimensions.

The City states that the new regulations correct a structural disincentive that prevented many taxicab owners from switching their fleets to hybrid vehicles, while also meeting the goal of improving taxicab fuel efficiency and minimizing the effect of taxicab emissions on the environment.

The Mayor announced the new regulations:

> We have never let roadblocks prevent us from achieving our goals. So when the courts prohibited New York City from taking forward-looking actions that would create cleaner air and a healthier place to live, we said we would find another way to continue to green the City's yellow cabs - and we have. Today's actions by the Taxi and Limousine Commission provide financial incentives for the purchase of fuel efficient taxis and will

> speed up the phase-out of older, inefficient vehicles. Taxi fleet owners will have more reason to purchase cleaner vehicles and taxi drivers will be held financially harmless for the vehicle purchase decisions of fleet owners. The result will be more clean taxis on City streets. Turning yellow cabs green will be another step towards improving our air quality, reducing the use of fossil fuels and lowering our carbon emissions.

See Press Release, Office of the Mayor, Statement of Mayor Bloomberg on Passage of Green Taxi Incentives by the Taxi and Limousine Commission Board of Commissioners (Mar. 26, 2009).

The TLC Commissioner echoed and amplified the Mayor's remarks:

> It is good public policy to incentivize the purchase of vehicles that will help us to clean our environment, while equalizing the playing field for drivers who have no say in the kinds of vehicles they drive, and how big a role fuel costs play in their income. With more than 15% of the city's taxi fleet already clean-fueled, this was the right thing to do, and it was the right time to do it.

See Press Release, TLC, NYC Taxi and Limousine Commission Approves Hybrid Incentive Plan (Mar. 26, 2009).

Appendix B

Plaintiffs filed an Amended Complaint challenging the City's revised regulations and now bring a motion for a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, to enjoin the City's enforcement of the rules.

At the beginning it is appropriate to point out what this case is not about. No one questions the desirability of fuel efficient and environmentally "clean" vehicles; all parties agree that the City's pursuit of these goals is laudable. Nor is there a question whether New York City can incentivize the purchase of certain types of taxicabs. Several years ago the City issued new taxi medallions which were limited to hybrid vehicles. *See* N.Y. City Administrative Code § 19-532(b) (2003). There was no challenge to the incentive. Recently the City extended the service life of hybrid vehicles from three to five years. *Id.* § 19-535(b) (2006). Again, there was no challenge to this incentive. Similarly, in the present case, Plaintiffs do not challenge the $ 3 per shift "incentive" increase in lease rates for hybrid taxicabs.

On the other hand, there is no doubt that the City could not demand that new motor vehicles purchased, sold, or operated in New York City meet certain mileage or emission standards. The City does not contend otherwise. The issue in this case is more limited and the question is more focused: do the new lease cap regulations have the preempted effect of mandating that taxicab owners purchase only taxicabs with hybrid or clean diesel engines.

Appendix B

The Court's purpose is not to interfere with government officials taking actions in the public interest. Increasing the number of hybrid taxicabs is an appropriate and important governmental priority. Congress, however, has exercised its powers and imposed both national fuel efficiency and engine emissions standards. Congress also directed that the federal standards controlled and preempted state and local governments from acting where Congress has already spoken. If the new rules are in fact a mandate, the Court must determine whether the City's program interferes with the Congressional intent to preserve exclusive jurisdiction. This involves two questions.

The Court first must determine whether the City's new lease cap regulations are a mandate to purchase hybrid vehicles. Plaintiff taxi owners say that they have no real choice under the proposed rules; they will be forced to buy only hybrid vehicles to sustain economic viability. The City maintains that the new lease cap rules permit owners to continue to make a profit, and, therefore, taxicab owners still have a choice. Second, the Court must determine whether the new rules, if they are in fact a mandate, are "related to" mileage or emission standards so that the City's law is preempted by federal law governing those two issues.

The Court finds that Congress intended to retain control over those two federal interests. The effect of the new regulations is to mandate taxicab owners to buy only hybrid vehicles. The requirement is preempted in the same way as the City's earlier attempt to impose mpg requirements. Plaintiffs have demonstrated a likelihood of success in showing that: (1) the new regulations are preempted by federal law because they

are a *de facto* mandate to purchase hybrid taxicabs; and (2) these requirements are related to fuel economy standards under the EPCA and the control of emissions under the federal Clean Air Act ("CAA"). Accordingly, the Plaintiffs' motion for a preliminary injunction is GRANTED.

BACKGROUND

I. The Court's Prior Decision

In September 2008 the Plaintiffs[2] moved to enjoin TLC Rule § 3.03(c)(10)-(11), which required all new taxicabs in New York City to be either wheelchair accessible or to have a minimum city rating of 25 mpg by October 1, 2008,[3] and a minimum city rating of 30 mpg by October 1, 2009 (hereinafter, the "25/30 Rules"). (*See* Declaration of Elizabeth Saylor ("Saylor Decl.") Ex. 1 (containing enjoined TLC Rule § 3-03(c)(10)-(11)).) The only vehicles that met the 25/30 Rules contained hybrid or clean-diesel engines. Plaintiffs argued that the 25/30 Rules were preempted by the EPCA and the CAA.[4]

2. The Plaintiffs in the original action are not the same Plaintiffs in this action, although there is some overlap.

3. The City suspended implementation of the prior rules until November 1, 2008, so that the parties and the Court could properly brief and consider the dispute.

4. The EPCA preemption clause says that a state or political subdivision of a state may not "adopt or enforce a law or regulation related to fuel economy standards . . . ." 49 U.S.C. § 32919(a). The CAA preemption clause says that no state or political subdivision of a state "shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . . ." 42 U.S.C. § 7543(a).

Plaintiffs claimed irreparable injury because the EPCA and CAA provided no private right of action, and accordingly they would be unable to recover their financial damages under 42 U.S.C. § 1983, unless the Court issued an injunction.

On October 31, 2008, the Court found that the EPCA preempted the 25/30 Rules because the rules, by their own language, clearly related to fuel economy standards by setting fuel economy standards for taxicabs. *See Metro. Taxicab Bd. of Trade v. City of New York*, No. 08 Civ. 7837 (PAC), 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *9 (S.D.N.Y. Oct. 31, 2008). The Court rejected the City's argument that the 25/30 Rules were not preempted because they did not actually interfere with the goals of the EPCA. The Court, relying on *Engine Manufacturers Association v. South Coast Air Quality*, 541 U.S. 246, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004), found that allowing one municipality to affect fuel economy standards could have an unwanted aggregate affect, if other states or municipalities followed suit. *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *10 (citing *Engine Mfrs.*, 541 U.S. at 255.) The Court found that the CAA did not preempt the 25/30 Rules, however, because the rules were silent concerning emissions. The Court examined two cases that discussed the interplay between the EPCA and the CAA, and determined that even if emissions reduction was a secondary consequence of the rules, it did not follow that the rules were automatically preempted. 2008 U.S. Dist. LEXIS 94021, [WL] at *13-14 (analyzing *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie,*

508 F. Supp. 2d 295 (D. Vt. 2007), and *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007)). Because the EPCA preempted the 25/30 Rules and Plaintiffs would suffer irreparable harm, the Court issued a preliminary injunction.

