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Via Electronic Submission

Ms. Wienke Tax
Air Planning Office (AIR-2)
Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901

**Re: Approval and Promulgation of Implementation Plans; California;
2007 South Coast PM_{2.5} Plan and 2007 State Strategy, 76 Fed. Reg.
41,562 (July 14, 2011) (docket EPA-R09-OAR-2009-0366)**

Dear Ms. Tax:

On behalf of the American Road & Transportation Builders Association (“ARTBA”), this provides comments on the above-captioned notice of proposed rulemaking (“NPRM”) by the Environmental Protection Agency (“EPA”) on the California State Implementation Plan (“SIP”) for the South Coast Air Quality Management District (“SCAQMD”) and the South Coast Air Basin (“SCAB”). Because the referenced California statewide measures include in-use controls inconsistent with §209 of the Clean Air Act (“CAA”) and are adoptable by states outside not only California but also EPA Region IX, ARTBA requests that EPA designate this rulemaking as having nationwide scope or effect pursuant to CAA §307(b)(1). Further, the lawfulness of the California and SCAQMD measures will hinge on litigation between ARTBA and EPA currently underway in the Ninth Circuit, No. 11-71897, and the D.C. Circuit, No. 11-1256. As such, ARTBA requests that EPA stay action on this proceeding pending the resolution of ARTBA’s litigation.

With respect to the nationwide scope-effect determination, ARTBA notes that the D.C. Circuit has never addressed many of the preemption issues raised below. Accordingly, the §307(b)(1) determination is necessary to ensure nationwide uniformity in the interpretation and enforcement of these important CAA preemption issues. 42 U.S.C. §7607(b)(1); *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 283-84 (1978).

I. LEGAL BACKGROUND

Under the Constitution’s Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. Art. VI, cl. 2. Courts have identified three ways in which the Supremacy Clause can preempt state or local laws: express preemption, “field” pre-emption, and implied or conflict pre-emption. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). In assessing preemption claims, courts often consider two presumptions.

First, preemption analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Transworld Airlines, Inc.*, 504 U.S. 374, 383 (1992).

Second, under *Santa Fe Elevator* and its progeny, courts sometimes apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). For the statute at issue here, the Supreme Court has not determined whether a presumption against preemption applies. *EMA v. SCAQMD*, 541 U.S. 246, 256 (2004) (noting that "not all Members of this Court agree" on applying "the 'presumption against preemption' to determine the *scope* of pre-emption" under §209) (emphasis in original).

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

The Supreme Court recently recognized that *Santa Fe Elevator* applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and "not... when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 107-08 (2000) (*quoting Rath Packing*, 430 U.S. at 525); *accord Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). More recently, in an implied conflict preemption case, the Supreme Court downplayed the import of federal presence in the field and held that the "presumption [against preemption] thus accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 & n.3 (2009).

Analyzing and applying the presumption against preemption requires first determining the field at issue. For example, *Locke* concerned the environment in the form of water quality, but analyzed the narrow *maritime-commerce* field, making clear that courts must analyze preemption using the narrow field at issue (here, vehicular-emission standards). *Locke*, 529 U.S. at 106-07; *accord Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits," not to all tort law or to public health and safety); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions, not to states' discretion to spend state funds). The field here is nonroad vehicular emissions.

A. Legislative Background

As outlined below, amendments between 1963 and 1990 define the authority of EPA, California, other states, and local governments over onroad and nonroad vehicles. In 1963, Congress entered the vehicular-emission field, requiring EPA's predecessor to "encourage" industry's "continued efforts" to develop devices and fuels to limit vehicular emissions. PUB. L. NO. 88-206, §6, 77 Stat. 392, 399 (1963). Congress also found "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." *Id.* §1(a)(3), 77 Stat. at 393. In 1965, Congress expanded the federal role with federal motor-vehicle emission standards. PUB. L. NO. 89-272, §202, 79 Stat. 992 (1965). In 1967, Congress preempted "any [state or local] standard relating to the control of emissions" from new vehicles and engines. PUB. L. NO. 90-148, §208(a), 81 Stat. 485, 501 (1967).¹

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

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

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

California's unique air-quality problem and pioneering vehicular-emission standards led Congress to authorize the *State* of California to impose its own standards after obtaining a waiver of federal preemption. PUB. L. NO. 90-148, §208(b), 81 Stat. at 501. Although that provision applies to any state that adopted new-vehicle, non-crankcase emission standards prior to March 30, 1966, only California had done so. S. REP. NO. 90-403, at 6, 33.²

¹ In 1970, Congress recodified §208 as §209. PUB. L. NO. 91-604, §8(a), 84 Stat. 1676, 1976-77 (1970). For consistency, ARTBA refers to this section as "§209."

² March 30, 1966, was the promulgation date of the first federal motor-vehicle standards. 31 Fed. Reg. 5,170 (1966). In addition to setting exhaust-emission standards, the federal standards prohibited crankcase emissions entirely, *id.* at 5,171, rendering state crankcase standards prospectively irrelevant. At the time, the states had just begun either to regulate, or to contemplate regulating, vehicular emissions. *See* Brief of Respondent SCAQMD *et al.* in *EMA v.*

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

In 1970, Congress recodified the CAA without altering its mobile-source provisions materially to this matter.³ In 1977, Congress authorized states other than California (but not subdivisions) to adopt California's motor-vehicle standards, 42 U.S.C. §7507, and added §209(c) to extend CAA preemption to CAA-regulated components of "in-use" motor vehicles during their CAA-regulated "useful life," PUB. L. NO. 95-95, §221, 91 Stat. at 762, thereby abrogating *Allway Taxi v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd* 468 F.2d 624 (2d Cir. 1972) (authorizing local retrofit requirements upon re-sale or re-registration and for commercial-use licenses).

For motor vehicles, the 1990 amendments clarified §177 and added the Clean-Fuel Fleet Program ("CFFP") for ozone nonattainment areas designated serious or worse. 42 U.S.C. §§7507, 7511a(c)(4)(B), 7586. For nonroad vehicles, the 1990 amendments added §213's authority for EPA's national standards for nonroad vehicles and – as explained more fully in Section II, *infra* – added §209(e) to preempt state and local nonroad vehicular-emission standards and other requirements, with certain exceptions for California and for other states' authority to adopt the California regime. 42 U.S.C. §7543(e)(1)-(2). Section 213 requires EPA to adopt regulations that set standards that "achieve the *greatest degree* of emission reduction achievable through the application of [available] technology" and that "apply to the [vehicles'] useful life." 42 U.S.C. §7547(a)(3) (emphasis added). In pertinent part, §213(d) makes EPA's new nonroad vehicle standards adopted under §213 subject to §§206-209.⁴ 42 U.S.C. §7547(d).

