No. 10-618

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 Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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January 24, 2011

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QUESTION PRESENTED

Did the Second Circuit err when it affirmed a preliminary injunction, holding that the preemption provision of the Energy Policy and Conservation Act likely prohibited adoption of taxi fleet vehicle rules which were indistinguishable in purpose and effect from predecessor regulations that petitioners *conceded* were preempted under that statute – and which the district court determined, after an evidentiary hearing, imposed a "de facto mandate" that was "essentially a command to taxicab owners to meet [a] higher mpg standard"?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Metropolitan Taxicab Board of Trade, Midtown Car Leasing Corp., Bath Cap. Corp, Ronart Leasing Corp., Geid Cab Corp., Linden Maintenance Corp., and Ann Taxi Inc. do not have parent corporations and there is no publicly held company that owns 10% or more of their stock.

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PROVISIONS INVOLVED

In addition to Energy Policy and Conservation Act ("EPCA") provision and the challenged rules set forth in the petition (Pet. 1-2), the rescinded predecessor to the challenged rules and the Clean Air Act's ("CAA") preemption provision are also relevant to this action:

> Rules of the City of New York tit. 35 § 3-03(c)(10)-(11) (JA31-32)
>
> 42 U.S.C. § 7543(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. . . .

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioners and amici seek review of the Second Circuit's decision in order to decide the limits EPCA's express preemption provision imposes on programs at the state and local level that provide incentives to purchase more fuel efficient automobiles. But petitioners freely concede that no other court of appeals has decided that question, let alone done so in a manner that even allegedly conflicts with the decision below. Indeed, no appellate court has construed

EPCA's preemption provision (and no district court has invalidated an incentive).

In fact, the question whether EPCA preempts incentives is not at issue in this case. The district court enjoined the challenged rules ("Replacement Rules") after determining that they were indistinguishable in purpose and effect from predecessor rules ("Rescinded Rules" or "25/30 MPG Rules"), which had explicitly mandated the purchase of vehicles with a fuel economy rating of at least 25 miles per gallon ("mpg"). Petitioners have now *expressly conceded* that the Rescinded Rules were preempted under EPCA. The district court held that the Replacement Rules amounted to a de facto mandate and that the differences between the two sets of rules reflected only "procedural maneuvering" and "creative drafting." The court also found pretextual petitioners' assertion that the Replacement Rules were "police power" regulations aimed at adjusting driver incomes.

Although the Second Circuit decision affirming preliminary relief did not rely on the de facto mandate finding – concluding instead that the Replacement Rules were preempted because they referenced fuel economy standards – the Second Circuit did not overturn or question that finding. (Nor did it disturb the district court's holding that the Replacement Rules were also preempted by the CAA.) The court even highlighted that petitioners continue to operate incentives for hybrid taxis, without any suggestion of disapproval.

Petitioners' assertions that the Second Circuit struck down all incentive programs therefore depend on an unsupported reading of the decision that is utterly abstracted from the facts and procedural history of this case. As is clear from the decision below – and as other courts have had no difficulty recognizing – the Second Circuit did not invalidate all incentives or purport to. Far from taking preemption to the furthest reaches, the court's decision stands for the unremarkable proposition that a local rule that is concededly preempted may not be revived by re-drafting it to omit particular words. No principle of preemption law would support a different conclusion.

Petitioners and amici primarily criticize what they take to be the Second Circuit's *reasoning*, predicting that the reasoning will lead to undesirable effects. This Court, however, reviews judgments – not opinions. In any event, those criticisms lack merit. The Second Circuit applied settled principles. Indeed, it is the petitioners' account that neglects the text and purpose of the preemption provision.

Notably, petitioners do not ask the Court to review or overturn the *judgment* in this case on either of the grounds it was issued – EPCA or CAA. The only relief requested is a remand for the court of appeals to determine whether the district court committed clear error when it held that the Replacement Rules "effectively mandate" the purchase of fuel efficient vehicles. (Petitioners have conceded that an "effective mandate" is preempted.) A decision by this Court therefore would be essentially advisory.

Even if the Court were persuaded of the need to address the complex, novel and abstract question purportedly presented without any further development in the lower courts, the singular facts and circumstances of this case would make it an obviously inappropriate occasion for doing so. The Court should await a case involving preemption of what the parties agree is (or the Court at least viewed as) a simple incentive. Consideration of this case also likely would require deciding the significance of "circumvention" and post-injunction reenactment, as well as the significance of the fact that petitioners expressly conceded that the Rescinded Rules were preempted. Given the multiplicity of different and difficult case-specific issues raised, the prospect that the Court could or would reach the larger questions here, let alone "bring clarity," is infinitesimal.

B. THE ENJOINED AND RESCINDED FIRST VEHICLE RULES

In December 2007, the New York City Taxi & Limousine Commission ("TLC"), citing the City's interest in reducing air pollution and dependence on fossil fuel, adopted rules requiring that all newly purchased fleet taxis have a minimum "city" fuel economy rating of 25 mpg by October 1, 2008 and a minimum rating of 30 mpg by October 1, 2009. Prior to that, the City had never set fuel economy or emissions standards for taxi fleets. The only vehicles

qualifying under the 25/30 MPG Rules were ones with hybrid or "clean diesel" engines.[1]

Respondents, owners and an owners' trade group, brought suit contending, among other things, that the 25/30 MPG Rules violated the EPCA preemption provision, which prohibits localities from adopting laws "related to fuel economy standards or average fuel economy standards for automobiles," 49 U.S.C. § 32919(a), as well as the preemption provision of the CAA, 42 U.S.C. § 7543(a).

The district court agreed with plaintiffs, granting preliminary injunctive relief. *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-7837, 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008) ("*MTBOT I*"). The City did not appeal that ruling, and it has conceded that the 25/30 MPG Rules were preempted. App. 56a; JA661.