II. The New Regulations

On March 26, 2009, the TLC repealed the 25/30 Rules and enacted new regulations. The new regulations, TLC Rule § 1-78(a)(3), created incentives to increase taxi owners' use of hybrid vehicles and disincentives to decrease their use of Crown Victoria model taxicabs. When fully implemented the regulations weighted the disincentives four times greater than the incentive. The Crown Victoria Long Wheel Base model ("Crown Victoria") has been the dominant model for New York City taxicabs since the TLC approved it for use in 2001. From 2001 to 2005, it was the sole vehicle that complied with TLC specifications for taxicabs. (*See* Declaration of Andrew Salkin ("Salkin Decl.") P 5.) Of the more than 13,000 yellow taxicabs, approximately 2,060 (16%) are either hybrid or clean-diesel vehicles, while the balance of the remainder are Crown Victorias. (*Id.* PP 4, 8.)

The new regulations affect the maximum lease rate that vehicle owners may charge drivers leasing a taxicab per 12-hour shift. The prior rules set a maximum lease rate of: $ 105 for all day shifts; $ 115 for the night shift on Sunday, Monday, and Tuesday; $ 120 for the night shift on Wednesday; and $ 129 for the night shifts on Thursday, Friday, and Saturday. *See* TLC Rule § 1-

78(a)(1). The standard lease cap for one shift for a week period is a maximum of $ 666. *Id.* § 1-78(a)(2).

The challenged regulation, TLC Rule § 1-78(a)(3)(ii) (hereinafter, "Lease Cap Rules" or "Rules"), reduces the maximum lease cap for all taxis not hybrid or clean diesel, or wheelchair accessible.[5] The first reduction of $ 4 per shift was to go into effect on May 1, 2009.[6] The reduction is increased to $ 8 per shift on May 1, 2010; and to $ 12 per shift on May 1, 2011. *Id.* § 1-78(a)(3)(ii). The Rules also reward use of hybrid vehicles by increasing the maximum lease cap for hybrid taxicabs by $ 3 per shift. *Id.* § 1-78(a)(3)(i). As indicated, Plaintiffs do not challenge the incentive aspect of the Lease Cap Rules, which have taken effect.

The new Rules provide that taxi owners receive the $ 3 lease cap upward adjustment if they "hack up," or transform, their taxicab pursuant to the specifications in TLC Rule § 3-03.1, which describes hybrid electric taxicab specifications. The Rules define a hybrid vehicle as a "commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner." *Id.* § 3-03.1(b). The only vehicles that meet

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5. As previously stated, the Court uses the phrase "hybrid" to include all taxis with hybrid or clean diesel engines. The lease rates for wheelchair-accessible vehicles are unchanged under the Lease Cap Rules. (*See* TLC "Statement of Basis and Purpose.")

6. Upon the Court's Order, the City suspended implementation of § 1-78(a)(3)(ii) until July 1, 2009.

the new requirement are in fact the same hybrid vehicles that met the City's now abandoned 25/30 Rules. The City recognizes that its new regulatory mechanism "operates within the same universe of approved vehicles." (*See* Defendants' Letter Brief of May 22, 2009 ("Def. May 22, 2009 Letter") 5.)

III. Promulgation and Stated Purpose of the Lease Cap Rules

At the same time that it enacted the Lease Cap Rules, the TLC also rescinded a rule, in place since 1997, prohibiting the TLC from reducing the maximum lease rate unless the TLC found "substantial evidence of reduced operating expenses of the affected medallion owners." *Id.* § 1-78(e).[7] After eliminating the requirement for a cost-based rate determination, the

7. The full text of the rescinded § 1-78(e) is:

> The Commission *shall not lower any upper limitation of lease rates* established in Rule 1-78 herein, *unless* in the view of the Commission, the record before the Commission includes *substantial evidence of reduced operating expenses of the affected medallion owners*. The Commission shall not raise any upper limitation of lease rates established in Rule 1-78 herein, unless in the view of the Commission, the record before the Commission includes substantial evidence of increased operating expenses of the affected medallion owners. The factors to be reviewed in consideration of any proposed increase in the upper limitation of lease rates shall also include, but not limited to [sic], the

(Cont'd)

TLC substituted "the Commission's assessment of appropriate policy considerations" for determining lease rates. *Id.* § 1-78.1(b). These two rule changes rescinded the TLC's longstanding "cost-based" approach for enacting lease cap adjustments and permitted a "policy-based" approach.

As anticipated by the City's press releases of November 2008 and March 2009,[8] the TLC's "Statement of Basis and Purpose" for the new Lease Cap Rules is to replace the enjoined rules in order to "create incentives for taxicab owners to buy cleaner vehicles." (*See* Declaration of Ramin Pejan ("Pejan Decl.") Ex. J.) The statement continues by noting that the Rules "are intended to place gasoline costs on the owner who chooses the vehicle," rather than on the driver, who pays gasoline costs but "may have no voice in the owner's choice of vehicles." *Id.* Under the new Rules the costs to the driver will be roughly equal between driving a

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(Cont'd)

> effects on driver earnings and the retention of experienced drivers.

TLC Rule § 1-78(e) (emphasis added).

8. The Court, in its prior decision in this case, "limited its review to the stated purpose of the [25/30 Rules], as published in the City Record." *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *14. The City Record specified fuel efficiency standards which were clearly related to federal requirements. Here, however, the regulations refer to "hybrids" and are silent on their "relatedness" to either fuel economy or emissions. That silence does not end the inquiry and the Court will examine the full record, including public statements, to determine the meaning of the new rules.

hybrid and non-hybrid vehicle, while the lease income to owners of non-hybrid taxis will be reduced, according to the TLC.[9] *Id.*

The Lease Cap Rules create a $ 15 spread by 2011 between what owners of hybrid taxicabs and owners of Crown Victorias may charge in maximum lease rates per vehicle per shift. The City states that the Lease Cap Rules correct a structural disincentive in the current rules that prevented many taxi owners from transitioning to hybrid vehicles. (*See* Salkin Decl. P 32.) This disincentive existed because taxi drivers, not owners, pay for gasoline, and it costs more to transform a hybrid vehicle into a taxi. Accordingly, because the gas costs are irrelevant to taxi owners, many owners choose the cheaper and time-tested option of hacking up Crown Victorias.

The TLC determined that the incentive rate for hybrids should be based on Plaintiffs' representations in the prior *Metropolitan Taxicab* case that it costs approximately $ 6,000 more to purchase and hack up a hybrid vehicle as compared to a Crown Victoria. (Salkin Decl. P 26.) Dividing $ 6,000 by three years, the statutory life of a taxicab, is $ 2,000. That figure divided

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9. The City's sensitivity to the impact of fuel costs on taxicab drivers' income does not appear to be consistent with the TLC's denial last year of the New York Taxi Workers Alliance's request for a fuel surcharge to offset the impact of rising gasoline costs. The TLC found that even with the higher gasoline costs, taxicab drivers made a living wage. (*See* Salkin Decl. P 15; Pejan Decl. Ex. I.)

by the maximum number of shifts per year, 730, equals approximately $ 2.75 per shift, which the TLC rounded up to $ 3. (*Id.*) By allowing hybrid taxi owners to charge this extra $ 3 per shift, those owners would recoup the additional cost of changing to hybrid cars, according to the TLC. (*Id.*) [10]

To calculate the $ 12 reduction in lease rates, the TLC shifted from the capital cost of "hacking up" a vehicle to the cost of gasoline in New York City during a two-year period from December 11, 2006, to December 8, 2008, which was $ 3.05 a gallon. The TLC then compared the expected costs of gasoline per shift for a Crown Victoria and for the Ford Escape, the most popular brand of hybrid taxicab. Based on averages of 15 miles per gallon and driving 135 miles per shift, the costs in gasoline per shift would be $ 27.45 for the Crown Victoria. In the Ford Escape, which averages 34 miles per gallon, the gasoline cost is $ 12.11 per shift. The TLC rounded the price differential to $ 15, and then offset the $ 15 from the $ 3 incentive, resulting in a $ 12 downward adjustment. (*Id.* PP 28-29.)