SCAQMD, No. 02-1343 (U.S.), at 17 n.2, 21-22 n.7, 2003 WL 22766722 (*citing* HEW, *Digest of State Air Pollution Laws* (1963 & 1967 eds.)).

³ The conference committee rejected the Senate's proposal to lift preemption of all post-purchase controls. *See* S. REP. NO. 91-1196, at 32 (*reporting* S.4358, 91st Cong., 2nd Sess., §210(c) (1970)).

⁴ The first three sections concern compliance testing and certification (§206), require compliance with emission standards during a vehicle's useful life (§207), and authorize information collection (§208). 42 U.S.C. §§7525, 7541, 7542.

As with motor vehicles in the 1960s, the impetus for legislation came in part from California, which had begun *planning* to regulate nonroad vehicles.⁵

Sections 213 and 209(e) originated in H.R. 3030, as reported by the House. As offered, H.R. 3030 did not include nonroad preemption, and §213(d) made EPA's new nonroad vehicle standards "subject to" only §§206-208. H.R. 3030, §211(c) (July 27, 1989). When it reported H.R. 3030 with nonroad preemption added, the House added "and 209" to §213(d)'s list of subject-to sections and explained the connection between §213(d) and §209(e):

Standards issued under this subsection are to be subject to sections 206, 207, 208, and 209... Section 209 of the Act is amended to provide that no State or political subdivision shall adopt or enforce standards relating to the control of emissions from *new nonroad vehicles subject to regulation under this Act*. This preemption does not apply to existing nonroad vehicles or engines.

H.R. Rep. 101-490, 310 (1990) (emphasis added). Thus, §213(d) underscored the connection between that which EPA promulgated under §213(a) and that which §209(e) preempts.⁶

The Senate bill did not address nonroad preemption. S. 1630, 101st Cong. (1990). The Conference Committee did not amend the House version of §213(d) and amended §209(e) without revising the House bill's "any standards or other requirements relating to the control of emissions" language. By adding non-new nonroad engines into the California authority in §209(e)(2), however, the Conference Committee extended the scope of preemption from only new to both new and non-new. 42 U.S.C. §7543(e)(2). The Conference Report is silent on nonroad vehicles. H. Conf. Rep. 101-952, 336-37 (1990).

⁵ See California Clean Air Act of 1988, 1988 Cal. Stat. c. 1568 (*enacting* Cal. Health & Safety Code §43013(b)-(d)); Letter from William H. Dempsey, President, American Association of Railroads, to Hon. Henry A. Waxman, Chairman, House Subcommittee on Health & Environment, at 2-3 (June 7, 1989), in 1 *Clean Air Act Amendments: Hearings Before the Subcomm. On Health & the Env't of the House Comm. on Energy & Commerce*, 101st Cong. at 619 (1989) (describing California studies to assess potential regulation of locomotive operating hours and alternative fuels, as well as of locomotive engine standards).

⁶ As it passed the House, H.R. 3030 preempted any state (including California) from adopting standards or other requirements relating to the control of emissions from new nonroad vehicles. H.R. Rep. 101-490, 309-10 (1990); H.R. 3030, §211(d) (May 23, 1990). Representative Morehead decried this intrusion into state and local power to regulate nonroad emissions and unsuccessfully sought to delete §209(e) or, at least, its application to California. 136 Cong. Rec. H2,561-62 (1990).

Other than the reports of the respective houses for provisions that originated in their respective bills, the statutory language and the Joint Explanatory Statement of the Committee of Conference constitute the only authoritative legislative history of the 1990 amendments. On the House side, the managers agreed not to make floor statements interpreting the bill unless the managers agreed that the statements fairly interpreted the legislative intent. 136 Cong. Rec. E3,699 (Oct. 27, 1990) (“[We] did not want the House debate to deteriorate into a war of conflicting interpretations of agreed-upon legislative language. [We] kept our remarks general, except for a few colloquies that we jointly agreed to include in the legislative record.”) (Rep. Waxman); 136 Cong. Rec. E3,712, E3,714 (Oct. 26, 1990) (“only the statement of the managers, which is part of the conference report, reflects the views of all the managers or conferees in the House and Senate”) (Rep. Dingell); 136 Cong. Rec. E3,694, E3,695 (Oct. 26, 1990) (“We negotiated long and hard over the language in the legislation, and it is that language that reflects the agreement of the conferees... [and] as a result, the authoritative legislative history is sparse”) (Rep. Lent). One House-approved colloquy concerned §209(e)’s preemptive scope:

States are preempted from regulating only two categories of new nonroad vehicles and engines—first, small farm and construction equipment, and second, new locomotives and new engines used in locomotives. With regard to this latter category, we balanced the need to control emissions from new locomotives against our belief that State efforts to regulate locomotive emissions or operations would impose an unconstitutional burden on interstate commerce.

136 Cong. Rec. H12,848 (Oct. 26, 1990) (Rep. Dingell). Other legislators offered their own “unilateral legislative histories” in individual statements:

Unfortunately, other Members of the House have taken a different course, and the *Congressional Record* of October 26 contains several detailed statements of legislative intent by individual Members.... These unilateral legislative histories do not reflect my understanding of S. 1630. Rather, these statements by individual Members interpreting the provisions of S. 1630 are just that – statements by individual Members.

136 Cong. Rec. E3699 (Oct. 27, 1990) (Rep. Waxman). Several senators offered “unilateral legislative histories” on §209. *See* 136 Cong. Rec. S18,038 (Oct. 24, 1990) (Sen. Baucus); 136 Cong. Rec. S17,237 (Oct. 26, 1990) (Sens. Wilson & Chafee); 136 Cong. Rec. S16,976 (Oct. 27, 1990) (Sen. Baucus); 136 Cong. Rec. S16,938 (Oct. 27, 1990) (Sen. Chafee); *see Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 227-28 (9th Cir. 1992) (holding with respect to the same Baucus-Chafee floor statements that “statements of individual legislators are entitled to little, if any, weight”).

In a 2004 statute known in pertinent part as the Bond Amendment, Congress prospectively preempted states (other than California) and subdivisions from adopting California measures applicable to nonroad engines of 50 or less horsepower, with a savings clause for state measures adopted prior to September 1, 2003. PUB. L. NO. 108-199, §428, 118 Stat. 3, 418-19 (2004). Specifically, the savings clause provides that “[§428(c)] does not apply to ... the authority of any State under section 209(e)(2)(B) of the Clean Air Act ... to enforce standards or other requirements.” PUB. L. NO. 108-199, §428(e), 118 Stat. at 418-19.