C. THE REPLACEMENT RULES

Within months of the district court's decision, the TLC announced an ostensibly "new" set of rules, which, rather than mandating that owners purchase the high-mpg taxis, instead relied on "incentives" and "disincentives" to "induce" (JA99) them to do so. Rules

[1] Because almost all the qualifying vehicles were hybrids, that term is used here, as in the opinion below, to encompass those with "clean diesel" engines.

of the City of New York tit. 35 § 1-78(a)(3) ("Replacement Rules"). Specifically, the Replacement Rules set the maximum lease rate fleet owners could charge drivers for the disfavored vehicle types at $30 per day below that for vehicles that met the fuel efficiency criteria. (This disparity resulted from a $12-per-shift reduction for those leasing out conventionally-powered vehicles and a $3 increase for those purchasing – and leasing – hybrids. Only the $12 penalty was challenged.)

Adoption of this regime required the TLC to rescind its own longstanding rule against "lower[ing] any upper limitation of lease rates . . . unless . . . the record . . . includes substantial evidence of reduced operating expenses of the affected medallion owners." JA58-59 (rescinded § 1-78(e)). The TLC conceded it did not consider owners' costs in reducing these rates, and the only evidence before the Commission showed increased costs.[2]

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[2] At the same time the TLC imposed this lease cap reduction, it also reduced the cap for all vehicles by shifting the cost of sales taxes from drivers to owners. Respondents challenged both actions in state court, alleging that failure to consider cost when setting rates contravenes state law. That claim did not succeed in the lower courts, but the New York Court of Appeals recently granted review to decide, *inter alia*, whether "a government regulatory agency charged with setting rates [may] do so without any regard to the costs borne by the companies it regulates?" *Metro. Taxicab Bd. of Trade v. Taxi and Limousine Comm'n*, No. 110594/09. On account of the federal court's injunction, the Rescinded Rules are no longer directly at issue in

(Continued on following page)

Nor, for that matter, was concern for costs *to drivers* a significant impetus. Months earlier (when gas prices hovered at historic highs and fleets were almost uniformly comprised of fuel-hungry Ford Crown Victoria sedans), the TLC had refused drivers' request for a gas surcharge, on the ground that the existing lease rates already "met and surpassed" its "goal of creating a living wage for drivers." JA501.

Rather, as City officials repeatedly emphasized, the "'goal'" of the Replacement Rules remained what it had been "'from the beginning'" "'to get fuel efficient taxis on the road using whatever appropriate methods required.'" App. 17a (quoting press release). As with their predecessor, the Replacement Rules' stated "[n]umber one" purpose was "to promote hybrids and cleaner vehicles." JA145. The City described the Replacement Rules as "'another way'" to reach the same goal and as a means to overcome the "'speed bump'" the district court's preemption decision represented. App. 18a, 17a (quoting press release). While the Replacement Rules removed the explicit reference to "miles per gallon," their avowed purpose was to "induce" (JA99) the same result, and precisely the same vehicles that had been required (and prohibited) under the prior regime were subject to "incentives" and "disincentives" under the new one. App. 11a, 57a.

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that proceeding. A favorable decision, however, would likely invalidate them.

D. THE SECOND PRELIMINARY INJUNCTION MOTION

Respondents amended their complaint, claiming that the Replacement Rules were not meaningfully different from the ones they replaced and were therefore preempted.

After initial briefing and oral argument, the district court conducted an evidentiary hearing to determine "whether the new lease cap rules provide 'meaningful alternatives' to taxicab owners or whether the rules leave owners with only one 'rational choice.'" JA12 (citation omitted). In response, plaintiffs presented testimony of three experts, including James Levinsohn, a University of Michigan economist, who had undertaken a sophisticated economic analysis of how owners' profits would be affected by the Replacement Rules.

Levinsohn concluded that the "choices" offered owners under the Replacement Rules were illusory. One fleet, he explained, would earn only $581 per year per Crown Victoria taxi but more than $7,000 (12 times more) were it to purchase a hybrid. Another fleet would face a "choice" between *losing* $2,241 annually per Crown Victoria or a $3,258 profit per hybrid. Using highly conservative assumptions, Levinsohn determined that owners who continued to operate Crown Victorias would suffer, at a minimum, a 65 to 75% decline in profits.

Petitioners presented two experts who took issue with Levinsohn's conclusion – on conceptual, rather

than empirical grounds. (Neither had conducted an independent economic analysis.) They maintained that so long as a fleet operator could make even $1 leasing the disfavored vehicles, the Replacement Rules should not be described as an "effective mandate" to purchase fuel-efficient vehicles.

E. THE DISTRICT COURT'S RULING

On June 22, 2009, the district court issued a 50-page opinion and order granting preliminary injunctive relief. App. 14a-65a. The court began by underscoring that the case *did not* concern whether the City could mandate the purchase of taxis that meet certain mileage or emissions standards – because "the City has conceded that it [could not]." *Id.* 20a. Nor, the court continued, was it about "whether New York City can incentivize the purchase of certain types of taxicabs," noting three such regulations that had been implemented without challenge: (1) a 2003 rule limiting certain new taxi licenses to hybrids; (2) a 2006 rule extending the service life of hybrid taxis from three to five years; and (3) the $3 per-shift increase adopted along with the challenged $12 penalty. App. 20a. The district court reiterated its view that the central issue was whether "the new lease cap regulations have the preempted effect of mandating that taxicab owners purchase only taxicabs with hybrid or clean diesel engines." *Id.* 20a.

After examining the relevant caselaw, the court explained that under both EPCA and CAA, a local

law is preempted if, *inter alia*, it "effectively mandates a specific, preempted outcome." *Id.* 40a. Rejecting "the City's argument that any rate structure that yields more than $1 in profit does not 'compel' or mandate a result" (*id.* 51a), the court found that the Replacement Rules "effectively force Fleet Owners to purchase hybrid taxicabs" (*id.* 65a). The district court explained:

> The combined effect of the lease cap changes, and even the disincentive alone, constitutes an offer which cannot, in practical effect, be refused. . . . 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.