Under the new regulations, the TLC did not consider the operating costs of the medallion owners. Instead, the TLC calibrated a cost which the owner had never borne and reduced the lease rate by that calculated value. The TLC's justification for this new

10. The City's calculation seems to ignore the fact that the statutory life of a hybrid vehicle is five years, not three. Using the City's methodology, the proper incentive for a taxicab with a five-year life cycle would appear to be $ 1.64 per shift.

regulation: to "green" the taxi fleet with cleaner and more efficient taxicabs. The new lease cap regulations would not have been possible under the prior regulatory framework.

The TLC considered other regulatory options before enacting the Lease Cap Rules. The TLC considered requiring taxicab owners who lease their vehicles to pay for the cost of fuel, either through direct reimbursement of gas costs to drivers or by requiring Fleet Owners to deliver a vehicle with a full tank of gas at the start of each shift. (*Id.* P 33.) The TLC states that it did not promulgate this rule because it was "logistically infeasible" and difficult to enforce. (*Id.*)

IV. Procedural History

a. The Parties

The Amended Complaint, filed on April 17, 2009, alleges that the Lease Cap Rules are preempted by the EPCA and the CAA because the Rules are essentially a mandate to purchase vehicles with a certain mpg or emissions rating.

The Plaintiffs are operators of taxicab fleets (hereinafter, "Fleet Owners") and a trade association for fleet operators. The Fleet Owners regularly lease their vehicles to drivers, and the majority of the vehicles are Crown Victorias. Together, Plaintiffs control more than 25% of the taxicabs in New York City. (*See* Am. Compl. PP 7-11.) Industry-wide, fleet owners, the group

presumptively benefitting from the current structural disincentive to purchase hybrids, control approximately 35% of all taxicab medallions. (*See* Salkin Decl. P 32; May 7, 2009 Oral Argument Transcript ("Oral Arg. Tr.") 36:09-14.)

Defendants are New York City; the TLC, which is the City's regulatory agency for the taxicab industry; Mayor Michael Bloomberg, in his official capacity; TLC Commissioner, Chair, and Chief Executive Officer Matthew Daus, in his official capacity; TLC Assistant Commissioner for Safety & Emissions Peter Schenkman, in his official capacity; and TLC First Deputy Commissioner Andrew Salkin, in his official capacity.

b. The Evidentiary Hearing

The Court held oral argument on Plaintiffs' motion on May 7, 2009. Following oral argument the Court held an evidentiary hearing on May 20, 2009, to determine the effect of the Lease Cap Rules on Fleet Owners and whether the Rules force Fleet Owners to switch to hybrid vehicles.

Plaintiffs presented three experts at the May 20, 2009 hearing: James Levinsohn, an economist teaching at the University of Michigan, who presented a detailed estimation of the profit differential between Crown Victoria and hybrid owners under the status quo lease caps and under each of the first three years of the Lease Cap Rules; Ray Mundy, a transportation and logistics specialist teaching at the University of Missouri, who

discussed the history of lease caps in New York City and how tying lease caps to the use of hybrid vehicles would affect the purchasing decisions of Fleet Owners; and Dean Karlan, an economist teaching at Yale University, who testified about brand loyalty and why businesses make certain economic decisions.

Defendants presented two experts: Kurt Strunk, a senior consultant at National Economic Research Associates ("NERA"), who testified about errors in Dr. Levinsohn's economic study and concluded that so long as Fleet Owners made more than $ 1 in profits under the Lease Cap Rules, the new Rules would not "force" them to switch to hybrids; and Rachel Weinberger, a transportation planning specialist teaching at the University of Pennsylvania, who testified that the prior lease cap rules presented a structural disincentive for Fleet Owners to switch to hybrid taxicabs, but that even under the new Lease Cap Rules not all Fleet Owners would behave in the most efficient economic manner and switch to hybrid vehicles.

DISCUSSION

I. Preliminary Injunction Standard

A preliminary injunction may be granted upon a showing of irreparable harm, and because this matter involves a challenge to a New York City statutory or regulatory scheme, Plaintiffs must also demonstrate a likelihood of success on the merits. *Jolly v. Coughlin,* 76 F.3d 468, 473 (2d Cir. 1996). For the reasons given in

the previous decision, Plaintiffs have shown that they will suffer irreparable harm without an injunction. *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *5-7 (finding that Plaintiffs would have no private right of recovery under the EPCA). The issue for this preliminary injunction motion is whether Plaintiffs have shown a likelihood of success of the merits.

II. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on the merits because the Lease Cap Rules are preempted by federal law. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, "state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (internal quotations and citation omitted). The Supremacy Clause "may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995); *see also Mortier*, 501 U.S. at 604-05 ("Congress' intent to supplant state authority in a particular field may be express in the terms of the statute.").

Even without express preemptive language, courts may infer Congress' intent to preempt state action where "the scheme of federal regulation is sufficiently

comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). Where a party claims that federal law preempts state action in a field traditionally occupied by state regulation, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. In every preemption analysis, courts must look to Congress' intent to determine the scope of the preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)).

Before analyzing Congress' intent in enacting the EPCA and the CAA and whether those federal statutes preempt the Lease Cap Rules, the Court must determine whether the new rules are a *de facto* mandate to Fleet Owners to purchase hybrid taxicabs. If the Lease Cap Rules present only a single "real" option for Fleet Owners, then the Rules are a mandate and the Court will then determine if that single option is preempted. *See, e.g., Travelers Ins.*, 514 U.S. at 668 ("We acknowledge that a state law might produce such acute, albeit indirect, economic benefits, by intent or otherwise, as to force an ERISA plan to adopt a certain

scheme . . . and that such a state law might indeed be preempted . . . ."); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007); *Retail Indus. Leaders Ass'n v. Suffolk County*, 497 F. Supp. 2d 403, 417 (E.D.N.Y. 2007). If the Lease Cap Rules present viable options to Fleet Owners to either purchase a Crown Victoria or a hybrid, then the Rules are not a mandate. A preemption analysis would then be irrelevant since the City is not forcing the Fleet Owners to take any new action—much less a potentially preempted action. *See Travelers Ins.*, 514 U.S. at 659 (noting that where a state law with some economic impact did not bind the affected parties to "any particular choice," the state law did not function as a regulation of a preempted area of law).

a. Are the Lease Cap Rules a Mandate?

i. Legal Precedent

There are no controlling cases that deal with whether the Lease Cap Rules are a mandate, and, if so, whether the Rules are preempted. Both parties cite to cases involving the Employee Retirement Income Security Act of 1974 ("ERISA"), in which the Supreme Court and lower courts have addressed the issue of preemption where a state law, while seemingly presenting choices, essentially mandates an outcome that is preempted by federal law.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995), a New York

state statute required hospitals to collect surcharges from patients covered by a commercial insurer, but exempted patients insured by Blue Cross/Blue Shield. *Id.* at 649. The effect of the law was to make "the Blues" a cheaper and more attractive option for administrators of employee benefit plans that fell under ERISA. The plaintiffs, who were other health-care insurers, argued that the law was preempted by language in the ERISA statute stating that ERISA superseded all state laws insofar as they "relate to" an employee benefit plan. The Court determined that the only way to understand the term "relate to" was to examine the objectives of the ERISA statute and then compare "the purpose and the effects" of the New York statute to see if they conflict. *Id.* at 656-59. The Court noted that the intent of the ERISA preemption provision was to ensure that plan administrators would work with a uniform body of law, so as to minimize the administrative and financial burden of complying with many different state directives. *Id.* at 657-58.

