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AAMA v. Massachusetts Department of Environmental Protection

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This Note describes the mobile source regulatory scheme under the Clean Air Act and examines two circuit court decisions addressing the issue of state adoption of zero emission vehicle (ZEV) sales mandates. The Note analyzes the very different approaches to the issue taken by the First and Second Circuits, including the First Circuit’s use of the primary jurisdiction doctrine to remand the ZEV issue to EPA. The Note evaluates EPA’s well-crafted response and concludes that the agency correctly maintained the underlying policy and balance of power established by Congress in the mobile source provisions of the Clean Air Act.

CONTENTS

Introduction ............................................................................. 622
I. Background ........................................................................ 624
II. Description of the Cases and EPA Response .............. 628
   A. Second Circuit Invalidates New York ZEV Mandate. 628
   B. First Circuit Refers ZEV Issues to EPA ..................... 629
   C. EPA Finds MOA Requirements May Be Adopted by
      Massachusetts ............................................................... 634
III. Analysis ........................................................................... 638
   A. Strong Arguments Support Invoking the Primary
      Jurisdiction Doctrine ................................................... 638
   B. EPA Response Maintains Policies Underlying the
      Clean Air Act ............................................................... 642
Conclusion ............................................................................. 646

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INTRODUCTION

In late 1998, the First Circuit forced the Environmental Protection Agency (EPA) to decide a long-standing controversy over state regulations mandating the sale of zero emission vehicles (ZEVs). In American Automobile Manufacturers Ass’n v. Massachusetts Department of Environmental Protection, the First Circuit refused to invalidate a Massachusetts ZEV sales mandate and instead invoked an infrequently used administrative law doctrine to stay proceedings in the case. Under the primary jurisdiction doctrine, the court referred three issues to EPA regarding interpretation of Sections 209 and 177 of the Clean Air Act, which prohibit states from regulating mobile sources except under certain conditions. Courts invoke the primary jurisdiction doctrine to stay further proceedings in a case until the parties have had reasonable time to seek an administrative ruling on an issue that is “within the special competence of an administrative agency.” The doctrine is designed to further “the goal of national uniformity in the interpretation and application of a federal regulatory regime . . . by permitting an agency that has primary jurisdiction over the matter in question to have a first look at the problem.”

In referring the issues to EPA, the First Circuit explicitly rejected the approach taken several months earlier by the Second Circuit in American Automobile Manufacturers Ass’n v. Cahill. In Cahill, the Second Circuit invalidated a New York ZEV sales mandate as impermissible under Section 209 of the Clean Air Act. The First Circuit, in Massachusetts Department of Environmental Protection, interpreted these provisions differently and then placed the ZEV sales mandate issue squarely in the hands of EPA to decide the validity of a Massachusetts ZEV sales mandate. EPA crafted a well-reasoned response in September 1999.

EPA intended its response to end a controversy over ZEV sales mandates that had raged in a series of lawsuits between U.S. automakers and the states of New York and Massachusetts.

1. 163 F.3d 74, 86 (1st Cir. 1998).
3. Massachusetts Dep’t of Envtl. Protection, 164 F.3d at 81 (citing Reiter v. Cooper, 507 U.S. 258, 268 (1993)) (holding that courts have discretion to stay proceedings in cases long enough to allow parties to seek administrative rulings from agencies with special knowledge of certain issues).
4. Id.
5. 152 F.3d 196 (2d Cir. 1998).
6. Id. at 201.
The controversy had also slowed EPA establishment of a National Low Emission Vehicle (NLEV) Program aimed at addressing the growing problem of air pollution from mobile sources in the United States.\(^7\) The NLEV final rule promulgated by EPA neither expressly prohibited nor endorsed state adoption of ZEV sales mandates, essentially leaving the issue to the individual states and automakers to fight out in court.\(^6\) Ironically, having fully distanced itself from the ZEV sales mandate debate, the agency was forced to address the issue once again after the First Circuit's remand under the primary jurisdiction doctrine.