B. EPA Regulatory and Litigation Background

In its initial §209(e) rulemaking, EPA bifurcated other nonroad vehicles from locomotives, deferring locomotives for future action. 59 Fed. Reg. 31,306, 31,329 n.21 (1994); 59 Fed. Reg. 36,969, 36,973 n.8 (1994). Applying to all nonroad vehicles *except* locomotives, EPA’s 1994 §209(e) rulemaking defined “new” as “showroom new” (*i.e.*, new until they leave the showroom floor), 40 C.F.R. §85.1602 (1995); *accord* 40 C.F.R. §1074.5 (current version), but otherwise merely restated the statute, 40 C.F.R. §85.1603 (1995); *accord* 40 C.F.R. §1074.10 (current version). Contemporaneously, EPA issued an “interpretive rule” stating that:

EPA *believes* that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuels...

40 C.F.R. Pt. 89, subpart. A, App. A (emphasis added). In *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996) (“*EMA*”), the D.C. Circuit deferred to EPA only in the absence of a plausible alternative. *EMA*, 88 F.3d at 1093-94. Specifically, despite finding EPA’s reasoning not entirely satisfactory, *EMA* deferred to EPA because the panel understood the statute to lack *any* harmonizing interpretation. *Id.*

Only after successfully defending that narrow interpretation before the D.C. Circuit did EPA propose and finalize its broad preemption for locomotives. 62 Fed. Reg. 6365 (1997); 63 Fed. Reg. 18,978 (1998). The locomotive rules expressly preempt “fleet average standards,” 40 C.F.R. §85.1603(c)(2) (1995); *accord* 40 C.F.R. §1074.12(b) (current version), backdate locomotive “newness” to 1972, and extend it for decades, 40 C.F.R. §§85.1602, 92.2 (1995) (new extends 1.33 times the engine’s useful life, and indefinitely though remanufacturing); *accord* 40 C.F.R. §§1074.5, 1033.901 (same under current version).

In 2000, Texas adopted fleet and in-use controls on construction equipment, 25 Tex. Reg. 4059, 4073 (2000); 25 Tex. Reg. 4080, 4101 (2000), and ARTBA successfully challenged those controls as preempted under §209(e). *Engine Mfrs. Ass’n v. Huston*, 190 F.Supp.2d 922 (W.D. Tex. 2001), *vacated as moot*, No. 01-50819 (5th Cir. Mar. 5, 2002) (“*Huston*”). Relying on the same arguments that ARTBA makes here, the court concluded that “[t]he legislative history and plain language of §209(e) are clearly inconsistent with EPA’s offered interpretation.” 190

F.Supp.2d at 927 n.3. While that ruling was on appeal, Texas repealed its regulations, 26 Tex. Reg. 6935, 6936-37 (2001), and the Fifth Circuit vacated *Huston* as moot.

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

On March 29, 2006, ARTBA petitioned the D.C. Circuit for review under §307(b)(1) and the All Writs Act against EPA’s unreasonable delay and constructive denial of ARTBA’s rulemaking petition dated July 2, 2002. *ARTBA v. EPA*, No. 06-1112 (D.C. Cir. filed Mar. 29, 2006). On May 18, 2007, EPA issued an NPRM that included ARTBA’s petition and also proposed to re-promulgate the entirety of EPA’s preemption rules, 72 Fed. Reg. 28,098, 28,209-10 (2007), which EPA used to convince the D.C. Circuit to dismiss ARTBA’s litigation as moot. *ARTBA v. EPA*, No. 06-1112 (D.C. Cir. Oct. 5, 2007). On October 8, 2008, EPA promulgated its final rule (which incorporated EPA’s response to ARTBA’s petition) to deny relief on all issues that ARTBA raised. 73 Fed. Reg. 59,034, 59,130 (2008). ARTBA petitioned the D.C. Circuit for review of that EPA action under §307(b)(1) and the All Writs Act, which the D.C. Circuit dismissed for lack of a petition filed within 60 days of an after-arising grounds for review. *ARTBA v. EPA*, 588 F.3d 1109 (D.C. Cir. 2009). While ARTBA’s petition for a writ of certiorari was pending in that action, ARTBA re-petitioned EPA to amend or repeal EPA’s preemption rules in conjunction with an EPA NPRM on the San Joaquin portion of California SIP. EPA denied that administrative petition, and ARTBA sought review in *ARTBA v. EPA*, No. 11-71897 (9th Cir. filed July 8, 2011) and No. 11-1256 (D.C. Cir. filed July 8, 2011).

C. California and San Joaquin Regulatory Background

As EPA’s NPRM explains, California has adopted a novel series of statewide measures that set emission standards and other requirements for in-use onroad and nonroad vehicles and fleets of those vehicles. In addition to seeking credit for these statewide measures, SCAQMD also seeks credit for that district’s local implementation of the Surplus Off-Road Opt-In for NO_x (“SOON”) program under which large construction fleets must seek “SOON” funding to acquire cleaner-than-required equipment, with the cost partially deferred by government funds. Finally, SCAMQD’s proposed SIP revision also includes a proposed contingency measure (CTY-03) that would ban pre-Tier 3 off-road diesel engines on “high pollution advisory” days. All of these measures share the characteristic of setting fleetwide standards for CAA-regulated vehicles that differ from – and are more stringent than – the various standards and other requirements that Title II of the CAA applies to those vehicles.

II. SECTION 209 PREEMPTS FLEET-BASED, IN-USE STANDARDS AND OTHER REQUIREMENTS

As indicated above, preemption analysis includes two presumptions: (1) the statutory language is the touchstone of preemption analysis, and (2) in certain circumstances, courts adopt a presumption against preemption. In express-preemption situations like this one, these two presumptions compete against each other.

In triply broad language, §209(e) preempts “any [state or local] standard or other requirement relating to the control of emissions” from, *inter alia*, new construction equipment under 175 horsepower. 42 U.S.C. §7543(e)(1)(A). All three emphasized terms (“any,” “or,” and “relating to”) convey *expansive* preemption. *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (“read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind’”) (*quoting U.S. Gonzales*, 520 U.S. 1, 5 (1997)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-39 (1979) (interpreting “property or business” as expansively as suggested by the disjunctive and by its plain terms); *Morales*, 504 U.S. at 385 (rejecting construction that “simply reads the words ‘relating to’ out of the statute”). Significantly, unlike motor-vehicle preemption under §209(a)-(d), nonroad preemption under §209(e) applies not only to “standards,” but also to “any... other requirement relating to” emission controls, and §209(e) lacks an express savings clause to preserve states’ authority over in-use vehicles. *See* 42 U.S.C. §7543(d) (preserving states’ authority only as to motor vehicles). Although it addresses specific instances of statutory construction under the headings of each issue presented here, ARTBA notes here that EPA should give broad effect to broadly preemptive statutory text.