Id. 49a, 52a.

The court also viewed the "TLC's procedural maneuvering" as evidence that it "intended" to compel owners to purchase hybrids. *Id.* 50a. The district court underscored, *inter alia*: (1) that the Replacement Rules would have been impermissible under the TLC's own longstanding rules tying lease cap changes to operating costs; (2) that the City's expert admitted that he had never seen a ratemaking regime that did not require the regulatory agency to consider costs; and (3) that by reducing lease rates to reflect a cost that owners had never borne, the Replacement Rules amounted to "an immediate penalty for continuing to use the same vehicle [Crown Victoria] that the City mandated within this decade." *Id.* 29a, 49a.

The history of the case and the public statements of New York City's Mayor and other officials also reinforced the court's conclusion that the purpose of the Replacement Rules was to mandate hybrids. *Id.* 15a-22a (quoting officials' statements at length). And the court also cast doubt on the City's assertion that the Replacement Rules were concerned with equalizing driver income, noting both the TLC's recent rejection of a fuel surcharge (*id.* 28a n.9), and the testimony of plaintiffs' expert as to ways the new regime would contribute to, rather than alleviate, income disparities among drivers.[3]

After determining that the Replacement Rules are a de facto mandate to purchase hybrids, the district court turned to the questions of whether the Replacement Rules are "related to" fuel economy standards under the EPCA and to the control of emissions under the CAA. *Id.* 22a. The court held that the absence of a textual reference to mileage in the Replacement Rules was merely a result of "creative drafting." *Id*. 58a. The district court relied primarily on four facts in reaching this conclusion:

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[3] For example, under the Replacement Rules, the 26 mpg hybrid Malibu garners a $15 higher lease rate than the 22 mpg gasoline-powered Ford Transit Connect, even though the actual gas savings are less than $3. (Respondents had agreed to stop purchasing the Crown Victoria if the TLC would approve for use the Transit Connect, a relatively "clean" vehicle that Ford recently developed for the taxi market. Petitioners would not approve the Transit Connect because it is rated at less than 25 mpg.)

(1) "All of the TLC-approved hybrids or clean diesel vehicles are rated 25 mpg or higher," and "[t]hese are the same vehicles that the TLC approved under the preempted 25/30 Rules" (*id*. 57a); (2) one of the stated purposes of the Replacement Rules in the City Record "was to allow taxi owners who choose 'a fuel efficient' vehicle to realize greater lease income than owners who choose 'a less efficient vehicle,'" (*id*. 58a); (3) "the exact amount of the disincentive [was] based on a calculation of miles per gallon," (*id.*); and (4) the TLC Chair had stated, "'Our goal from the beginning was to get *fuel efficient* taxis on the road using whatever appropriate methods required to achieve our goal.'" *Id*. (emphasis added by the court).

Based on this evidence, the district court concluded that respondents were likely to succeed in showing that the Replacement Rules are preempted as "related to" fuel economy standards under the EPCA. *Id.* 56a. Relying on the stated purpose of the Replacement Rules, their practical effect, and petitioners' public statements, the court also held that respondents were likely to succeed on their CAA preemption claim. *Id.* 61a-64a.

F. THE SECOND CIRCUIT'S RULING

The court of appeals affirmed. *Id.* 1a-13a. The court began by setting forth the history of the case, explaining that the Replacement Rules were adopted in the immediate aftermath of the decision holding the 25/30 MPG Rule preempted. *Id.* 3a-5a. The court

underscored that the case concerned only the $12 reduction – not the $3 incentive. *Id.* 5a. The Second Circuit also noted that the City did not contest the record evidence showing that the Replacement Rules would lower profits by 65% to 75% on each Crown Victoria. *Id.* 5a, 6a.

The court then set forth the applicable legal framework, stating that because preemption claims "'turn on Congress's intent,'" courts start "'with the text'" of a preemption provision and "'move on, as need be, to the structure and purpose of the Act in which it occurs.'" *Id.* 8a (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). To interpret the term "related to" in the EPCA preemption provision, the court of appeals looked to this Court's decisions in ERISA preemption cases, because that statute also displaces state and local laws "related to" the subject of federal law. App. 8a. Quoting from *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 324-25 (1997), the court of appeals 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.'" App. 8a (quoting 519 U.S. at 324-25). If the law does neither, it may still be preempted if it "contains requirements that amount[ ] to connection[s] with the preempted subject matter." App. 8a n.4 (quoting

Dillingham, 519 U.S. at 328 and *Travelers*, 514 U.S. at 658) (internal quotations omitted; alterations in original).

Under these standards, the court of appeals held the Replacement Rules were preempted because they "directly reference fuel economy standards" and thus "directly regulate the relevant preempted subject matter." App. 11a-12a. The court held that in the context of this case "'hybrid' is simply a proxy for 'greater fuel efficiency.'" *Id.* 11a. In support of that conclusion, the court noted, *inter alia*, that: (1) the City's list of approved vehicles under the "new" rules was identical to the one under the enjoined and concededly invalid 25/30 MPG Rules; and (2) the City admitted that the Replacement Rules were intended to improve fuel economy. *Id.* 10a-11a.

Because this conclusion was sufficient to affirm the district court's decision, the court found it unnecessary to explore the economic impact of the Replacement Rules, or reach CAA preemption. *Id.* 11a-12a. The court did not, however, question the district court's "effective mandate" finding or its CAA preemption conclusion.

REASONS FOR DENYING THE PETITION

The Second Circuit's decision, affirming a grant of preliminary injunction, does not warrant further review. It does not conflict with the decision of any circuit court or any precedent of this Court. Indeed,

petitioners concede that no other appellate decision has even interpreted the provision at issue.