This Note will examine the two cases brought by the AAMA, the First Circuit's use of the primary jurisdiction doctrine, and EPA's response to the issues remanded for agency resolution. Part I will lay out the requirements relating to the adoption of mobile source emission standards under Sections 209 and 177 of the Clean Air Act. It will explain California's LEV requirements and describe Massachusetts' and New York's adoption of the California LEV program. Part II will examine Massachusetts Department of Environmental Protection\(^9\) and Cahill\(^10\) and compare their very different approaches to analyzing the validity of ZEV sales mandates under the Clean Air Act. It will then describe EPA's response to the issues referred to the agency by the First Circuit. Part III will argue that several factors, including the need for a uniform interpretation of Sections 209 and 177, strongly supported the First Circuit's decision to invoke the primary jurisdiction doctrine. It will analyze EPA's carefully crafted response and contend that it was correct as a matter of both law and policy. Ultimately, this Note will conclude that EPA's response maintained the underlying policy and balance of power established by Congress when it enacted the mobile source provisions of the Clean Air Act.

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7. Unable to resolve the ZEV mandate within the context of NLEV, EPA, the states, and the automakers nevertheless eventually reached agreement on all other issues. EPA promulgated a final NLEV rule in January 1998. See Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: State Commitments to National Low Emission Vehicle Program, 63 Fed. Reg. 925 (1998) (codified at 40 C.F.R. §§ 9, 85, 86 (1999)). The NLEV program went into effect after EPA received notifications from all the automakers and nine northeastern states that they were voluntarily opting in to the program. See Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: Finding of National Low Emission Vehicle Program in Effect, 63 Fed. Reg. 11,374 (1998).


9. 163 F.3d 74 (1st Cir. 1998).

10. 152 F.3d 196 (2d Cir. 1998).
With one exception, Section 209 of the Clean Air Act vests exclusive control over motor vehicle emission control standards in the federal government. Section 209(a) provides that "no state... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."\(^{11}\) The exception to federal preemption, in Section 209(b), allows California to adopt its own vehicle emission standards as long as two conditions are met.\(^{12}\) First, the California standards must be "in the aggregate, at least as protective of public health and welfare as applicable Federal standards."\(^{13}\) Second, California must obtain a waiver from EPA.\(^{14}\)

The "opt-in" provision of Section 177 allows other states to "adopt and enforce for any model year" California standards in lieu of federal standards.\(^{15}\) First, the state standards must be "identical to the California standards for which a waiver has been granted for such model year."\(^{16}\) Second, California and the other states must have adopted the standards at least two years before the commencement of the model year to which the standards apply.\(^{17}\) The purpose of Sections 209 and 177 is to prevent U.S. automakers from being subject to multiple emissions standards in different states. In particular, the provisions are intended to limit mobile source emissions standards to those adopted by the federal government and by California. Section 177 thus prohibits states from taking any action that would create, or have the effect of creating, a "third vehicle" subject to emission control requirements that differed from those set by either the federal government or California.\(^{18}\)

In 1990, California adopted a Low Emission Vehicle (LEV) Program in an effort to solve its growing air pollution problem.\(^{19}\) The program classifies new vehicles into four low emission categories based on the amount of pollution they emit.\(^{20}\) Under

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13. Id.
14. See id.
16. Id.
17. See id.
18. Id.
19. See Cahill, 152 F.3d at 198.
20. See CAL. CODE REGS. tit. 13, § 1950.1 (1999). The four categories are: (1) Transitional Low Emission Vehicles (TLEVs); (2) Low Emission Vehicles (LEVs); (3)
the program, each individual automaker may sell or lease any combination of vehicles within each category as long as the average emissions from the mix of vehicles meet an overall non-methane organic gases (NMOG) fleet average standard.\textsuperscript{21} The California LEV program contained one exception to its overall flexibility, namely a requirement that automakers sell or lease a certain number of Zero Emission Vehicles (ZEVs) in California each year.\textsuperscript{22} Specifically, the program required two percent of all vehicles sold or leased in California in model years 1998-2000 to be ZEVs, five percent in model years 2001-2002, and ten percent in model year 2003.\textsuperscript{23} In accordance with Section 209(b) of the Clean Air Act, EPA granted California a waiver for its LEV Program on January 7, 1993.\textsuperscript{24}