“Where the statutory language is plain and direct any contrary meaning must be shown by legislative history that is more plain and direct.” *NRDC v. EPA*, 656 F.2d 768, 783 (D.C. Cir. 1981) (*citing Aaron v. SEC*, 446 U.S. 680, 697, 100 S.Ct. 1945, 1956 (1980)); *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) (when statutory language is unambiguous, courts need not consult the legislative history). But to the extent that EPA considers legislative history, the House managers and hornbook principles of statutory construction counsel for considering the House committee report’s discussion of statutory language from the House bill that the Conference Committee approved into the Conference bill. *See* 136 Cong. Rec. E3699 (Oct. 27, 1990) (where “provisions in the conference report track provisions in the House-passed bill (H.R. 3030), the report of the Committee on Energy and Commerce is also an authoritative source of the legislative intent”) (Rep. Waxman); *accord Begier v. Internal Revenue Service*, 496 U.S. 53, 66 n.6 (1990). As with the statutory text, ARTBA will cite the relevant legislative history in making its case under each of the issues presented here.

The presumption against preemption does not apply here for two primary reasons. First, CAA’s plain language and legislative history express a clear, manifest intent to preempt standards and other requirements generally and fleet standards particularly, rendering the presumption inapposite by its terms. Second, like §209(a) before it, §209(e) regulates in an area

where states historically have *not* exercised police power,⁷ but instead (at least as to locomotives) in an area with a broad history of federal preemption. *Napier v. Atlantic Coast Line*, 272 U.S. 605, 611-13 (1926); *Staten Island Rapid Transit Railway Co. v. Public Service Commission of New York*, 16 F.2d 313, 314-16 (S.D.N.Y. 1926) (New York cannot require railroad to electrify) (Hand, J.); cf. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 779-84 (1944). To some extent, these two reasons interrelate by counseling against application of the presumption against preemption in express-preemption statutes.

Thus, and unlike the warehouse pricing at issue in *Santa Fe Elevator*, states act here in an area with no history of state exercise of police power (nonroad vehicular-emission standards) in *pari materia* with an area in which such state police power has been displaced for almost a century (locomotive emission standards). Significantly for CAA preemption, the supervening Supreme Court decisions in *Locke*, *Buckman*, and *Geier* undermine past bases for excluding conflict preemption from consideration in CAA preemption analysis. See *Motor & Equipment Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1108 n.20 (D.C. Cir. 1979) (relying on presumption against preemption, §209's express preemption, and §116's savings clause to defeat conflict preemption). Whether denoted as conflict or express preemption, any perceived conflict is heightened by §209's expressly requiring consistency with §202(a). 42 U.S.C. §7543(b)(1)(C), (e)(2)(A)(iii).

The following three sections address the three issues presented here. To the extent that they reach a different conclusion than the D.C. Circuit reached in *EMA*, these sections rely on statutory-construction and legislative-history arguments not addressed in *EMA*, as well as several post-*EMA* developments (e.g., EPA's locomotive rulemakings, the Supreme Court's *SCAQMD* decision and other post-1994 preemption decisions, and the Bond Amendment), which together compel a different conclusion than the *EMA* panel reached.

A. Section 209 Preempts Fleet Rules

As used in §209, the term “standards” plainly includes fleet-based standards. In *SCAQMD*, the Supreme Court confirmed that §209 protects both manufacturers and consumers

⁷ Leading up to the 1990 amendments, at least California had begun *planning* to regulate nonroad vehicles, 1988 Cal. Stat. c. 1568, as Congress was aware. See, e.g., 1 *Clean Air Act Amendments: Hearings Before the Subcomm. On Health & the Env't of the House Comm. on Energy & Commerce*, 101st Cong. at 619. Indeed, §209(e) appears to represent an effort to head the states off at the proverbial pass of nonroad regulation. Congress did not, however, give industry a free pass: §213 requires that EPA develop standards that “achieve the *greatest degree* of emission reduction achievable through the application of [available] technology.” 42 U.S.C. §7547(a)(3) (emphasis added). In this respect, the nonroad-vehicular emission field resembles the onroad-vehicular emission field at the time that Congress acted to preempt the states' vehicular emission standards. See note 2, *supra*.

from state and local standards. 541 U.S. at 252-55. When coupled with §209(e)'s preempting standards for both new and non-new vehicles, the Supreme Court's decision obviously controls here. Moreover, if §209(e) preempts locomotive fleet standards, 40 C.F.R. §85.1603(c)(2) (1995); 40 C.F.R. §1074.12(b) (current version), it clearly also preempts construction-equipment fleet standards. *ACF Indus.*, 510 U.S. at 342. Although it is entirely clear that fleet rules constitute a "standard" under §209, the Supreme Court's remand in *SCAQMD* warrants several additional arguments on fleet rules.

As the Supreme Court recognized, SCAQMD's fleet rules conflicted with §246's CFFP, *EMA*, 541 U.S. at 254 & n.6, 259, which provides regulated motor-vehicle fleets with several benefits in exchange for authorizing states to regulate them as fleets: (a) §243(e)(2) defines "clean-fuel vehicle" as meeting the *least-stringent* California standard applicable to that vehicle class, and §246(f) requires states to provide credits to fleet operators that exceed CFFP requirements by purchasing either more clean-fuel vehicles than §246 requires or vehicles certified to standards more stringent than §246 requires; (b) §177 prohibits *indirect* limits on the sale of clean-fuel vehicles and expressly applies to all of Title II (*e.g.*, §209 in Part A and §246 in Part C), whereas §209's preemption and waiver expressly apply only to Part A (*i.e.*, neither §246 nor §177⁸); and (c) §241(2) defines "clean alternative fuel" to include reformulated gasoline and diesel, and §246(d) leaves fuel choices to fleet operators.⁹ State fleet rules (such as SCAQMD's fleet rules) adopted without §246's protections irreconcilably conflict with §246's carefully balanced program.

⁸ This relationship between §177, §209, and §246 answers the Supreme Court's search for a missing "notwithstanding" clause. *SCAQMD*, 541 U.S. at 257. By its terms, §209(a) preempts state and local adoption of standards relating to the control of emissions subject to "this part" (*i.e.*, CAA Title II, Part A (§§202-219), 42 U.S.C. §§7521-7554), and §209(b) provides California a waiver of the preemption of "this section" (*i.e.*, §209, 42 U.S.C. §7543). Because the CFFP resides in Part C of Title II (§§241-250), 42 U.S.C. §§7581-7590, states adopting CFFP-compliant fleet regulations do not violate §209(a). But state and local fleet regulations *outside* §246 necessarily cannot rely on §246, thereby falling under §209(a)'s express preemption, notwithstanding §116's general savings clause. *Geier*, 529 U.S. at 873 (neither savings clause nor express-preemption provision bars "conflict preemption"); *Buckman*, 531 U.S. at 352 (same).

⁹ Where state rules treat vehicles disparately by fuel type without express quantitative emission limits, those rules impose a "standard." 42 U.S.C. §7521(a)(3)(ii) (including fuel type as factor defining emission standards for vehicle classes). A reading that preempts only quantitative emission rates "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate [emissions],'" *Morales*, 504 U.S. at 385, rather than prohibiting their adopting or enforcing any standard that *relates to* the control of emissions. Fuel-type requirements are even more obviously preempted standards for nonroad vehicles, which CAA defines to include the vehicle's "fuel system." 42 U.S.C. §7550(10)-(11).