Examining the New York statute, the Court noted that the law created an "indirect economic effect" on plan administrators' choices, but that "[a]n indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Id.* at 659-60. The Court found that the statute's indirect influence affected a plan administrator's decisions about which plan to use, "but it does not affect the fact that any plan will shop for the best deal it can get, surcharges or no surcharges." *Id.* at 660. In analyzing how the state law

fit with Congress' intent to preempt state regulation of ERISA plans, the Court held that "cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages . . . are a far cry from those 'conflicting directives' from which Congress meant to insulate ERISA plans." *Id.* at 662. The law was not preempted because: (1) it did not force only one, preempted, choice; and (2) the manner in which the law indirectly affected ERISA plan decisions was not part of Congress' preemptive object.

Significantly, however, the Court left open an unresolved question:

> [W]e do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions on the matter. We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted . . . .

Id. at 668 (internal citations omitted). While this observation is dicta, the Supreme Court clearly recognized that the indirect economic pressures of a state law could force a party to adopt a scheme that would be preempted, even if the Court did not find such pressures in *Travelers Insurance*.

Appendix B

The Supreme Court analyzed the potentially preemptive impact of a state law operating as a *de facto* mandate in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997). There, a California law allowed contractors to pay lower wages to workers from state-certified apprenticeship programs when working on public works projects. *Id.* at 319-20. At issue was whether the California law affected the apprentice programs' ERISA plans by essentially forcing them to obtain a state certification, which arguably was preempted because it "relate[d] to" ERISA. The Court held that the law was not preempted by the ERISA statute because the wage law was "quite remote from the areas with which ERISA is expressly concerned—'reporting, disclosure, fiduciary responsibility, and the like.'" *Id.* at 330 (quoting *Travelers Ins.*, 514 U.S. at 661). The Court also analogized the case to *Travelers Insurance* and found that the added inducement from the lower wage paid for state-approved apprentices was not "tantamount to a compulsion upon apprenticeship programs." *Id.* at 333. The Court noted that the wage statute "alters the incentives, but does not dictate the choices, facing ERISA plans." *Id.* at 334.

The Fourth Circuit distinguished *Travelers Insurance and Dillingham Construction in Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), another ERISA case. In that case Maryland passed a law that targeted Wal-Mart and forced the company—and, by specifically excluding other

employers who might fall within the statute, only that company—to either spend at least 8% of its total payroll on health insurance for its employees or pay the shortfall to the state. *Id.* at 183. The Fourth Circuit examined how the Maryland regulation conflicted with the purpose of the ERISA statute, which was to permit ease of nationwide plan administration. The court held that "the only rational choice employers have under the [Maryland act] is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold," because no reasonable employer would pay money to the state that it could instead spend on its employees. *Id.* at 193. The court looked at the Maryland legislature's intent in passing the so-called Fair Share Act and found that the intent and effect were to create a "fee or a penalty" that gave Wal-Mart "an irresistible incentive" to increase health benefits. *Id.* at 194 ("The Maryland General Assembly intended the Act to have precisely this effect.").

The Fourth Circuit distinguished the Wal-Mart case from *Travelers Insurance* and *Dillingham Construction* for several reasons. First, it said that the Maryland law directly regulated ERISA plan structuring, whereas *Travelers Insurance* and *Dillingham Construction* involved indirect regulations, so the Maryland law had a "tighter causal link between the regulation and employers' ERISA plans," making it more analogous to cases where ERISA regulation was preempted. *Id.* at 195-96. Second, the court found that the law allowed for no meaningful alternatives to increasing the payment for health insurance, and that

even if those alternatives did exist, they would still affect plan decisions in a preempted manner. *Id.* at 196-97.

Retail Industry Leaders Association v. Suffolk County, 497 F. Supp. 2d 403 (E.D.N.Y. 2007), dealt with facts nearly identical to *Fielder*. In *Suffolk County*, the local legislature targeted Wal-Mart to make health care expenditures of at least $ 3 per employee work-hour or pay the shortfall and civil penalties to the county. 497 F. Supp. 2d at 406. The court looked at the legislative history of the local act and found that "Suffolk County enacted it in order to mandate that covered employers and, specifically, Wal-Mart, increase spending on healthcare coverage." *Id.* at 417. Citing to *Fielder*, the court also found that "the alternative options for compliance with the Act are unrealistic." *Id.* at 418. Since it was a mandate, the act was preempted under ERISA because it "would disrupt uniform plan administration." *Id*.

The rule derived from these cases is that a local law is preempted if it directly regulates within a field preempted by Congress, or if it indirectly regulates within a preempted field in such a way that effectively mandates a specific, preempted outcome. This Court's initial ruling in *Metropolitan Taxicab* was an example of a local law directly regulating within a preempted field. *See* 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *9. Fielder is an example of a case involving an effective mandate of a preempted outcome. *See* 475 F.3d at 193-96. Conversely, a local law is not preempted when it only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted

options, as held in *Travelers Insurance* and *Dillingham Construction*.

ii. Application to the Facts

The Lease Cap Rules at issue control the maximum lease rates which taxicab owners may charge. They allow a higher rate for hybrids and much lower rates for Crown Victorias. While silent on mileage and emission standards, the Rules were expressly adopted to encourage the purchase of hybrid vehicles which meet the City's mileage goals and desired emission standards.

The Court must look to the effect of the Lease Cap Rules on Fleet Owners to determine if they are a *de facto* mandate to purchase hybrid vehicles. Plaintiffs bear the burden to persuade the Court that the Rules constitute a mandate "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (citation omitted). While *Travelers Insurance, Dillingham Construction, Fielder*, and *Suffolk County* describe how a court should analyze the interplay between an effective mandate and preemption, they provide little guidance on how a court should determine whether specified economic incentives actually create a mandate. For this reason the Court asked the parties to present expert evidence on the effect of the Lease Cap Rules.

In his written declaration of May 18, 2009, and at the May 20, 2009 evidentiary hearing, Plaintiffs' expert economist, Dr. Levinsohn, estimated the expected

impact of the Lease Cap Rules on Fleet Owners by using financial data supplied by the Plaintiffs. Dr. Levinsohn calculated the difference in profit for Fleet Owners if they used entirely Ford Escape Hybrids compared to Crown Victorias, factoring in the comparative revenue from lease charges; the comparative cost of purchasing and hacking up a taxicab; medallion costs; the comparative operating cost; and other general administrative costs.