Notably, petitioners do not ask this Court to overturn the judgment of the court of appeals. They ask only that this Court remand the case so that the court of appeals can decide whether the Replacement Rules amount to an effective mandate. But the district court already found, after an evidentiary hearing, that the Replacement Rules are a de facto mandate *and* that they are substantively identical to the Rescinded Rules that the City has conceded are preempted. Petitioners' claim relies on a conundrum and would require that this Court accept that Congress meant to allow localities to adopt regulations that are essentially identical, in both purpose and effect, to ones concededly preempted under federal law. And even a decision in petitioners' favor on that improbable claim would be of entirely academic significance – unless they could further persuade the court below to overturn the district court's factual findings *and* to reverse its conclusion that respondents were likely to succeed on an independent basis that petitioners do not ask the Court to consider.

As other courts have grasped, the Second Circuit's interlocutory decision here simply did not announce – and did not purport to announce – the sort of sweeping, categorical rule petitioners and amici ascribe. Their exaggerated criticisms betray a basic unfamiliarity with this case's actual facts and procedural history. Claims that this decision places "at risk" measures that are neither "proxies" for fuel

economy regulation nor "effective mandates" simply ignore that both defects were found here. Indeed, to the extent there develops a genuine need for this Court's guidance as to the limits, if any, EPCA places on local government efforts to adopt genuinely voluntary incentive measures, this case represents an especially inappropriate occasion to provide it.

I. THE SECOND CIRCUIT'S INTERPRETATION OF EPCA'S PREEMPTION PROVISION IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Decision Is Fully Consistent With Governing Law and Does Not Even Colorably Conflict With The Decision of Any Other Court

Petitioners do not even allege a decisional conflict as to the meaning of the EPCA provision they ask the Court to decide. On the contrary, the petition candidly acknowledges that "the Second Circuit is the first federal court of appeals [even] to interpret the EPCA preemption provision." Pet. 29. Indeed, not only has the development of EPCA preemption law so far been limited to the district court level, but the handful of courts to consider incentives have upheld them (after expressly distinguishing this case). *Infra* III. Although this Court does not strictly confine exercise of its certiorari jurisdiction to questions that have divided appellate courts, the prospect of its being in the vanguard of "a new area of developing law" (Pet.

29), is ordinarily a strong reason against, rather than in favor of, review.

Unable to identify any circuit split (or appellate authority of any kind) involving the EPCA provision, petitioners posit a "conflict" between the decision here and "the framework of analysis employed by" other circuits interpreting ERISA's preemption provision, which also uses the phrase "related to." *Id.* 9; *see also id*. 8, 9 (accusing Second Circuit decision of "non-adherence with this Court's jurisprudence" to a "degree that should not be tolerated").

There is obvious, unexplored, tension between petitioners' criticism of the court for relying overly on text at the expense of statutory purpose and their claims of "conflict" with decisions involving an entirely different (though similarly-worded) federal statute. In any event, petitioners' claims of "analytical framework" conflict – not to mention their suggestion of judicial impudence – are entirely without merit.

One of the supposedly "conflicting" circuit court ERISA decisions held that the challenged measure *was* preempted. And the two that found no preemption did not sustain a measure (1) that was adjudged only cosmetically different from a predecessor *conceded to be preempted*; or (2) found by a court to be a "de facto mandate" – let alone both, as is the case here.

The decision here set forth the same legal standards as does the petition. The court of appeals stated that because preemption claims "'turn on Congress's

intent,'" its inquiry must start "'with the text'" and "'move on, as need be, to the structure and purpose of the Act in which it occurs.'" App. 8a (quoting *Travelers*, 514 U.S. at 655). To determine the meaning of "related to" in EPCA's preemption provision, the court looked to this Court's ERISA preemption decisions in *Dillingham* and *Travelers* – the same principal ones relied upon by petitioners.

Indeed, the decision carefully hewed to the "analytical framework" set out in *Dillingham* for determining "related to" preemption: state law is displaced "if it [1] has a connection with or [2] reference to" the federally regulated subject matter. 519 U.S. at 324 (alteration in original; internal quotation marks and citations omitted). *Cf*. Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

The court of appeals here concluded that the Replacement Rules were preempted because they "reference" fuel economy standards – that is, they rely on the distinction between hybrid and non-hybrid vehicles that, under these circumstances, was a mere proxy for fuel-economy standards. App. 9a-11a. *See Dillingham*, 519 U.S. at 325 (A law has an impermissible "reference" to a preempted subject matter when the law "acts immediately and exclusively" in the preempted area or "where the existence of [the preempted subject matter] is essential to the law's operation").

Because the Replacement Rules failed under the "reference" prong, the court did not need to determine whether the Replacement Rules *also* suffered from an impermissible "connection with" fuel economy standards (or whether, as the district court held, they were also unenforceable under the CAA). *See Travelers*, 514 U.S. at 668 (a law that makes no prohibited reference is nonetheless preempted if it "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme").

Neither this result nor the reasoning conflicts in the least with the Fourth, Sixth, and Ninth Circuit decisions the petition cites. Although each of these "determine[d] whether the challenged laws mandated, or effectively mandated, something within the area that Congress intended to exclusively control" (Pet. 18), this Court has nowhere suggested, let alone "required" (*id.* 16), that the two prongs of ERISA preemption be considered in any particular sequence, or that both be considered in every case. *See Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992) (holding law that "specifically refer[red] to welfare benefit plans regulated by ERISA" preempted "on that basis alone"); *Retailer Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 193 n.2 (4th Cir. 2007) (declining to reach the "reference to" preemption claim because it had already found an impermissible "connection with" the preempted area); *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275, 281 (6th Cir.

2008) (noting parties' agreement as to no "reference" and therefore considering only "connection" issue); *cf*. *Golden Gate Rest. Assoc. v. City and County of S.F.*, 546 F.3d 639 (9th Cir. 2008) (holding challenged law not preempted after exonerating it under both prongs).