Although §246's *implied* preemption applies only to motor vehicles, it has direct relevance to nonroad vehicles by underscoring §209's *express* preemption of fleet rules as "standards" under §209(a). Given the many "actual conflict[s]" needed to find an "intent to supersede the exercise by the state of its police power" for covered ozone *nonattainment* areas, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960), it would be anomalous for §246 to leave ozone *attainment* areas (to which §246 does not apply) free to regulate fleets, while preempting ozone *nonattainment* areas from doing so. To read §209 and §246 in harmony, EPA must conclude that fleet rules fall under *both* sections, with §246 as a specific exception to §209's general preemption of such standards. Any other reading either (a) frustrates the intricately balanced CFFP by allowing opt-out states to use §182(c)(4)(B) to circumvent §246 with replacement fleet measures that deny §246's protections or (b) even worse, argues that Congress intended to preclude non-CFFP fleet rules in *nonattainment* areas, but not in *attainment* areas.

In any event, EPA's locomotive rule expressly includes "fleet average standards" among the "standards and other requirements" that §209(e) preempts. 40 C.F.R. §85.1603(c)(2) (1995); 40 C.F.R. §1074.12(b) (current version). Given that the same phrase used in multiple places in a single statute presumptively keeps the same meaning throughout, *ACF Indus.*, 510 U.S. at 342, it follows *a fortiori* that the same phrase in §209(e) ("standards or other requirements") keeps the same meaning whether the nonroad vehicle is a locomotive or construction equipment. Accordingly, §209(e) necessarily preempts fleet rules for non-locomotive nonroad vehicles, every bit as much as they preempt fleet rules for locomotives.

Even if EPA retains both the showroom-new definition of "new," *but see* Sections II.B, II.C.1, *infra*, and the allowance of in-use controls, *but see* Section II.C, *infra*, not every state rule applied to fleets of non-new nonroad vehicles constitutes an "in-use" restriction. If the state rule constitutes a "standard," such as a fleet-wide numerical limit, that state rule is a "standard," which requires an EPA waiver of preemption. And if a state standard applies during the vehicle's federally regulated useful life, that state standard is inconsistent with "this section" under §209(e)(2)(A)(iii)¹⁰ and, therefore ineligible for a waiver of preemption.

Because §202(a)(1) expressly requires that "standards shall be applicable to such vehicles and engines for their useful life (as determined under [§202(d)])," and §202(d) expressly incorporates §207, 42 U.S.C. §7521(a)(1), (d), California's imposing additional controls on an in-use vehicle during its federally regulated useful life is inconsistent with both §202(a) and §209(c). *Id.*; 42 U.S.C. §7543(e)(2)(A)(iii). By denying these statutory protections, state standards or requirements that impose additional emission-related controls during a vehicle's

¹⁰ EPA's 1994 nonroad rulemaking recognized that §209(e) required that California's nonroad standards must meet the same criterion of consistency with §202(a) that California's onroad standards must meet. 59 Fed. Reg. 36,969, 36,983 (1994); 40 C.F.R. §85.1605(b)(3) (1995-2008); 73 Fed. Reg. at 59,380 (new 40 C.F.R. §1074.105(b)(3)).

federally regulated useful life are inconsistent with §202(a) and §209(c), which makes them both preempted and ineligible for a waiver of preemption. *See Am. Motors Corp. v. Blum*, 603 F.2d 978, 981 (D.C. Cir. 1979); 42 U.S.C. §7543(b)(1)(C), (c), (e)(2)(A)(iii). Thus, whether or not they can impose in-use controls on nonroad vehicles, *see* Section II.C, *infra*, states cannot impose fleet-based controls on in-use nonroad vehicles during their federally regulated useful life.

B. EPA's Differential Treatment of Locomotives versus Small Construction and Farm Equipment

EPA must apply the law that Congress enacted, and that law treats locomotives and small construction/farm equipment the same. Since 1926, it has been well settled that states are completely preempted from regulating “the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.” *Napier*, 272 U.S. at 611-13. States cannot regulate even first aid kits or fire extinguishers, *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas*, 653 F. Supp. 617, 626-27 (W.D. Tex.), *aff'd in pertinent part*, 833 F.2d 570, 576 (5th Cir. 1987), much less emissions. *Staten Island Rapid Transit Ry.*, 16 F.2d at 314-16 (New York cannot require railroad to electrify). Because repeals by implication are disfavored, *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974), courts must consider locomotive preemption to interpret §209(e).

Unlike EPA in 1994 and the *EMA* panel in 1996, EPA and any reviewing court now must consider how EPA subsequently handled locomotives. The inconsistencies in these interrelated rulemakings – which spring from the same words in the same section of the same statute – lay bare the infirmities of the EPA's 1994 interpretation. *Compare* 40 C.F.R. §§85.1602, 85.1603(c)(2), 92.2 (1995) (preemption for post-1972 “new” locomotives extends to 1.33 times the useful life and explicitly includes fleet standards) *and* 40 C.F.R. §§1074.5, 1074.12(b), 1033.901 (same under current version) *with* 40 C.F.R. §85.1602 (1995) (preemption ends when “new” construction equipment leaves showroom) *and* 40 C.F.R. §1074.5 (same under current version). To avoid “untenable distinctions” in §209(e)'s treatment of locomotive and other nonroad vehicles, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), ARTBA bids EPA to consider these provisions as a whole, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986). Upon doing so, EPA's current, divergent treatment of locomotives and other nonroad vehicles becomes untenable.

The House adopted §209(e) in part because “State efforts to regulate locomotive emissions or operations would impose an unconstitutional burden on interstate commerce.” 136 Cong. Rec. H12,848 (Oct. 26, 1990) (Rep. Dingell). Of course, §209(e) can apply to *operations* only if it applies to fleets beyond the initial sale. Preempting state controls during vehicles' CAA-regulated useful life conforms to both the legislative history and the statute itself. First, it follows the House report, under which §209(e) preempted new vehicles “*subject to regulation under this Act*,” but “[did] not apply to *existing* nonroad vehicles or engines.” H.R. Rep. 101-490, at 310 (emphasis added). Second, protecting vehicles during their CAA-regulated useful life

conforms both to §209(c)'s preemption for CAA-regulated parts during their CAA-regulated useful life and to §213(a)(3)'s requirement that EPA standards apply to vehicle's useful life. Insofar as Congress drafted §209(e)'s nonroad preemption *more broadly* than §209(a)-(d)'s motor-vehicle preemption, EPA cannot interpret §209(e) *more narrowly* than §209(c). Controlling emissions from vehicles regulated under EPA's new-vehicle standards certainly "relates to" the control of emissions from new vehicles. 42 U.S.C. §7543(e).