If the lease cap rates had remained unchanged, Dr. Levinsohn estimated that Fleet Owners using Crown Victorias made approximately $ 8,500 per year in profits, while those using hybrids earned only $ 5,100 in profits, meaning that hybrid profit was $ 3,400 less per vehicle per year. (*See* Declaration of James Levinsohn ("Levinsohn Decl.") 8-9; *see also* Plaintiffs' Ex. 31 from May 20, 2009 Evidentiary Hearing ("Pl. Hr'g Ex.").)

A chart that Plaintiffs presented at the May 20, 2009 hearing illustrates Dr. Levinsohn's findings from his analysis of two Fleet Owner operations, Gotham Yellow LLC ("Gotham") and Ronart Leasing Corp. ("Ronart"):

Appendix B

Profits Per Car Per Year

Gotham Data

*2*Under current lease		*3*Under challenged lease rates,		
*2*rates, for car		*3*for car purchased in:		
*2*purchased today				
		May 2009	May 2010	May 2011
Crown Vics	$ 8,518	$ 3,327	$ 1,511	$ 581
Hybrid	$ 5,103	$ 7,099	$ 7,099	$ 7,099
Penalty (Difference in profits)	-$ 3,415	$ 3,772	$ 5,588	$ 6,518

Appendix B

Ronart Data

*2*Under current lease		*3*Under challenged lease rates,		
*2*rates, for car		*3*for car purchased in:		
*2*purchased today				
		May 2009	May 2010	May 2011
Crown Vics	$ 4,962	$ 363	-$ 1,348	-$ 2,241
Hybrid	$ 1,617	$ 3,258	$ 3,258	$ 3,258
Penalty (Difference in profits)	-$ 3,345	$ 2,895	$ 4,606	$ 5,499

See Pl. Hr'g Ex. 31.

The Lease Cap Rules immediately increase the lease cap for hybrid taxicabs by $ 3, but reduce the lease cap rates for Crown Victorias by $ 4. The impact of this is that the profitability of using hybrid taxicabs is increased and Crown Victoria profitability is decreased. The current $ 3,415 disadvantage for hybrids changes to a $ 3,772 advantage for hybrids, under the figures for Gotham, representing a swing of close to $ 7,200.

(*Id.*) The swing under Ronart's data for the same period is nearly $ 6,250. (*Id.*) One year later, in May 2010, when the maximum lease rate for Crown Victorias is reduced by $ 8, the profits for Crown Victoria owners are reduced to approximately $ 1,500 under Gotham's data, and the hybrid advantage increases to nearly $ 5,600. (*Id.*) Finally, in May 2011, when the Lease Cap Rules reduce the rates for Crown Victorias by $ 12 per shift, the profits from Crown Victoria taxicabs are reduced to $ 581 and the hybrid advantage increases to approximately $ 6,500. (*Id.*) Under Ronart's data Crown Victoria owners operate at a loss in the second and third years of the Lease Cap Rules. (*Id.*)

In Dr. Levinsohn's opinion, the size of the profit disparity between hybrids and Crown Victorias is so great that no rational taxicab owner would choose to take such a loss in profit when the available alternative is so much more profitable.

Plaintiffs' expert on the taxicab industry, Ray Mundy, submitted a written declaration and testified that the TLC first regulated lease rates in 1996 and first set lease caps in 1997. (*See* Declaration of Ray Mundy ("Mundy Decl.") PP 26-27.) Dr. Mundy explained the detailed, cost-based analysis of changes in fleet owner profit that the TLC undertook in 2004 when implementing new lease caps and fare increases. (*Id.* PP 30-32.) Dr. Mundy also stated that in his experience in the taxi industry nationwide, he has never encountered an example of a regulatory agency decreasing a lease rate for a vehicle that was formerly

approved. (*Id.* P 34.) Had the prior regulations stayed in place, the City could not have made the cost changes it enacted. The Lease Cap Rules reduced revenues for certain types of vehicles, without regard to cost, in order to implement the City's policy choice: taxi owners should buy hybrids.

Defendants' consultant Kurt Strunk framed the "mandate" question differently than Dr. Levinsohn. According to Mr. Strunk, the Lease Cap Rules are not a mandate so long as Crown Victoria operators continue to earn any profit. (*See* Declaration of Kurt Strunk ("Strunk Decl.") 6; *see also* May 20, 2009 Evidentiary Hearing Transcript ("Hr'g Tr.") 117:04-07.) There is no reason to compare costs and revenues associated with purchasing a hybrid, he said, because the relevant data point is that Crown Victoria operators will continue to make some profit under the Lease Cap Rules. In Mr. Strunk's opinion, any amount over zero is sufficient to demonstrate that there is an economic profit and, therefore, there is no mandate. (Hr'g Tr. 117:04-07.)

Mr. Strunk admitted that it was unusual for a regulatory agency to determine ratemaking changes based on policy, rather than on a cost analysis. "Ratemaking based on cost is more common," he said; Mr. Strunk was unaware of any agencies in the United States that regulated on anything other than costs. (*See id.* 120:11-121:09.)

Defendants' transportation expert Rachel Weinberger echoed Mr. Strunk's analysis: Fleet Owners

had a reasonable choice, even under the Lease Cap Rules, because Fleet Owners could make "a reasonable return on [their] investment, which would be an economic rent greater than zero." (*Id.* 125:02-03.) Dr. Weinberger was not as critical of Dr. Levinsohn's analysis as Mr. Strunk was. ("But I do, actually, want to applaud Dr. Levinsohn. I thought he did a very nice piece of work in a very short amount of time from an academic perspective." *Id.* 123:09-11.) Nonetheless she adhered to Mr. Strunk's point: economic rents above zero cannot constitute a mandate. (*Id.* 123:12-15.) Dr. Weinberger compared the Fleet Owners' situation to her own status as a property owner; she chooses not to maximize her profits and raise the rent on her tenants because they are a known quantity and she makes an acceptable profit. (*Id.* 126:11-21.) Upon questioning by the Court, however, Dr. Weinberger acknowledged that if given an empty apartment and the choice between a tenant paying $ 100 rent and a tenant paying $ 200 rent, she would "[o]f course" choose the $ 200 tenant because she is a reasonable business person. (*Id.* 126:22-127:08.) Since Fleet Owners must purchase vehicles every year as prior purchases age out of the fleet, it would seem that the renting of the empty apartment would be the more apt analogy.

In addition to Dr. Weinberger's and Mr. Strunk's testimony that the Lease Cap Rules are not a mandate, the City contrasts data from the purchasing decisions of Fleet Owners against individual owners who drive their own taxicabs. Individual owners already pay for their own gas and thus have an incentive to purchase

hybrids. The City classifies two types of owners who drive their own vehicles: (1) those who own the vehicles but lease their medallions ("DOVs"); and (2) those who own medallions and their own vehicle and may or may not lease out the vehicle, but who also drive several shifts a year ("non-affiliation owners"). (*See* Salkin Decl. P 30-31.)

The City states that DOVs account for approximately 7,000 taxicabs, more than 50% of all cabs. Non-affiliation owners account for 3,000 taxicabs. (*Id.* P 31.) In the 16-month period from January 2008 to April 2009, vehicles purchased by DOVs were split 55% Crown Victoria and 40% hybrid or clean diesel.[11] Vehicles purchased by non-affiliation owners during that time were 47% Crown Victoria and 47% hybrid or clean diesel. Fleet Owners purchased 70% Crown Victorias and 28% hybrid or clean diesel. (*See* Pejan Decl. Ex. K.)