Thus, the Second Circuit's "fail[ure]" to reach whether the Replacement Rules constituted an effective mandate – after it had already found preemption due to the impermissible "reference" – could not possibly be described as error. *See* Pet. 19.

Of course, petitioners' unsupported claim as to how the Second Circuit "should have" structured its preemption analysis (*id.* 19) is all the more startling given the circumstances of this case. The district court had made extensive findings, after an evidentiary hearing, that these Replacement Rules *do* "effectively mandate the use of taxicabs with a certain mpg rating." App. 59a.

Notably, petitioners do not ask this Court to review that determination, which was the basis for the district court's judgment and was not disturbed on appeal. The only relief petitioners ask from this Court is a remand for the court of appeals to decide whether the district court committed clear error. This is one of many reasons that a decision of this Court *in petitioners' favor* would be of scant practical significance.

B. The Second Circuit Correctly Decided The Preemption Question This Case Actually Presents

Petitioners and amici offer an array of disconnected criticisms of the Second Circuit's opinion below. Petitioners complain that the court of appeals erred in "examin[ing] only the text of the provision in question" and did not take sufficient account of legislative purpose, the "nature of the effect of the [Replacement Rules]," or the "presumption against preemption." Pet. 10-11.

These abstract claims fail on their own terms, but in this case, all arguments against preemption quickly reach the same dead end: the fact that the regulations at issue are identical in purpose and effect to ones petitioners expressly conceded were preempted under EPCA. Nothing petitioners and amici say (or could say) about the text or purpose of EPCA, or preemption law generally, explains why Congress would have intended that states and localities be able to re-adopt and enforce the very same measures held properly preempted (and enjoined). In providing for preemption, Congress presumably was concerned about matters of substance, rather than the draftsmanship of local regulations, and may be expected to be especially disapproving of efforts to circumvent the effect of its own preemption mandates, particularly if done in response to a valid federal court order. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (regime revised in response to prior decision "partake[s] too much of the infirmity of the

[previously invalidated regime] to be able to survive"). And in considering the "nature of the effect" of the challenged rules, the court below necessarily recognized this central fact. A contrary ruling in this case would permit the City (and all cities) to evade congressionally-intended preemption simply through "creative drafting." *See* App. 58a.

Petitioners and their amici's extravagant claims about the error and importance of the decision here disregard the actual facts and procedural history of this case. The decision did not hold – or suggest – that local laws are preempted "*whenever* [they] rely on a distinction between hybrid and non-hybrid vehicles." *See* Pet. 8 (emphasis added). The court's conclusion that hybrid is a proxy for fuel efficiency standards was "*for purposes of the new rules*." App. 10a (emphasis added). *See Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."). As both courts recognized, every vehicle listed for "incentives" under the Replacement Rules has at least a 25 mpg rating, and every vehicle penalized has a less-than-25 mpg rating. App. 11a, 57a. As the district court explained, this was no coincidence. The $15 lease rate differential was itself derived from a mpg calculation. *Id.* 58a. And petitioners' public statements, as well as the history of the litigation, made clear that the Replacement Rules' purpose was to effectively mandate the purchase of vehicles meeting the fuel economy standards set in the Rescinded Rules. *Id.* 15a-22a.

Given that the Replacement Rules favor the *exact same vehicles* that were mandated under the concededly-preempted 25/30 MPG Rules, the court's holding that the Replacement Rules impermissibly "referenced" fuel economy standards is unassailable.

Claims that the Second Circuit's "view" would strike down any law "that affects, or reflects any concern regarding, automobile fuel economy" are likewise unsupportable. *See* Public Citizen Br. 9. Nor did the court anywhere suggest that "every taxicab regulation that affects a fleet owner's vehicle purchase decisions," would be invalid. Pet. 14. Indeed, the district court stated in so many words that this case *does not* concern "whether New York City can incentivize the purchase of certain types of taxis," pointing out that three City hybrid incentives remain in place: (a) the $3 hybrid incentive passed at the same time as the $12 penalty; (b) a 2003 rule limiting certain new taxi licenses to hybrids; and (c) a 2006 rule extending the service life of hybrid vehicles from three to five years. App. 20a. The court of appeals affirmed that judgment and "view" about the $3 hybrid incentive. *Id*. 5a.

Moreover, after an evidentiary hearing, the district court found that the Replacement Rules, while styled as "incentives," create a "de facto mandate" to purchase vehicles with a 25 mpg rating or higher. *Id.* 65a, 59a; *accord id.* 57a (The Replacement Rules are "essentially a command to taxicab owners to meet that higher mpg standard."). Indeed, there is a faintly Orwellian cast to describing a measure with

the purpose and effect of making operation of lower-mpg vehicles commercially infeasible as merely "removing disincentives." *See* Public Citizen Br. 9 (citing DOJ C.A. Br. 2-3).

The district court also considered – but rejected as pretextual – petitioners' claim that this was an exercise in regulating the relative incomes of drivers. App. 28a n.9. Thus, petitioners' assertion that the decision restricts their "traditional police power" is meritless.

Unable to argue that the judgment below was wrong, petitioners and their amici spend considerable time critiquing the court of appeals' reasoning. This Court, however, "reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842 & n.8 (1984); *accord Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of certiorari) (same). In any event, it is petitioners and amici – not the Second Circuit – who misunderstand preemption law generally and this provision in particular.