Whether intentionally or not, EPA's removal of locomotives from the 1994 rulemaking prevented the *EMA* panel's interpreting §209(e) through the long history of locomotive preemption. *Napier*, 272 U.S. at 611-13; *Staten Island Rapid Transit Ry.*, 16 F.2d at 314-16. Because it accepted EPA's "harmonization" argument on the definition of "new" as "showroom new" *in 1996*, 88 F.3d at 1087, the *EMA* panel may have found relevant the locomotive rules' discordant departures from that harmony *in 1998*. 40 C.F.R. §§85.1602, 92.2 (1995) ("new" extends back to 1972, out to 1.33 times an engine's life, and indefinitely through remanufacturing); 40 C.F.R. §§1074.5, 1033.901 (same under current version). EPA no longer can rely on the harmony that its locomotive bifurcation temporarily manufactured.

C. Section 209(e) Preempts In-Use Controls

With respect to in-use controls, the *EMA* panel held that neither *EMA* nor EPA offered an "entirely satisfactory" interpretation of §209(e) and so deferred to EPA's otherwise-unsatisfactory interpretation of an ambiguous statute. *EMA*, 88 F.3d at 1094. Here, ARTBA offers post-*EMA* developments and statutory-construction and legislative-history arguments that *EMA* did not address and that warrant reversing the *EMA* court's holding on in-use controls.

As signaled in Section II, *supra*, §209(e) broadly preempts not only "any standard" but also "any... other requirement." Specifically, §209(e)(1) entirely preempts states from taking such actions for new construction and farm vehicles under 175 horsepower and new locomotives; for other nonroad vehicles, §209(e)(2) authorizes only California to set such "standards and other requirements" and authorizes other states only to mirror California's actions. *See* 42 U.S.C. §7543(e)(1)-(2).

In its breadth, §209 makes clear that nonroad in-use controls fall within "any standards or other requirements" that relate to controlling emissions. For motor vehicles, §209 preempts only "any standard" and various *specified* requirements, 42 U.S.C. §7543(a)-(c), and includes an express savings clause that retains states' authority over the use, operation, or movement of *motor vehicles*. 42 U.S.C. §7543(d). Thus, under §209, Congress preempts motor vehicle emission *standards* and enumerated requirements, but explicitly reserves state authority over in-use motor vehicles. Under the same section, Congress then preempts *any* nonroad standard *or other requirement* and *excludes* a corresponding savings clause.

[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. U.S., 464 U.S. 16, 23 (1983) (internal quotations omitted). “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). If Congress intended to parallel in §209(e) the contours of §209(a)-(d) motor vehicle preemption, Congress easily could have done so. Congress did not.

By its terms, §209(e) is the only portion of §209 that applies to nonroad vehicles. Except for §209(b),¹¹ the balance of §209 applies exclusively to “motor vehicles,” and thus is inapposite to nonroad vehicles. 42 U.S.C. §7550(2), (11). Moreover, Congress expressly precluded the possibility of §209(b)’s waiving “this section” by expressly making §209(b) inapplicable to §209(e)(1). 42 U.S.C. §7543(e)(1).

Notwithstanding §209(e)’s plain language, EPA’s self-described “interpretive rule” states that “EPA believes that states are not precluded under section 209” from adopting in-use controls. 40 C.F.R. Pt. 89, subpt. A, App. A. With regard to in-use restrictions, the *EMA* panel upheld EPA’s unsatisfactory interpretation primarily because (1) EPA attempted to harmonize CAA’s definition of “new;” (2) §209(e)’s inconsistent use of the “standard or other requirement” language suggested that “other requirements” refer narrowly to enforcement techniques such as certification and inspection regimes; and (3) given the lack of any satisfactory interpretation, EPA plausibly could interpret §213(d) to import the §209(d) motor-vehicle saving clause into §209(e). *EMA*, 88 F.3d at 1093-94. ARTBA addresses these issues in turn.

1. Harmonization of “New”

EPA must “interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (interior citations omitted). As indicated in Section II.B, *supra*, by bifurcating the locomotive and non-locomotive portions of the §209(e) rulemaking, EPA deprived the *EMA* panel of the opportunity to assess the dissonance of EPA’s vastly different scopes of preemption for locomotives versus non-locomotives. With that dissonance now at issue, EPA and any reviewing court can reassess the rival attempts to harmonize §209(e), consistent with the long history of locomotive preemption. *Napier*, 272 U.S. at 611-13; *Staten Island Rapid Transit Ry.*, 16 F.2d at 314-16. If ARTBA’s interpretation harmonizes the statute, EPA must reject its admittedly inadequate prior interpretation.

¹¹ Section 209(b) is not *per se* limited to motor vehicles and literally allows EPA to waive “this section” for California. 42 U.S.C. §7543(b).

2. Scope of “Requirements”

The *EMA* panel found it significant that §209(e)(2)(B) authorizes states other than California to adopt California standards, but not to adopt “other requirements.” *EMA*, 88 F.3d at 1093; *compare* 42 U.S.C. §7543(e)(2)(A) *with id.* §7543(e)(2)(B). In that panel’s view, this supported EPA’s narrow reading of requirements (*i.e.*, certification, inspection). *EMA*, 88 F.3d at 1093. Under §209(e)(2)(A), California can take precisely two actions: adopt standards and adopt other requirements. The phrase “take such other action” in §209(e)(2)(B) clearly serves as a double for “adopt ... other requirement” in §209(e)(2)(A) and *avoids* ambiguity.¹² Accordingly, §209(e)(2)(B)’s “take such other action” phrasing does not open the door to EPA’s creatively giving states a portion of the authority otherwise preempted under §209(e) (*i.e.*, the authority to impose in-use requirements). But even if it did, §209(e)(2)(B)’s “take such other action” phrasing under does not by its terms even apply to §209(e)(1)(A)’s new construction and farm equipment under 175 horsepower and so cannot justify in-use control of §209(e)(1)(A) vehicles.

The *EMA* panel also accepted EPA’s argument that the difference between §209(e)(2)(B)(i)’s “standards and implementation and enforcement” and §209(e)(2)(A)’s “standards or other requirements” allows interpreting “requirements” to mean “ancillary enforcement mechanisms.” *See* 88 F.3d at 1093 (§209(e) neither “compel[s] EPA’s interpretation [nor] forbid[s] it”). First, EPA’s argument ignores that the implementation-and-enforcement limitation appears in §209(e)(2)(B)(i)-(ii), which concerns technical leadtime restrictions on states’ adopting “standards,” not “other requirements.” Because it concerns only the same standards preempted by §209(a)-(c), that isolated portion of §209(e) unsurprisingly tracks §209(b)-(c)’s enforcement restrictions for motor-vehicle *standards*, without in any way limiting §209(e)’s broader *other-requirement* preemption. Second, the subsequent Bond Amendment uses the broader “standards or other requirements” to describe §209(e)(2)(B) preemption. *See* PUB. L. No. 108-199, §428(e), 118 Stat. 3, 418-19 (2004) (“[§428(c)] does not apply to... the authority of any State under section 209(e)(2)(B) of the Clean Air Act ... *to enforce standards or other requirements*”) (emphasis added).¹³ Consistent with ARTBA’s position, the new statute suggests that §209(e)(2)(B)’s language mirrors §209(e)(2)(A)’s “adopt or enforce... other requirements.”