The City argues that since DOVs and non-affiliation owners—the parties with a greater economic incentive to purchase hybrids due to high gas prices—continued to purchase Crown Victorias even after the economic incentive to purchase hybrids existed, it proves that taxi owners will still choose to buy Crown Victorias even when confronted by a substantial economic incentive not to do so. (*See* Salkin Decl. P 37; Pejan Decl. Ex. K.) This argument is a surmise because the existing buying pattern does not reflect the $ 12 per-shift disincentive

11. The Court assumes that the remaining 5% of vehicles were wheelchair-accessible, the third category of permissible taxicabs.

the City adopted for the express policy purpose of putting more hybrid taxicabs on the street.

Based on the foregoing evidence from the testimony at the hearing and the written declarations of the parties, there is one clear conclusion to be drawn from the Lease Cap Rules, the manner in which they were adopted, and the methodology of the new regulatory architecture. The Lease Cap Rules' purpose is to incentivize the purchase of hybrids, while at the same time provide a very meaningful disincentive to the continuing use of conventionally powered vehicles. The combined effect of the lease cap changes, and even the disincentive alone, constitutes an offer which can not, in practical effect, be refused.

The City argues that the Fleet Owners cannot show irreparable harm based on the initial $ 4 reduction. But if the Fleet Owners waited for the $ 12 disincentive to take effect in 2011, the City would surely argue that the Fleet Owners were too late. The Court need not wait, however. By creating the $ 12 disincentive, the City clearly intended to send an obvious signal as to the economic consequences for continuing to stay with Crown Victorias. While the City might have addressed the structural disincentive in other ways—perhaps a larger incentive for hybrid taxi owners—it chose a $ 12 disincentive for conventional vehicles, at a weight four times the incentive for hybrids. The disincentive reduces income without any consideration of Fleet Owner costs and imposes an immediate penalty for continuing to use the same vehicle that the City mandated within this decade.

Any doubt about the City's intent in enacting the Lease Cap Rules is dispelled by looking at how the City changed the rules. TLC Rule § 1-78(e) required the TLC to find "substantial evidence of reduced operating expenses of the affected medallion owners" before it reduced maximum lease cap rates. Such a study would have taken some time, and almost certainly would not have found any evidence that operating expenses declined in the five years between 2004 and 2009. Rather than dealing with costs, which had been the guide for over a decade, the TLC changed the rules so that it "may initiate lease cap changes at any time, based on the Commission's assessment of appropriate policy considerations." *See* TLC Rule § 1-78.1(b). Using only a policy analysis, the TLC could quickly change the maximum lease caps to create a penalty for Crown Victoria operators and a benefit for drivers, regardless of any changes to Fleet Owners' operating expenses. Defendants' own expert, Mr. Strunk, acknowledged that he had never seen such a policy-based approach to ratemaking regulation in the United States. The only reasonable inference that can be drawn from the TLC's procedural maneuvering is that it intended that the substantially reduced lease cap rates for Crown Victoria owners would convince the owners to transfer to hybrid vehicles.

There is one final piece of evidence in the question of whether Fleet Owners are effectively forced to switch to hybrid taxicabs under the new rules. Based on Dr. Levinsohn's economic analysis—to which the City presents no competing analysis, only a critique of his

methodology—the Lease Cap Rules, when fully phased in, provide an economic incentive of approximately $ 5,500 to $ 6,500 per vehicle to switch to hybrids. Dr. Levinsohn calculated that profits for Crown Victoria owners are currently $ 8,500 per vehicle per year. Under the new Lease Cap Rules, Fleet Owners who continue to use Crown Victorias would forgo a profit margin up to 76% of their current profit. (*See* Levinsohn Decl. 11-12; Pl. Hr'g Ex. 31.) A sensible business person faced with such a profit reduction would choose to avoid that loss and, in this case, favor the more profitable hybrid taxicab option. *See Fielder*, 475 F.3d at 193 (discussing the "only rational choice" that an employer could make when faced with supposed options under Maryland's Fair Share Act). The City's expert, Dr. Weinberger, acknowledged as much when discussing her hypothetical economic decisions as a landlord; when faced with the option of taking substantially higher profits in rent, she "of course" would take the money. (Hr'g Tr. 126:22-127:08.)

The Court cannot accept the City's argument that any rate structure that yields more than $ 1 in profit does not "compel" or mandate a result. The taxicab industry, as much as any other industry, is profit oriented and business owners try to maximize profits. Even a first-grader who has nothing recognizes that getting $ 100 is much better than getting $ 1, even though the first-grader is better off with $ 1 than with $ 0. Given a choice, the first-grader will always take $ 100, just as the Fleet Owners will always take a profit of $ 7,100 (hybrids) over a profit of $ 580 (Crown Victorias),

the expected differential in May 2011 under Dr. Levinsohn's analysis. (*See* Pl. Hr'g Ex. 31, *supra* P. 21.)

The City's presentation of recent purchasing patterns of DOVs and non-affiliation owners is not convincing. The economic position of DOVs and non-affiliation owners is not comparable to the Fleet Owners' position. While Fleet Owners lease their vehicles out two shifts a day, every day, the TLC prohibits drivers from operating their taxicabs more than 12 consecutive hours. *See* TLC Rule § 2-23. Accordingly, DOVs and non-affiliated owners do not have as strong an incentive as the City suggests to currently switch to hybrid taxicabs because DOVs and non-affiliation owners only pay for their own gas a maximum of half of the shifts. This could explain why many DOVs and non-affiliation owners continue to buy Crown Victorias; due to the cost of purchasing and hacking up hybrid taxicabs, it may still be in their economic benefit to drive Crown Victorias. The purchasing patterns that the City presents are not strong arguments that Fleet Owners will act against their economic interests and buy Crown Victorias once the Lease Cap Rules are in effect. Far stronger evidence of likely future purchasing performance is the sharp reduction in profits directly associated with the ownership of a Crown Victoria once the Lease Cap Rules are in place.

Looking at all the evidence, it is clear to the Court that the Lease Cap Rules do not present viable options for Fleet Owners and instead operate as an effective mandate to switch to hybrid vehicles. Having decided

that the Lease Cap Rules constitute a mandate, the Court turns to the issue of preemption.

b. Preemption Under the EPCA

Preemption claims turn on Congress' intent, so the Court must review Congress' goals in enacting the EPCA and the relevant text of the provision in question. *See Wyeth v. Levine*, 129 S. Ct. at 1194; *Travelers Ins.*, 514 U.S. at 655. The Court reviewed this same issue in the previous case involving these parties. *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *8.

Congress enacted the EPCA to address the energy crisis resulting from the 1973 Mideast oil embargo. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1182 (9th Cir. 2008) (citing H.R. Rep. No. 94-340 at 1-3 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1762, 1763-65). The goals of the EPCA are to improve motor vehicle efficiency and to "decrease dependence on foreign [oil] imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." *Id.* (quoting S. Rep. No. 94-516 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 1956, 1957); *see also Green Mountain*, 508 F. Supp. 2d at 305-06. The Department of Transportation ("DOT") is charged with establishing federal fuel economy standards on a fleet-wide basis. *See* 49 U.S.C. §§ 32902(a), 32902(c). These average standards are known as "corporate average

fuel economy" or "CAFE" standards. The CAFE standard is "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

The EPCA contains an express preemption clause:

> When an average fuel economy standard prescribed under this chapter . . . is in effect, a State or political subdivision of a State *may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards* for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a) (emphasis added). This language is quite clear: "Congress's undoubted intent was to make the setting of fuel economy standards exclusively a federal concern." *Green Mountain*, 508 F. Supp. 2d at 354.