For example, petitioners assert that measures should be preempted only if they will "have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers," and argue that is not so here where no more than about 3,000 purchase decisions would be affected. Pet. 14-15. But this is surely wrong. Indeed, it was precisely the danger of uncoordinated 3000-car-at-a-time local fuel efficiency policies that impelled

Congress to enact an explicit (and broad) preemption provision in EPCA – not a savings clause.[4] Such measures, considered individually, may be consistent with the statute's substantive, energy independence objectives, yet still violate the purposes of the preemption clause. As the Court explained in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, "if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." 541 U.S. 246, 255 (2004).[5]

Petitioners and amici also accuse the court of ignoring the word "standards" in the EPCA preemption

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[4] Chicago also wrongly posits that preemption is warranted only where local measures "improperly burden interstate commerce or overly intrude on federal concerns." *See* Chicago Br. 10. But these are the limitations that apply *absent* any indication of preemptive intent – indeed in cases involving statutes with *non*-preemption provisions. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869-73 (2000).

[5] Indeed, the presentation of the statute's substantive purposes is tellingly incomplete. The statute's chosen means of promoting fuel economy, corporate average standards, reflects the high value Congress put on preserving "wide consumer choice." *Ctr. for Auto Safety v. Thomas*, 847 F.2d 843, 864 (D.C. Cir. 1988), vacated on other grounds, 856 F.2d 1557 (D.C. Cir. 1988); *accord* H.R. Rep. No. 94-340, at 87 (1975). That strong policy is impinged by the Replacement Rules here, which would harshly penalize respondents and other owners for choosing a relatively fuel-efficient vehicle specifically developed for the urban taxi market, rather than a hybrid on the other side of the 25 mpg cut-off. *See infra* n.3.

provision, noting that the term "*average* fuel economy standards" is a defined term in the statute and that a regulation of purchasers would not qualify. Chicago Br. 16. But the statute refers in the disjunctive to "or fuel economy standards," and the latter, which must be presumed to have a different meaning, is not defined in the statute. Moreover, the text does not confine itself to locally-enacted "standards," but rather prohibits laws "related to" standards. In any event, this argument was soundly rejected in *Engine Manufacturers*, which held that local regulations mandating the purchase of alternative-fuel vehicles violated the CAA's preemption provision. 541 U.S. at 255. The Court explained that it "would make no sense" to treat "sales restrictions and purchase restrictions differently for pre-emption purposes." *Id.*[6]

Petitioners' efforts (Pet. 13-14) to enlist statements in this Court's opinions recognizing outer limits of "related to" miss the point. To accept that "related to" does not authorize "infinite" displacement of local law is not to erase the dominant theme of decades of ERISA jurisprudence: that the phrase *is* unusually broad and "expansive." *See FMC Corp. v.*

[6] The City's amicus further obscures matters when it implies that *Engine Manufacturers* held that the term "'standard'" must encompass "'command, accompanied by sanctions.'" Public Citizen Br. 7 (quoting 541 U.S. at 255). As the opinion makes clear, the quoted language established that "commands" are statutorily *sufficient*. The Court expressly left open the question whether the CAA preemption language "refers only to standards that are enforceable." *Id.* at 258.

Holliday, 498 U.S. 52, 58 (1990) (describing phrase as "conspicuous for its breadth"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("deliberately expansive"); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2203 (2009) (describing phrase as "expansive"). It entails no "uncritical[ ] literal[ism]" or undue "stretch[ing]" (Pet. 14) to conclude that preemption is warranted where, as here, the measure at issue is meaningfully indistinguishable from one the locality itself admits is properly preempted. It could hardly be otherwise.

The weakness of petitioners' position is further revealed by their heavy reliance on statutes enacted *after* the EPCA was passed as evidence for the intent of the Congress that passed EPCA. Pet. 15-16, 21-23. While courts occasionally consider subsequent legislation when ascertaining congressional intent, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000), this Court has repeatedly recognized that "the views of a subsequent Congress," generally "form a hazardous basis for inferring the intent of an earlier one," *Bilski v. Kappos*, 130 S. Ct. 3218, 3250 (2010) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)); *accord Massachusetts v. E.P.A.*, 549 U.S. 497, 529 (2007). In any event, some of the after-enacted statutes relied upon by petitioners involve federal-incentives or federally-approved state plans, such that preemption analysis may not be implicated. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Ceombie*, 508 F. Supp. 2d 295, 398 (D. Vt. 2007) (holding that

because the emission standards were passed pursuant to a federal waiver under the CAA, they were federal, not local standards, and preemption therefore does not apply); 42 U.S.C. § 13235(a) (federally-approved state plans under the Energy Policy Act); 42 U.S.C. §§ 7410(a), 7586 (federally-approved state plans under the CAA); *supra* n.8. Others involve incentives different in kind from those at issue here.

Finally, petitioners' efforts to flog the "presumption against preemption," do not amount to anything. At the outset, it is not evident from the opinion that the Second Circuit panel did not "consider" – as opposed to did not discuss – the presumption. Notably, the opinion petitioners quote (Pet. 11) for the proposition that the presumption must be explored in every preemption case was a one-Justice *dissent* in *Engine Manufacturers*, 541 U.S. at 260-61 (Souter, J., dissenting). The majority opinion there specifically acknowledged but rejected that criticism, and pointedly found preemption without discussing the presumption. *Engine Mfrs.*, 541 U.S. at 256.

Moreover, the Court repeatedly has held that there are cases – involving subject matters of longstanding federal involvement or concern – where the presumption "is not triggered." *See United States v. Locke*, 529 U.S. 89, 108 (2000). There are strong reasons for concluding that this case falls into that category. The regulation of vehicle fuel-economy and emissions are areas of longstanding federal concern, and "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; *accord Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (In "contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project."). And while the regulation of taxicab *service* is surely an area of traditional local concern, the fuel efficiency concerns that animated this regulation are not "unique local problems" (Chicago Br. 10), but are of national character.[7] But whether or to what extent the presumption is operative is ultimately academic: the district court decision

[7] The decision here no more brought "the taxicab industry under federal regulatory control" (Pet. 12) than did this Court's decision in *Engine Manufacturers*, 541 U.S. at 258; or the district court's injunction in *MTBOT I,* which petitioners now concede was correct; or this Court's decision in *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 618-20 (1986) (holding taxi licensing decision preempted under the National Labor Relations Act). Indeed, the brief submitted by the federal government below admitted that "some incentive programs, even those arising in the context of traditional state regulation of the taxicab industry, could be so onerous that they effectively would command the purchase of new vehicles" and be preempted. DOJ C.A. Br. 19 n.5.