In 1992, New York and Massachusetts enacted regulations adopting the 1990 California LEV Program pursuant to Section 177.\textsuperscript{25} Severe air pollution problems were the driving force behind New York's LEV regulations—particularly increasing designations of areas within the state as nonattainment for ozone and carbon monoxide.\textsuperscript{26} Massachusetts adopted the California LEV program for similar reasons after EPA designated the entire state as nonattainment for ozone.\textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
    \item See id. Alternatively, automakers may meet the NMOG standard through credits earned by producing more low emission vehicles than required in a given model year or purchased from other automakers.\textsuperscript{21}
    \item See \textit{Massachusetts Dep't of Envtl. Protection}, 163 F.3d at 78.\textsuperscript{22}
    \item These provisions were subsequently amended. A description of the regulations before amendment can be found in \textit{Massachusetts Dep't of Envtl. Protection}, 163 F.3d at 78.\textsuperscript{23}
    \item See California State Motor Vehicle Pollution Control Standards, 58 Fed. Reg. 4,166 (1993) (providing a waiver of federal preemption).\textsuperscript{24}
    \item See \textit{Cahill}, 152 F.3d at 199; \textit{Massachusetts Dep't of Envtl. Protection}, 163 F.3d at 78.\textsuperscript{25}
Conflict over opt-in to the California LEV program arose after California modified its program in March 1996. At that time, California eliminated the ZEV sales requirements for model years 1998-2000 and 2000-2002, ostensibly because compliance with these requirements presented technological and commercial difficulties for the automakers. Although California submitted its amended LEV Program to EPA for confirmation that it remained within the previous waiver, as of December 10, 1999, EPA has not yet issued a determination on the matter.

California subsequently entered into individual Memoranda of Agreement (MOAs) with the seven largest automakers requiring them to sell specific numbers of ZEVs during model years 1998-2000 in return for financial and infrastructure assistance from the state (for example, for fleet purchases, battery disposal, recycling, and charging stations). California and the automakers maintained that the MOAs were not regulations but rather legally enforceable contracts under California law. As a result, California did not follow the usual administrative procedures in adopting the MOAs and did not submit them to EPA for confirmation that they fell within the scope of the 1992 waiver.

The AAMA took advantage of the unstable situation and filed suit against both Massachusetts and New York. Massachusetts had responded to the California modification by amending its LEV program to incorporate the ZEV requirements in the

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28. See Massachusetts Dep't of Envtl. Protection, 163 F.3d at 78.
29. See id. at 78. The ten percent sales requirement for model year 2003 remains in effect.
30. See id. at 79. California submitted a letter to EPA in February 1997 requesting that EPA approve the amendments to the LEV Program and confirm them as being within the scope of the previous waiver of federal preemption granted by EPA in 1993. EPA subsequently published a notice in the Federal Register requesting comments on California's request. See California State Motor Vehicle Pollution Control Standards, 64 Fed. Reg. 14,715 (1999) (providing opportunity for public hearing and public comment).
31. See Massachusetts Dep't of Envtl. Protection, 163 F.3d at 79. The MOAs are intended to facilitate a market-based introduction of ZEVs in California through demonstration programs and continued research and development of electric vehicle battery technology. For more information on the MOAs, see ZEV Fact Sheet: Memoranda of Agreement. http://www.arb.ca.gov/msprog/zevprog/moa.htm.
32. See Massachusetts Dep't of Envtl. Protection, 163 F.3d at 79.
33. See id.
California MOAs (but not the reciprocal state obligations).\textsuperscript{35} New York, however, had not followed suit but had instead maintained the requirements of the original California LEV program in its regulations.\textsuperscript{36} The automakers challenged New York's unamended ZEV sales requirement\textsuperscript{37} and Massachusetts' amended ZEV sales requirements\textsuperscript{38} as violations of both the preemption requirements of Section 209(a) and the opt-in requirements of Section 177. The arguments in both cases centered on the distinction between "standards" and "enforcement mechanisms."\textsuperscript{39} Sections 209 and 177 of the Clean Air Act clearly subject "standards" to strict preemption and identicality requirements, while these requirements, as applied to measures intended to "enforce" these standards (that is, "enforcement mechanisms"), are ambiguous. As a result, the cases specifically focused on: (1) whether the ZEV sales mandates are "standards" or "enforcement mechanisms" that are preempted under Section 209; (2) whether Section 177 requires both "standards" and "enforcement procedures" in opt-in states to be identical to those in California; and (3) whether the MOAs are standards that may be adopted by other states. The automakers won their case at the district court level in Massachusetts, but lost in district court in New York. Appeals