The DOT delegates the responsibility for setting fuel economy standards to the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. § 1.50(f). The NHTSA must weigh four factors when setting standards: "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). The NHTSA has interpreted "economic practicability" to include consideration of consumer choice, economic

hardship for the auto industry, and vehicle safety. *Green Mountain*, 508 F. Supp. 2d at 307. The NHTSA balances the goals of improving fuel economy with maintaining consumer choice and avoiding adverse economic effects on auto manufacturers. As a California district court described it:

> NHTSA must set fuel economy at the maximum feasible level while avoiding serious adverse economic effects on manufacturers and maintaining a reasonable amount of consumer choice among a broad variety of vehicles. Accordingly, Congress carefully drafted the CAFE program to require fuel economy restrictions that do not have the effect of either imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles.

Central Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1169 (E.D. Calif. 2006) (internal citations and quotations omitted).

A manufacturer's fleet of new passenger vehicles currently must average at least 27.5 miles per gallon. *See* 49 U.S.C. § 32902(b). By 2020 that minimum fleet average rises to 35 miles per gallon. *Id.* Less than a month ago President Obama proposed new CAFE standards that would require a fleet average of 35.5 miles per gallon by 2016. *See* Press Release, The White House, President Obama Announces National Fuel Efficiency Policy (May 19, 2009). There is no question

that the federal government is actively pursuing regulation that would affect national fuel efficiency standards.

The City acknowledges that the prior 25/30 Rules are preempted under the EPCA because they "related to fuel economy standards." (*See* Oral Arg. Tr. 16:13-15.) Defendants now argue that the Lease Cap Rules, even if they are a mandate, are not preempted under the EPCA because they simply designate hybrid vehicles as required taxicabs and do not require vehicles with a certain mpg rating. The City argues that the term "related to" should be construed narrowly, so that a *de facto* requirement to purchase hybrid taxicabs does not "relate to" fuel economy standards under 49 U.S.C. § 32919(a).

A constricted interpretation of the term "related to" is not appropriate. The Supreme Court just recently referred to that term as "expansive." In *Travelers Indemnity Co. v. Bailey*, Nos. 08-295, 08-307, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 2009 U.S. LEXIS 4537, 2009 WL 1685625 (June 18, 2009), a case dealing with the enforceability of a Bankruptcy Court order enjoining related state court lawsuits, the Supreme Court stated unequivocally that "[i]n a statute, '[t]he phrase 'in relation to' is expansive.'" 2009 U.S. LEXIS 4537, 2009 WL 1685625, at *8 (quoting *Smith v. United States*, 508 U.S. 223, 237, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)). Although the Court noted that at some point the term "relate to" loses any meaning because "'everything is related to everything else,'" *id*. (quoting *Dillingham*

Constr., 519 U.S. at 335), the Court found that the state claims at issue "clearly" related to the Bankruptcy Court's injunction and so there was no need to "stake out the ultimate bounds" of the connection. *Id.*

In this case, while it is true that the Lease Cap Rules do not require a specific mpg rating, the effect of the rules is to force taxicab owners to meet an mpg threshold determined by the mileage rating of the TLC's approved hybrid or clean diesel vehicles. All of the TLC-approved hybrids or clean diesel vehicles are rated 25 mpg or higher. (*See* Saylor Decl. Ex. 14.) These are the same vehicles that the TLC approved under the preempted 25/30 Rules. (*Compare* Saylor Decl. Ex. 4 *with* Saylor Decl. Ex. 14.) The Lease Cap Rules are essentially a command to taxicab owners to meet that higher mpg standard. *See Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (finding that while a New York law requiring that a percentage of vehicle sales be "zero emission vehicles" did not "impose precise quantitative limits on levels of emissions," the CAA nevertheless preempted the sales requirement because the law was "in the nature of a command having a direct effect on the level of emissions").

The City's purpose in enacting the Lease Cap Rules also sheds light on the issue of preemption. *See Travelers Ins.*, 514 U.S. at 658 (looking at the "purpose and the effects" of the New York law); *Fielder*, 475 F.3d at 190 (examining the "nature and effect" of Maryland's Fair Share Act to determine preemption). While consideration of the purpose of the local regulation is

not the end-all to the Court's preemption review, that does not mean it should be ignored. It is fair to consider purpose in conjunction with the law's effects. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."). Here, one of the City's stated purposes in enacting the Lease Cap Rules was to allow taxi owners who choose "a fuel efficient" vehicle to realize a greater lease income than owners who choose "a less efficient vehicle." (*See* Pejan Decl. Ex. J.) The City's discussion of "efficient" vehicles relates to how many miles per gallon a vehicle travels. Indeed, the exact amount of the disincentive is based on a calculation of miles per gallon. (*See* Salkin Decl. P 29.) Looking beyond the reasons stated in the City Record, TLC Commissioner Daus, in announcing the Lease Cap Rules, stated that, "Our goal from the beginning was to get *fuel efficient* taxis on the road using whatever appropriate methods required to achieve our goal." (*See* Saylor Decl. Ex. 8 (emphasis added).)

Focusing on the effect and purpose of the Lease Cap Rules, it is clear that the rules "relate to" fuel economy standards, as contemplated in 49 U.S.C. § 32919(a), the EPCA preemption clause. The 25/30 Rules specifically referred to mpg standards, but creative drafting and the absence of specific reference to mileage do not make the effect—or the purpose—of the Lease Cap Rules any different than the prior preempted regulations. The

Lease Cap Rules effectively mandate the use of taxicabs with a certain mpg rating. *See Cent. Valley*, 529 F. Supp. 2d at 1175 ("The narrowest interpretation consistent with the plain language of EPCA's preemptive provision is that it encompasses only those state regulations that are explicitly aimed at the establishment of fuel economy standards, or that are the *de facto* equivalent of mileage regulation . . . ."). The express language of the EPCA preemption clause and the clear message from the White House that the federal government is active within the preempted field of fuel economy standards lead to one conclusion: fuel economy standards are a federal matter and the EPCA preempts local laws, such as the Lease Cap Rules, that infringe upon the federal prerogative.

Further, the City cannot argue that the Lease Cap Rules do not "relate to" fuel economy standards because the rules burden only a small percentage of taxicab owners and only insignificantly affect the EPCA's objectives. As discussed in the previous litigation in this case, the Supreme Court foreclosed such an argument in *Engine Manufacturers*. The Court found that the aggregate effect of allowing every state or political subdivision to enact seemingly harmless rules would create an "end result [that] would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs.*, 541 U.S. at 255.