It would be particularly odd to infer an exception for taxis when the EPCA expressly provides one for vehicles purchased for a City's "own use." *See MTBOT I*, 2008 WL 4866021, at *10-*12 (finding this exemption does not apply); *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 100 (1992) (O'Connor, J., plurality opinion) (where Congress includes a savings clause, "the natural implication . . . is that state laws regulating the same issue as federal laws are not saved" if they fall outside the clause's express terms).

explicitly referenced the presumption, and nonetheless found preemption. App. 34a. As in *Engine Manufacturers*, the presumption "demonstrably makes no difference to resolution of the . . . question." 541 U.S. at 256.

In sum, the court of appeals' decision finding preemption is correct.

II. THIS IS NOT A REMOTELY APPROPRIATE CASE TO SETTLE GENERAL RULES CONCERNING EPCA PREEMPTION

Even if the (interlocutory) decision below were not the first appellate case to consider the provision at issue, this case would be a singularly inappropriate vehicle for resolving the issues petitioners and amici ask the Court to decide.

First and foremost, the question whose importance and urgency they insist upon – the application of EPCA's preemption clause to local measures that provide incentives for certain vehicle types – is not actually presented here. As has been explained above, the Second Circuit was not called upon to decide – and did not decide – whether every voluntary incentive is subject to preemption. The opinion accompanying the judgment it affirmed expressly stated that the case was *not about* incentives. App. 5a, 20a. And both courts explicitly acknowledged that the judgment left in place other TLC hybrid-promoting regulations, such as the $3 incentive. *Id.*

Although the court of appeals saw no need to reach the question, the district court had found (based on a developed evidentiary record) that the Replacement Rules were not incentives but instead a de facto mandate that would "force Fleet Owners to purchase hybrid taxicabs." *Id.* 65a.

Moreover, as explained above, the opinion did not hold that "hybrid" is always a proxy for "greater fuel efficiency" – let alone that every "police power" regulation that incidentally affects vehicle choice is subject to EPCA preemption. The absence of a specific mpg standard in the Replacement Rules was held to be only a matter of "creative drafting" (*id.* 58a), and the claim that petitioners were regulating drivers' incomes was found to be pretextual (*id.* 28a n.9).

This distinctive history and procedural posture make clear that this case is unsuited for plenary review. Not only does the petition ask the Court to decide a question that was not considered by the courts below (and has not been considered by any appellate court), but any attempt to address these broader questions – let alone "bring clarity" – would necessarily be complicated by this case's many idiosyncratic features.

Even if the Court were to credit petitioners' doubtful, maximal reading of the opinion below – or the "implications" of its reasoning (Public Citizen Br. 9) – respondents would be entitled to seek affirmance of the case on alternative grounds. Indeed, the district court ruled *in respondents' favor* on two

independently sufficient grounds, based on specific findings developed after an evidentiary hearing: EPCA preemption under the "connected to" prong and preemption under the CAA.

The submissions of petitioners and amici read as if the appellate court overturned the "effective mandate" conclusion and held the Replacement Rules were in fact a mere incentive. But that is not so: those findings are undisturbed (and correct). And though petitioners refrain from asking the Court to review them (lest the full difficulty of their position be appreciated), the tactical decision to proceed piecemeal does not bind the Court. It is a testament to how poorly suited this case is for plenary review that the only relief petitioners claim this Court *could* award would be a *remand* for the Second Circuit to review, under a highly deferential standard, the district court's amply supported "effective mandate" determination. *See* Pet. 19 (claiming error only based on Second Circuit's "failure" to rule on that issue).

Petitioners would also be unlikely to successfully overturn the holding that the Replacement Rules are prohibited under the CAA. Under that statute, "exclusive control over 'standard[s] relating to the control of emissions from new motor vehicles' is vested in the federal government, and the states are preempted from regulating in the area." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 198 (2d Cir. 1998) (quoting 42 U.S.C. § 7543(a)). In *Engine Manufacturers*, this Court held that a law requiring "fleets of street sweepers . . . [and] taxicabs picking up airline

passengers" to purchase or lease "green" vehicles, including alternative-fuel vehicles, was preempted by the CAA. 541 U.S. at 249. Contrary to amici's claims, the Court in that case did not reach the question of whether an incentive is preempted under the CAA.[8] Precisely because, as petitioners argue, determining whether an incentive is preempted may require an analysis of the "structure, purpose, and history of the statute" (Pet. 10), an incentive may be preempted under the CAA but not the EPCA, or vice versa.

Deciding this case would also require the Court to decide the significance of "circumvention" and post-injunction reenactment, as well as the significance of petitioners' concession that their Rescinded Rules were preempted. No other case raising preemption issues is likely to involve a defendant subject to this

[8] When holding that a mandate to purchase alternative-fuel vehicles was preempted, the Court in *Engine Manufacturers* looked to § 246 of the CAA, which permits states to adopt purchasing mandates and financial incentives, such as increased vehicle registration fees, if they do so as part of a State Implementation Plan ("SIP"). 42 U.S.C. §§ 7581-7590. The Court noted that the CAA prescribes "numerous detailed requirements" that must be complied with to avoid preemption and saw that as further evidence that the CAA was intended to otherwise preempt emissions standards directed to purchasers. *Engine Mfrs.*, 541 U.S. at 254 n.6. This Court then asked, "what is the use of imposing such a limitation if the States are entirely free to impose their own fleet purchasing standards with entirely different specifications?" *Id.* at 258.

significant, binding (and voluntarily-assumed) constraint.[9]

Given the multiplicity of different and difficult case-specific issues raised, the prospect that the Court could or would reach the larger questions here is minute. The unique history of this case, as well as the multiple alternative grounds to strike down the Replacement Rules, make this case a particularly bad vehicle for deciding whether true incentives may be preempted.