\textsuperscript{35} See Massachusetts Dep't of Env'tl Protection, 163 F.3d at 79. Massachusetts' amended regulations thus contain ZEV requirements for model years 1998-2000 that are required by the MOAs but no longer by the modified California LEV regulations. Massachusetts' amended regulations are found at MASS. REGS. CODE tit. 310, § 7.40 (1999).

\textsuperscript{36} See Massachusetts Dep't of Env'tl Protection, 163 F.3d at 80.

\textsuperscript{37} See American Auto. Mfrs. Ass'n v. Cahill, 973 F. Supp. 288, 293 (N.D.N.Y. 1997). The district court granted summary judgment for New York, holding that the ZEV sales mandate was not a "standard" relating to the control of emissions but instead an "enforcement mechanism" that was not covered by the preemption provision of Section 209 of the CAA.

\textsuperscript{38} See American Auto. Mfrs. Ass'n v. Massachusetts Dep't of Env'tl Protection, 998 F. Supp. 10, 15 (D. Mass. 1997). The district court held that whether or not the ZEV mandate was a "standard" or an "enforcement mechanism," it was a procedure that "attempts to enforce" an emissions standard and was thus plainly covered by the language of Section 209(a). The court thus held that the ZEV mandate was "presumptively preempted" under Section 209(a). With regard to the automakers' argument that the MOAs cannot be adopted by other states because they are not "California standards for which a waiver has been granted" for purposes of Sections 177 and 209, the district court agreed. The court stated: "Congress intended § 209 to apply to state regulations 'adopted' into state regulatory codes, rather than to agreements such as MOAs, which were jointly executed instead of unilaterally adopted." \textit{id.} at 22. The court found no evidence that Congress intended "standards" to apply to voluntary contracts like MOAs and thus did not reach the question of whether the MOAs were within the scope of the earlier waiver. See \textit{id.} at 23.

\textsuperscript{39} AAMA v. Cahill, 973 F. Supp. at 304-05; AAMA v. Massachusetts Dep't of Env'tl Protection, 998 F. Supp. at 16.
were filed in both cases, the outcomes of which will be discussed below.

II

DESCRIPTION OF THE CASES AND EPA RESPONSE

A. Second Circuit Invalidates New York ZEV Mandate

On appeal in American Automobile Manufacturers Association v. Cahill, the Second Circuit ruled in favor of the automakers and held that New York's ZEV sales mandate was a "standard" relating to the control of emissions that was preempted by federal standards under Section 209. The court expressly rejected New York's argument that its ZEV mandate was an "enforcement procedure" not subject to preemption under Section 209. The court distinguished standards from enforcement measures, defining standards as "regulatory measures intended to lower the level of auto emissions" and enforcement measures as "regulatory devices intended to ensure that the 'standards' are effective." The court easily applied the distinction between standards and enforcement mechanisms in this case. Despite acknowledging that ZEV sales requirements do not impose precise quantitative emissions limits, the court nevertheless held the ZEV sales mandate to be a standard since "a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions." The court continued with even vaguer language, distinguishing ZEV mandates that were "in the nature of a command having a direct effect on the level of emissions" from other regulatory measures that were "in the nature of a means of enforcing, or testing the effectiveness of, a command."