The purpose and effect of the Lease Cap Rules is to force Fleet Owners to purchase taxicabs with a certain mpg rating. Reading the language of the EPCA preemption statute, 49 U.S.C. § 32919(a), it is clear that

the Plaintiffs are likely to succeed in showing that the Lease Cap Rules are "related to" fuel economy standards and are preempted under the Supremacy Clause.

c. Preemption Under the CAA

The Clean Air Act empowers the Environmental Protection Agency ("EPA") to promulgate regulations necessary to prevent deterioration of air quality. 42 U.S.C. § 7601(a); *Cent. Valley*, 529 F. Supp. 2d at 1156. Part of the EPA's mandate under the CAA is to set standards relating to emissions from new vehicles. 42 U.S.C. § 7521(a)(1); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 452, 330 U.S. App. D.C. 1 (D.C. Cir. 1998) ("Subchapter II of the [CAA] vests in the federal government the almost exclusive responsibility for establishing automobile emission standards for new cars."). The CAA contains a preemption provision at § 209(a):

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

42 U.S.C. § 7543(a) (emphasis added).

Appendix B

Congress preempted states—and their political subdivisions—from creating their own emissions standards for new vehicles because Congress was concerned about the possibility of 50 different standards applying to one vehicle that so easily moves across state lines. *See Engine Mfrs. Ass'n ex rel. Certain of its Members v. EPA*, 88 F.3d 1075, 1079, 319 U.S. App. D.C. 12 (D.C. Cir. 1996) ("Congress had another reason for asserting federal control in this area: the possibility of 50 different state regulatory regimes 'raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers.'") (quoting *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109, 201 U.S. App. D.C. 109 (D.C. Cir. 1979)).[12]

The question for the Court is whether the Lease Cap Rules, which effectively mandate the purchase of hybrid taxicabs, relate to the control of emissions. In

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12. Congress granted California an exception from preemption because "Congress recognized that California was already the leader in the establishment of standards for regulation of automotive pollutant emissions at a time when the federal government had yet to promulgate any regulations of its own." *Engine Mfrs. Ass'n ex rel. Certain of its Members*, 88 F.3d at 1079 (internal quotation and citation omitted). Congress later permitted other states to adopt California's standards, if the EPA granted California a waiver. *See Am. Auto. Mfrs. Ass'n,* 152 F.3d at 198 (describing regulatory history); *Green Mountain*, 508 F. Supp. 2d at 304 (same). The case in front of this Court does not deal with any exceptions to § 209(a) preemption.

the prior litigation the Court found that the 25/30 Rules did not relate to emissions standards because those rules specifically targeted fuel economy but were silent as to emissions. *Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *14. This case is different. One of the stated purposes of the Lease Cap Rules is to "create incentives for taxicab owners to buy cleaner vehicles." (*See* Pejan Decl. Ex. J.) Additionally, the rules reduce the maximum lease cap for "owners of less clean taxicabs." (*Id.*) While the enjoined 25/30 Rules specifically did not target emissions, it is clear that one purpose of the Lease Cap Rules is to affect taxicab emissions by mandating the purchase of "cleaner vehicles."

As discussed earlier in the section on EPCA preemption, *see* Discussion Section II(b), *supra* pp. 31-32, the purpose of a regulation alone is not enough to create preemption; courts must also examine the effect of a local rule when conducting a preemption analysis. *See Travelers Ins.*, 514 U.S. at 658 (examining "purpose and the effects"); *Fielder*, 475 F.3d at 190 (examining the "nature and effect"). In *American Automobile Manufacturers Association v. Cahill*, the Second Circuit discussed a New York law requiring that a percentage of cars sold be "zero emission vehicles," or "ZEVs." 152 F.3d at 197. The court looked at the regulation's purpose and effect, and found that even though the ZEV requirement did not impose a precise limit on emissions levels, the sales regulation was preempted because it had the purpose of "effect[ing] a general reduction in emissions" and was "in the nature

of a command having a direct effect on the level of emissions." *Id.* at 200.

The case here is not unlike *American Automobile Manufacturers Association*. The Lease Cap Rules have a purpose of reducing emissions from taxicabs. The Court has already found that the rules are effectively a mandate requiring the purchase of hybrid taxicabs. Similar to what the Second Circuit reasoned when looking at the ZEV sales requirement, a requirement to purchase hybrid taxicabs is also a command that would directly affect the level of emissions. This is certainly the City's goal in enacting the Lease Cap Rules, and reducing emissions would be its result. Section 209(a), the CAA preemption provision, specifically reserves emissions regulation for new vehicles to the federal government. As discussed earlier, even though the effect of the Lease Cap Rules on nationwide regulation and vehicle production will be minor, the aggregate effect of permitting such local regulation would create an "end result [that] would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs.*, 541 U.S. at 255.

Engine Manufacturers is instructive in another aspect. The Court there held that the CAA preempted local rules requiring fleet operators to use "alternative-fuel vehicles" or vehicles that met certain emission specifications. *Id.* at 259. With almost no discussion, the Court assumed that regulations requiring "alternative-fuel vehicles" related to the control of emissions under the CAA's preemption statute. *Id.* at 249-52. The only

issue before the Court was whether preemption under the CAA applied equally to laws addressing purchasers of vehicles as well as manufacturers or dealers. *Id.* at 248-49. The Court did not specify why a mandate to use "alternative-fuel vehicles" meant that the vehicles were of a type that related to emissions control. In two footnotes, the Court defined "alternative-fuel vehicles" as, essentially, vehicles not powered by gasoline or diesel fuel. *See Id.* at 249-50 n.1, 2.

Here, § 3-03.1 of the TLC Rules defines a hybrid vehicle as a "commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner." The City argues that the definitions for "alternative-fuel vehicles" that the Court in *Engine Manufacturers* assumed without discussion were related to emissions standards are unlike the definition for hybrid vehicles in the City's rules. Exact parity between the two definitions, however, is not required. It is a matter of common sense that a rule with the stated purpose of increasing the number of "cleaner vehicles" and with the effect of requiring the purchase of hybrid taxicabs is a rule "relating to the control of emissions." 42 U.S.C. § 7543(a). The Supreme Court in *Engine Manufacturers* did not need testimony from scientific experts to explain the connection between "alternative-fuel vehicles" and emissions regulation. Neither does this Court need further testimony to understand the close relation between hybrid vehicles and emissions.

The Lease Cap Rules effectively force Fleet Owners to purchase hybrid taxicabs, and the purpose and effect of the rules is to reduce emissions.[13] CAA § 209(a) preempts New York City from enacting regulations related to emissions control, and the Plaintiffs have demonstrated a likelihood of success in proving such preemption.

CONCLUSION

For the reasons previously stated, the Court finds that the Lease Cap Rules are a *de facto* mandate upon the Plaintiffs to purchase hybrid vehicles. The Court further finds that the Plaintiffs have demonstrated irreparable harm and a likelihood of success in showing that such a mandate is preempted by the EPCA and the CAA. The Lease Cap Rules relate to fuel economy and emissions regulation, which are substantially federal concerns. Accordingly, the Plaintiffs' motion for a preliminary injunction is GRANTED.

Dated: New York, New York
June 22, 2009
SO ORDERED
/s/ Paul A. Crotty
PAUL A. CROTTY
United States District Judge

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13. The Court also noted earlier in this Opinion & Order that the purpose and effect of the Lease Cap Rules is to establish minimum mpg standards for taxicabs, *See generally* Discussion Section II(b). There is no logical problem in finding that the Lease Cap Rules have the purpose and effect of promoting both mpg and emissions standards. Even a casual reading of the City's public pronouncements and the regulatory record demonstrates that the City had both goals in mind.