¹² Specifically, “take such other action” avoids ambiguity regarding states’ authority to adopt “other requirements” different from California’s “other requirements.” If §209(e)(2)(B) mirrored the “adopt... other requirements language” of §209(e)(1) and §209(e)(2)(A), other states would claim the authority to adopt requirements “other” than California’s “other requirements.”

¹³ For new nonroad engines under 50 horsepower, the Bond Amendment (a) requires EPA both to consider safety when reviewing California waiver requests and to issue national emission standards, and (b) prospectively preempts states (other than California) and subdivisions from adopting “any standard or other requirement applicable to” such engines, with a savings clause for state measures adopted prior to September 1, 2003. *Id.* §428(a)-(e).

A subsequent statute interpreting §209(e) is “entitled to great weight in statutory construction.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-381 (1969). Because that statute interprets §209(e) contrary to EPA’s interpretation upheld in *EMA*, the interpretation provides another reason for EPA and any reviewing court now to reach a different conclusion.

3. Section 213(d) Incorporation

Most significantly for in-use controls, *EMA* deferred to EPA’s peculiar interpretation that §213(d) incorporates §209(d)’s in-use motor-vehicle savings clause into nonroad preemption under §209(e). *EMA*, 88 F.3d at 1094. In doing so, the *EMA* panel recognized that “[n]either party provide[d] an entirely satisfactory explanation” of §213(d), but petitioner *EMA* “fail[ed] to offer any coherent alternative [interpretation].” *Id.* The *EMA* panel failed, however, to consider that, by its terms, §213(d) applies only to EPA’s *new-vehicle* standards under §213(a). As incorporated by §213(d), therefore, §209(d) could save states’ authority to impose in-use restrictions only on nonroad vehicles on the showroom floor, 40 C.F.R. §85.1602 (1995); 40 C.F.R. §1074.5 (same under current version), not those in the field. Even on its own terms, EPA’s interpretation makes no sense.

Although EPA’s interpretation is even more unsatisfactory than the *EMA* panel realized, that panel nonetheless would have required *EMA* (or ARTBA) to provide a plausible interpretation. *EMA*, 88 F.3d at 1094. Using statutory-construction and legislative-history arguments that *EMA* did not consider, ARTBA harmonizes §209(e) and §213(d). *First*, as explained in Section II.B, *supra*, the legislative history explains that the original §213(d) simply linked new vehicles “subject to regulation under this Act” – but not then-existing (*i.e.*, unregulated) nonroad vehicles – to §209(e)’s preemption. H.R. Rep. 101-490, at 310. *Second*, because it did not amend §213(d), the Conference Committee did not change §213(d)’s simple meaning. *Third*, the ambiguity (if any) in the §209(e)-§213(d) link concerns post-enactment, pre-regulation vehicles, but that minor, temporal ambiguity cannot empower EPA to re-write the *unambiguous* aspects of the §209(e)-§213(d) link (namely, that CAA-regulated nonroad vehicles are subject to §209(e)’s preemption). *Fourth*, unlike motor vehicles, nonroad vehicles by definition include the vehicle’s “fuel system,” 42 U.S.C. §7550(10)-(11), which incorporates fuel standards within the “standards” applicable to nonroad vehicles under §209(e).

III. PROVISIONS WITH PUNITIVE CIVIL FINES OR CRIMINAL PENALTIES ARE REGULATORY AND INELIGIBLE FOR THE MARKET-PARTICIPANT EXCEPTION TO PREEMPTION

SCAQMD seeks approval for the contract-based SOON program. Although preemption jurisprudence can include a “market-participant” exception, under which a government operating its own affairs is exempt from otherwise-applicable preemption on the theory that the government operates as a market participant, not as a regulator. Although the “SOON” program operates in part on contracts between government and construction companies, the SOON program is ineligible for the market-participant exception because it includes punitive civil fines

and criminal penalties as possible enforcement mechanisms. By including such regulatory measures in what is in essence the SOON program's liquidated-damages clause, the SOON program goes beyond permissible contracting and becomes a regulatory measure that is plainly outside the market-participant exception to preemption.

Specifically, with respect to contract-based market participation,¹⁴ government-imposed penalties must qualify as liquidated damages for the government's action to remain contractual and proprietary. *See Priebe & Sons v. U.S.*, 332 U.S. 407, 411 (1947) (courts consider "enforceability of 'liquidated damages' provisions in government contracts"); *In re Bubble Up Delaware, Inc.*, 684 F.2d 1259, 1262 (9th Cir. 1982) ("[u]nder the principles of general contract law that apply to the construction of government contracts,... a basic requirement for a valid liquidated damages clause is that the liquidated amount be reasonable"). Otherwise, the penalties become sovereign and regulatory. *Washington State Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (market-participant exception inapposite where "measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce"); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881 (9th Cir. 2006) (sovereign action incompatible with market participation). Because the SOON program involves either (or both) criminal penalties or punitive civil penalties, those regulations are not eligible for a market-participation exception.

Unlike preemption under the dormant Commerce Clause, *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999), preemption under the Supremacy Clause need not include a market-participant exception: "What the Commerce Clause would permit States to do in the absence of the [Act] is... an entirely different question from what States may do with the Act in place." *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 290 (1986). Indeed, acting through the state's contracting power is a "distinction without a difference" where the challenged action "serves plainly as a means of enforcing" within the preempted sphere. *Gould*, 475 U.S. at 287-88; *Crosby*, 530 U.S. at 374-76 (preempting state procurement statute that conflicts with federal statute); *Chamber of Commerce*, 128 S.Ct. at 2415. Section 209 does not necessarily include a market-participant exception and especially not the broad exception under the dormant Commerce Clause

¹⁴ If state nonroad rules are merely "proprietary," those rules lose the protection of §116's general savings clause, which applies only to (1) emission standards and limitations not preempted by §209, §211(c)(4), and §233, and (2) certain requirements for controlling or abating air pollution. 42 U.S.C. §7416. As the 101st Congress recognized, §116's savings clause preserves only the "powers specifically enumerated in section 116." S. REP. NO. 101-228, at 250 (1989). When it wished to save state and local authority outside §116's narrow scope, Congress did so expressly. *See, e.g.*, 42 U.S.C. §§7661e(a), 7651c(f)(3), 7412(d)(9), 7412(i)(5)(A), 7412(r)(7)(H)(x), 7412(r)(11), 7429(h)(1), 7511b(f)(4). Assuming *arguendo* that a state could characterize its nonroad rules as "proprietary," they would fall unambiguously outside §116. To the extent that they conflict with §209, it would become all the easier to find conflict preemption.