III. THERE IS NO URGENT NEED FOR THIS COURT'S "IMMEDIATE INTERVENTION"

While acknowledging the absence of conflicting (or any) appellate authority concerning EPCA's preemption provision, petitioners and amici highlight the ubiquity, variety, and social importance of State and local hybrid incentive programs, which they claim the decision below "could" put "at risk." *See* Pet. 24; Chicago Br. 5; Public Citizen Br. 3, 9. They assert that this Court's "immediate intervention is required" "to prevent . . . state and local governments" and lower courts from reaching erroneous legal conclusions. Pet. 20.

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[9] Nor do the obstacles mentioned exhaust the barriers that petitioners would need to surmount in order to enforce the currently enjoined Replacement Rules. As noted above (*supra* n.2), the New York Court of Appeals recently granted leave to appeal on the question whether petitioners violated state law by failing to consider costs when reducing lease caps.

Doing so would be a sharp break from this Court's settled approach not to seek out opportunities to shape "new area[s] of developing law" (*see id.* 29.), but rather to withhold consideration until questions have received sustained attention from the federal appellate courts, *see* Sup. Ct. R. 10(a); E. Gressman, *Supreme Court Practice* 246 (9th ed. 2009). The reasons petitioners and amici give for abandoning that practice do not withstand casual scrutiny.

There is a logical contradiction between petitioners' claims that the decision here will lead courts and officials outside the Second Circuit astray (Pet. 20, 29) and petitioners' argument (*id.* 8-9) that the decision conflicts with this Court's and other circuits' existing precedents. If a measure is considered within the Fourth, Sixth, or Ninth Circuit courts, those courts can presumably be counted upon, without further instruction from this Court, to apply the "framework of analysis" petitioners assert their precedent correctly requires. *But see supra* I.A. (explaining that Second Circuit's framework is no different). And to the extent that "established precedents of this Court" (Pet. 8), supply the correct answer, federal courts in Chicago or St. Louis will likewise reach the appropriate conclusion. *Cf. United States v. Williams*, 184 F.3d 666, 671 (7th Cir. 1999) ("While we carefully and respectfully consider the opinions of our sister circuits, we are not bound by them.").

As for localities, it is not this Court's office to provide advance guidance to other branches of government. *See Aetna Life Ins. Co. of Hartford, Conn. v.*

Haworth, 300 U.S. 227, 240-41 (1937). Petitioners' dire forecasts depend to a great degree on fundamentally erroneous assumptions, already discussed, about (1) what was decided (and left undecided) below and (2) the likelihood that this Court's review would or even could result in broad, generally applicable guidance.

Of course, the premise that a ruling in any single case would or could settle the legality of the vast array of programs listed in the petition is itself surely mistaken. On one hand, petitioners' alarms ignore the reality that local regulations otherwise "at risk" of preemption may be permissible if they: (1) fall within EPCA's exception allowing localities to adopt fuel-economy requirements for "automobiles obtained for [their] own use," 49 U.S.C. § 32919(c); (2) were passed pursuant to another federal law or as part of a federal government approved plan (*supra* n.8); (3) were expressly saved from preemption as a regulation of the "operation, or movement of registered or licensed motor vehicles," 42 U.S.C. § 7543(d); or (4) fall under the "market participant" doctrine, *see Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (holding the state was acting as a market participant when it paid bounties to hulk haulers and scrap processors). On the other hand, this Court's decision in *Engine Manufacturers* indicates that, EPCA preemption aside, even incentives relating to the purchase of new vehicles may be challenged under the CAA, a statute that is at issue in this case – but which petitioners, despite an injunction on this ground, conspicuously do not ask the Court to "clarify." *See supra* n.8. And to the extent that voluntary

incentive measures are to be accorded distinctive treatment, courts will be called upon to develop standards for what qualifies.

Direct evidence casts doubt on the claimed immediate danger posed by the opinion here or what petitioners take to be its "implications." To date, relatively few incentives have been challenged, and none has been held preempted by a district court. The lower courts' decisions show them to have had no great difficulty (far less then petitioners and amici) giving the opinion below a less-than-maximal reading. In *Association of Taxicab Operators, USA v. City of Dallas*, No. – – F. Supp. 2d – –, No. 3:10-CV-769-K, 2010 WL 5584449 (N.D. Tex. Aug. 30, 2010), the court rejected a claim that EPCA (and the CAA) preempted a municipal rule giving compressed natural gas taxis front-of-the-line privileges at the airport, explaining that "[a]n incentive like the one in this case was never challenged in *Metro Taxicab*." *Id*. at *7. The court there emphasized that the Second Circuit's decision affirmed "the district court's statement [that] th[is] case is not about" incentives. *Id*. at *5-*7. Likewise the court in *Green Alliance Taxicab Assoc. v. King County*, No. C08-1048RAJ, 2010 WL 2643369 (W.D. Wash. June 29, 2010), held that a new-licensing regime was not preempted, on the ground it was a "voluntary incentive program," and therefore unlike the "mandate" in this case. *Id*. at *5. Indeed, the only decision, other than this one, to hold a taxi regulation – indeed *any* local regulation – preempted under the EPCA, *Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009), involved an explicit mandate, which

petitioners concede is preempted. (As petitioners note, Boston later substituted an incentive, leading owners to discontinue their challenge. *See* Pet. n.14).

The reasons for restrained exercise of certiorari – gaining the benefit of other courts' sifting and testing of competing legal rules through application to concrete factual situations – are implicated here. If petitioners' alarmist predictions have even a kernel of truth, the Court will have no shortage of opportunities to consider and decide issues in which they were actually and cleanly presented and clearly decided, without the awkward posture complicating features present in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 24, 2011