Having found that New York's ZEV sales mandate fell within the preemptive scope of Section 209, the Second Circuit then turned to Section 177 to determine whether the mandate was

40. 152 F.3d at 200.
41. See id. at 199.
42. Id. at 200.
43. See id.
44. Id.
45. Id.
permissible under that Section's "opt-in" provision. The automakers argued that states adopting California standards were required to follow California in abandoning its ZEV sales requirements for model years 1998-2002, or else the states would violate the "identicality" requirement of Section 177. The court agreed. As a result, other states were precluded from opting in to a California standard that no longer existed. To justify its ruling, the court stressed that Congress had limited the original exemption from federal preemption to California (the only state that already had a regulatory scheme in place) because of the "burden on commerce that would result from allowing other states to set their own individual emission standards." Adoption by other states of a "California standard" not in force in California would result in this very burden on commerce. Finally, the court staunchly disregarded the MOAs as irrelevant since "[w]ith or without the MOAs, California has still abandoned its ZEV sales requirement for model years 1998-2002." Warning that Congressional legislation would be required before states could adopt the MOAs as their own regulations, the court reversed the district court decision and held that New York's ZEV sales mandate was preempted by Section 209 of the Clean Air Act and fell outside the Section 177 exception.

B. First Circuit Refers ZEV Issues to EPA

The First Circuit took a very different approach to resolving the preemption issue in American Automobile Manufacturers Ass'n v. Massachusetts Department of Environmental Protection. Unlike the Second Circuit, the First Circuit declined to immediately decide the case and instead referred three issues to EPA under the primary jurisdiction doctrine: (1) whether Section 177 requires identicality of both standards and enforcement mechanisms; (2) what is the relevant standard in the ZEV

46. See id.
47. See id.
48. See id.
49. See id. at 201.
50. Id.
51. See id.
52. Id.
53. See id.
54. Massachusetts Dep't of Envtl. Protection, 163 F.3d 74.
debate; and (3) whether the California MOAs are standards that may be adopted by other states under the Clean Air Act.\textsuperscript{55}

First, the First Circuit referred to EPA the issue of whether Section 177 requires identicality of both standards and enforcement procedures.\textsuperscript{56} The court agreed with the district court that the ZEV sales mandate, whether it was termed a standard or an enforcement procedure, was a procedure that "attempted to enforce" an emissions standard.\textsuperscript{57} It was thus plainly covered by the language of Section 209(a) and therefore "presumptively preempted."\textsuperscript{58} The First Circuit wavered, however, on the question of whether enforcement mechanisms, like standards, are subject to the identicality requirements of Section 177. According to the court, the language of Section 177 can be read to require identicality of standards alone, allowing a state to adopt enforcement mechanisms that are not identical to those in California.\textsuperscript{59} Therefore, while Section 209(a) presumptively preempts both standards and enforcement procedures, Section 177 does not necessarily require both standards and enforcement procedures to be identical.

The First Circuit invoked two related administrative law doctrines—the \textit{Chevron} doctrine and the primary jurisdiction doctrine—to refer the identicality issue to EPA. Under \textit{Chevron}, a court must defer to a reasonable interpretation of a statute by an agency if the clear intent of Congress can not be discerned.\textsuperscript{60} The First Circuit declared that both of the competing

\textsuperscript{55}. See id. at 82-86.

\textsuperscript{56}. See id. at 82. The issue affects the legality of provisions in the Massachusetts regulations that require automakers to report annually on their ZEV production plans. See MASS. CODE REGS. tit. 310, § 7.40(12)(g). The Massachusetts reporting requirements differ from the California requirements.

\textsuperscript{57}. \textit{Massachusetts Dep't of Envtl. Protection}, 163 F.3d at 83.

\textsuperscript{58}. Id.

