Legal Opinion Letter

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 15 No. 5 March 11, 2005

FEDERAL LAW PREEMPTS CALIFORNIA'S ATTEMPT TO REGULATE GLOBAL WARMING

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In September 2004, California's Air Resources Board (CARB) adopted regulations imposing limits on carbon dioxide emissions from motor vehicles. The regulations have been challenged in federal court by more than a dozen auto dealers and the automobile manufacturing industry. This LEGAL OPINION LETTER reviews the argument that the California regulations are preempted by the federal fuel economy law and concludes that the California rules are, indeed, preempted, on both an express and implied basis.

The federal motor vehicle fuel economy program is authorized by federal law, 49 U.S.C. § 32901 et seq. This program is administered by the National Highway Traffic Safety Administration (NHTSA), a unit of the U.S. Department of Transportation, which has administered fuel economy standards for light duty motor vehicles for more than two decades. These standards establish average fuel economy levels that must be met by each vehicle manufacturer's fleet. The fleet averaging concept is central to the purposes of the federal program, because it permits manufacturers to adjust their fleets to satisfy consumer demands. In enacting the fuel economy program in 1975, Congress expressed its view that the program should improve fuel economy without "unduly limiting consumer choice." H.R. Rep. No. 94-340, at. 87 (1975), *reprinted in* 1975 U.S.C.A.A.N. 1762, 1849.

The federal fuel economy law provides that, once NHTSA has established fuel economy standards, no state or political subdivision may "adopt or enforce a law or regulation ***related to*** fuel economy standards." 49 U.S.C. § 32919 (emphasis added).

The law also provides that the average fuel economy of each manufacturer's fleet is calculated under "testing and calculation procedures prescribed by the Administrator" of the Environmental Protection Agency (EPA). 49 U.S.C. § 32904(c). EPA's test procedures call for measuring certain exhaust emissions, including carbon dioxide. The carbon dioxide emissions are measured in terms of CO_2 grams per mile, and then converted into miles per gallon, according to a formula in EPA's regulations. 40 C.F.R. § 600.113-93(e). With this information, EPA computes each manufacturer's fleet average fuel economy in miles per gallon, and reports the results to NHTSA. 49 U.S.C. § 32904(e).

California's Carbon Dioxide Regulations Are Expressly Preempted by Federal Law. Federal law expressly precludes the states from adopting or enforcing a law or regulation that is *related to* fuel economy standards, except in the case of rules for governmental fleet purchases and fuel economy disclosure statements. California's carbon dioxide regulations are "related to" fuel economy standards, and are therefore expressly preempted.

EPA recently observed that "the only practical way to reduce tailpipe emissions of CO_2 is to improve fuel economy." Notice of Denial of Petition for Rulemaking, *Control of Emissions from New Highway*

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Vehicles and Engines, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003.) Nothing in CARB's regulatory decision disputes this fact. Thus, California's CO_2 regulations are not only "related to" fuel economy standards — they *are* fuel economy standards.

Under the Supreme Court's preemption jurisprudence, a statutory provision that preempts state law "relating to" a matter is one of the strongest and most expansive statements of preemptive intent. A state law "relates to" a federal program "if it has a connection with" the federal program. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (internal quotation marks and citations omitted).

As California's CO_2 regulations are nothing more than state fuel economy standards, they are expressly preempted by the federal fuel economy law.

California's Carbon Dioxide Regulations Are Impliedly Preempted by Federal Law. Even if the federal fuel economy law did not contain such a strong express preemption provision, the California CO_2 regulations would be preempted under the doctrine of implied preemption, because the California regulations significantly interfere with the purpose and goals of the federal fuel economy program. Moreover, Congress entrusted NHTSA with exclusive authority over motor vehicle fuel economy, and California has no role to play in that field.

The centerpiece of the federal scheme of fuel economy regulation is the concept of fleet averaging. California's CO_2 regulations interfere with this purpose, because they impose *de facto* fuel economy requirements for vehicles sold in California that are significantly more stringent than the national standards. This will require vehicle manufacturers to alter the mix of vehicle models offered for sale in California. As a result, the choices of vehicle models available to California consumers will likely be reduced, in direct conflict with congressional intent. And, if other states follow suit, consumer choices in other states will be constrained, as well, in direct conflict with congressional intent.

Second, California's CO_2 regulations would conflict with the federal goal of ensuring that fuel economy standards are set at the level that considers four specific statutory factors: technological feasibility, economic practicability, the need of the nation to conserve energy, and the effect of other federal standards. By law, NHTSA must establish the standard at the "maximum feasible" level, taking these factors into account. California's fuel economy regulations were adopted without regard to these factors, and seek to substitute the state's judgment for the federal government's choice of how to balance these competing goals.

Third, California's CO_2 regulations do not account for the effect of more stringent fuel economy regulations on vehicle safety, a factor that NHTSA must consider when it establishes fuel economy standards. *See Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107, 120 n. 11 (D.C. Cir. 1990). If fuel economy standards are increased, the fleet of motor vehicles will likely be smaller and lighter than the current fleet. The National Academy of Sciences has estimated that the downsizing and downweighting of vehicles that occurred in the late 1970's and 1980's, in part to comply with fuel economy standards, has likely resulted in at least 1,300 more fatalities per year, because smaller, lighter vehicles are generally less crashworthy than larger, heavier vehicles. NHTSA has an active regulatory proceeding ongoing now to consider whether to restructure the fuel economy standards program, in part to ensure that the program does not degrade motor vehicle safety. 68 Fed. Reg. 74908 (Dec. 29, 2003). California's CO_2 regulations directly conflict with NHTSA's initiative because California's regulations do not consider the potential adverse effect on motor vehicle safety.

Finally, the expansive breadth of the express preemption provision discussed above demonstrates that Congress intended to entrust fuel economy regulation to NHTSA, and that the federal law would occupy the field of fuel economy regulation, with the two exceptions noted above. Thus, California's regulations must fall under the doctrine of field preemption.

Conclusion. In summary, Congress established a comprehensive, national regulatory scheme for motor vehicle fuel economy that leaves no room for regulation by the States. California's CO_2 regulations are inconsistent with this federal program, and are therefore preempted.

  ISBN 1056 3059