When EPA previously responded to an ARTBA comment on this issue in another regulatory action, EPA adopted the Ninth Circuit's reasoning on remand in *EMA v. SCAQMD*. See Response to the Petition of American Road & Transportation Builders Association to Amend Regulations Regarding the Preemption of State Standards Regulating Emissions from Nonroad Engines, at 17-18 (Aug. 21, 2008) (EPA-HQ-OAR-2004-0008-0921). In doing so, EPA failed to recognize that the Ninth Circuit's *EMA v. SCAQMD* decision is no longer good law, even in the Ninth Circuit. Compare *EMA v. SCAQMD*, 498 F.3d at 1044-49 (relying on *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (*en banc*)) with *Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008) (reversing the Ninth Circuit's *Chamber of Commerce v. Lockyer* decision).¹⁵ In reversing the Ninth Circuit decision on which the *EMA v. SCAQMD* panel relied, the Supreme Court focused on the challenged California statute's "formidable enforcement scheme" and held that held "by imposing punitive sanctions for noncompliance," the California statute "effectively reaches beyond the use of funds over which California maintains a sovereign interest." *Chamber of Commerce v. Brown*, 128 S.Ct. 2408, 2411, 2416 (2008). It is "undisputed" that "[the environmental statutes' civil penalty] provisions authorize fines of the punitive sort." *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 617 (1992). *A fortiori*, federal criminal sanctions cannot apply to rules within the market-participant exception. See 42 U.S.C. §7413(c). At least where the states themselves or EPA's SIP approval would impose criminal penalties or punitive civil penalties, the "market-participant" exception cannot apply.

Nor could EPA credibly contend that the Ninth Circuit's *EMA v. SCAQMD* market-participant holding extends beyond *state-local government fleets* that acquire vehicles to cover *private fleets* under contract to state and local government.¹⁶ The Ninth Circuit did no such thing.

¹⁵ Even if the Supreme Court's *Chamber of Commerce v. Brown* decision had not vitiated the Ninth Circuit's *EMA v. SCAQMD* decision on remand, that three-judge panel lacked the authority to overturn prior Ninth Circuit panels' findings that penalties are sovereign and regulatory and thus inconsistent with market participation. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("[o]ne three-judge panel... does not have the authority to overrule another three-judge panel of the court") (*en banc*); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (same) (*en banc*).

¹⁶ It would be similarly specious to argue that the Supreme Court in *EMA v. SCAQMD* knew sanctions applied, but nonetheless considered the market-participant exception viable. First, the Court remanded the question of facial versus as-applied scope of the *EMA* challenge. 541 U.S. at 259. Thus, the Supreme Court consider that litigation possibly to constitute only a *facial challenge*, which would not have even raised the question of preemption *as applied* to private fleets. Second, no punitive sanctions apply to government fleets. Cal. Health & Safety Code §§19, 42400-42410; *Vedder v. County of Imperial*, 36 Cal.App.3d 654, 661-62 (1974) (government not "person"); Cal. Bus. & Prof. Code §17201; *County of Santa Clara v. Astra U.S., Inc.*, 428 F.Supp.2d 1029, 1033-36 (N.D. Cal. 2006) (government not "person"). Accordingly, the Supreme Court could not know whether the fleet rules' penalty-free *potential* application to government procurers would defeat a *facial* challenge. *I.N.S. v. Nat'l Ctr. for Immigrants'*

SCAQMD, 498 F.3d at 1049 (although “[EMA’s] facial challenge entirely failed under *Salerno*[,...] the district court, after holding that the market participant doctrine protects from preemption the provisions governing procurement decisions by the state and local governments, should have gone on to address whether the remaining provisions were preempted”). The Ninth Circuit held only that SCAQMD’s rules withstood *facial* challenge because government procurers *might* own the fleets. *Id.* As an association whose private members contract with governments, ARTBA presents an issue the Ninth Circuit left unresolved: whether punitive liquidated-damage contracts exceed the market-participant exception?

IV. SECTION 209 PREEMPTS IN-USE CONTROLS DURING THE FEDERALLY REGULATED USEFUL LIFE

For the foregoing reasons, the California statewide measures that rely on in-use controls or impose in-use fleet measures are preempted. With respect to California’s in-use controls for construction and other diesel-power equipment, that preemption applies both for equipment above and below the 175-horsepower threshold. The proposed contingency measure (CTY-03) to ban pre-Tier 3 off-road diesel engines on “high pollution advisory” days is a preempted in-use standard – particularly for equipment under 175 horsepower – for the same reasons. Because these SIP and contingency measures are beyond California’s and SCAQMD’s authority, CAA §110(a)(2)(E)(i) prohibits EPA’s approving these measures as part of the California SIP. 42 U.S.C. §7410(a)(2)(E)(i).

V. EPA SHOULD DEFER DECIDING THE SOUTH COAST SIP UNTIL ARTBA’S LITIGATION CLARIFIES EPA’S PREEMPTION RULES

Because ARTBA is litigating the nationwide standards under which EPA will decide the important preemption issues in this case and because EPA’s decision on California measures would lead to other states’ adopting (or being compelled to adopt) California measures as reasonable further progress for their SIPs, ARTBA requests that EPA stay a decision on these SIP rules until the entry of a judgment in ARTBA’s litigation against EPA. Any other solution not only would irreparably injure ARTBA by subjecting ARTBA (and EPA) to a multiplicity of actions, across the country, but also would irreparably injure the public generally (including ARTBA’s members) and state air-quality planners nationwide in their efforts timely to attain air quality standards with *lawful* control measures. Because the California in-use control measures are unlawful, they represent the strong possibility of distracting regulators to adopt control measures in the short-run that the courts ultimately will invalidate when ARTBA’s litigation

Rights, 502 U.S. 183, 188 (1991) (“[t]hat the regulation may be invalid as applied... does not mean that the regulation is facially invalid”). Moreover, prior controlling Circuit precedent (and subsequent controlling Supreme Court precedent) holds that penalties are inconsistent with market participation, which the three-judge *EMA v. SCAQMD* panel could not overturn. Punitive penalties exceed the market-participation exception.


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concludes. In any event, the Clean Air Act contemplates that the D.C. Circuit will address significant CAA issues to ensure nationwide uniformity. *Adamo Wrecking*, 434 U.S. at 283-84. For that reason, EPA should stay consideration of nonroad rules pending resolution of the ARTBA litigation.

* * * * *

Please contact me with any questions about this matter.

Yours sincerely,



Lawrence J. Joseph

cc: Kim Smaczniak, U.S. Department of Justice

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