\textsuperscript{59}. See id. For example, Section 209(a) preempts adoption and enforcement of state standards, but Section 209(b) grants EPA authority to grant a waiver to California for adoption of standards. \textit{CAA} § 209, 42 U.S.C. § 7543 (1994) (no mention of enforcement is made). Section 177 allows other states to adopt and enforce standards if "such standards are identical . . . ." \textit{CAA} § 177, 42 U.S.C. § 7507 (1994) (no mention is made of enforcement). By contrast, Section 209(e) specifically allows states to adopt California emissions standards for nonroad vehicles and engines "if such standards and implementation and enforcement are identical." Id.

\textsuperscript{60}. \textit{Chevron}, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). \textit{Chevron} involved a challenge to EPA regulations enacted under the Clean Air Act that adopted a plantwide definition of the statutory term "stationary source" for purposes of the new source review program. Since neither the statute nor the legislative history defined this term, the Supreme Court accepted EPA's interpretation as a reasonable accommodation of conflicting policies surrounding the enactment of the statute. See id. at 865.
interpretations of Sections 177 and 209(a) were “sufficiently reasonable that [the court] would be bound by Chevron to defer to the EPA’s choice of either one.”

Given that Chevron would allow the court to defer to EPA if the agency had already offered a reasonable interpretation of Sections 209(a) and 177, the First Circuit appeared to reason that it therefore would be proper to refer the matter to EPA to decide initially under the primary jurisdiction doctrine. The court then concluded that the matter was “plainly within EPA’s primary jurisdiction” and should be resolved by calling on EPA’s knowledge of the Clean Air Act and of the public policy considerations that underlie the Act.

Second, the First Circuit referred to EPA the issue of what is the relevant “standard” in the ZEV sales mandate debate. This question is critical to determining if the Massachusetts ZEV mandate itself is subject to the identicality requirements of Section 177. The court recognized three possible “standards” under the LEV program: (1) the NMOG fleet average, (2) the ZEV certification standard, or (3) the ZEV sales mandate itself. The NMOG fleet average is the overall emissions level that every automaker’s vehicle fleet must maintain for each model year under the LEV program. The ZEV certification standard ensures that vehicles classified as ZEVs meet the zero emissions limit. The ZEV sales mandate requires that a percentage of each automaker’s fleet for a model year be ZEVs.

On one hand, the NMOG fleet average could be considered the standard, since it is the only requirement directly concerned with total emissions of pollutants to the atmosphere and the only standard by which the automakers are bound under the LEV program. In this case, the court suggested viewing the ZEV mandate merely as an enforcement procedure designed to ensure that the automakers meet the NMOG standard and produce enough ZEVs in the future to meet more stringent emissions standards (such as the ten percent quota for model year 2003).

On the other hand, the ZEV certification standard could also

61. Massachusetts Dep’t of Envtl. Protection, 163 F.3d at 83.
62. Id.
63. See id. at 84. This question had been raised previously by the Second Circuit but not addressed. See MVMA II, 17 F.3d at 536.
64. See Massachusetts Dep’t of Envtl. Protection, 163 F.3d at 84.
65. See id.
66. See id.
67. See id. at 78.
68. See id. at 84.
69. See id.
be considered the standard. Under this view, the ZEV mandate could be seen simply as a means to enforce the certification standard by requiring the automakers to sell a certain number of vehicles during model years 1998-2000 that are certified to meet the ZEV emissions limit.\(^7\) In either case, the court argued, the ZEV mandate would not be preempted by Section 209(a) because the applicable standard would meet the identicality requirement of Section 177. Both the NMOG fleet average and ZEV certification standard in Massachusetts are identical to those in California, which are still in force as part of the California LEV Program which received a waiver for model years 1998-2000.\(^7\)

The third possible "standard" could be the ZEV mandate itself, if one ascribes to the reasoning of the Second Circuit that the ZEV mandate directly affects the level of emissions (like a standard) rather than enforces a command (like an enforcement mechanism).\(^7\) The First Circuit recognized that if the ZEV mandate were the standard, it had to be identical to a California standard to avoid preemption.\(^7\) Furthermore, since a California ZEV mandate for model years 1998-2000 no longer existed, the Massachusetts ZEV mandate would be preempted unless one of two possibilities were true, either (1) the original California ZEV mandate contained in the LEV program, for which a waiver was granted in 1992 for model years 1998-2000, could still be copied by other states; or (2) the ZEV mandate in the MOAs was a California standard for purposes of Section 177 and within the scope of the 1992 waiver.\(^7\) The Second Circuit had rejected the first option as applied to New York in Cahill. Moreover, the First Circuit recognized that this option would not apply to Massachusetts, whose amended ZEV sales mandate was no longer identical to California's original 1990 ZEV mandate.\(^7\) The First Circuit thus limited its analysis to the second option.\(^7\)

The court's analysis of the second option led it to refer one final issue to EPA under the primary jurisdiction doctrine: whether the private MOAs between California and the automakers are "standards" that can be adopted by other states under Section 177.\(^7\) The court flatly rejected the decision of the

\(^{70}\) See id.

\(^{71}\) See id.

\(^{72}\) See id.; see also Cahill, 152 F.3d at 200.

\(^{73}\) See Massachusetts Dep't of Envtl. Protection, 163 F.3d at 83.

\(^{74}\) See id. at 85.

\(^{75}\) See id.

\(^{76}\) See id.

\(^{77}\) See id.
lower court that the MOAs are not regulatory standards because Congress intended Section 209 of the Clean Air Act to apply to state regulations “adopted” into state regulatory codes. Instead, the court maintained that the issue should have been referred to EPA because of the “vital need for a uniform answer” to whether MOAs are subject to Section 209(a) preemption and whether other states can “piggyback” onto MOAs. According to the court, the question of what constitutes a standard “lies at the heart of EPA’s mandate to regulate vehicle emissions across the nation.”

The court recognized that private MOAs could potentially eviscerate this mandate; if MOAs are considered contracts rather than official regulations, they are outside the scope of Section 209 and thereby allow California to regulate the automakers “in a manner beyond the reach of the EPA.” Furthermore, without EPA review of California standards, there is no way to ensure that “opt-in” states comply with the Clean Air Act.

With this troubling scenario in mind, the court astutely recognized the limited applicability of any decision that it could make and admitted that a nationwide answer could only come from EPA or the Supreme Court. The court then concluded that EPA’s institutional expertise and familiarity with the Clean Air Act made the agency the proper party to decide the matter.

According to the court, it would be “preferable to have the EPA, the agency entrusted with interpreting and enforcing the federal government’s environmental policy,” resolve the issue after reviewing the statutory language, Congressional intent, and public policy.

The court stayed further proceedings in the case for 180 days to allow Massachusetts to obtain a response from EPA on

78. See id. The automakers argued that the MOAs cannot be adopted because they are not official California regulations. Massachusetts argued that despite being in the form of a contract, the MOAs are functioning as “regulations in contractual guise” that were developed explicitly to prevent other states from adopting California’s ZEV mandate and thus can be adopted by other states under Section 177. See id. The First Circuit, in a footnote, appears to accept Massachusetts’ argument and recognize its possible relevance for determining if the MOAs interfere with the vehicle emissions regulatory scheme established under the CAA. See id.
79. Id. at 85, 86.
80. Id. at 85.
81. Id.
82. See id.
83. See id. at 85.
84. See id.
85. Id.
the referred issues. Massachusetts subsequently submitted a request for a response from EPA. After one extension from the court, EPA released an opinion on September 15, 1999.

C. EPA Finds MOA Requirements May Be Adopted by Massachusetts

EPA first determined that Section 177 only requires identicality of standards, not enforcement procedures. The agency agreed with the First Circuit that regardless of whether Massachusetts' ZEV mandate is deemed a standard or an enforcement procedure, the clear language of the statute indicates that it is presumptively preempted under Section 209(a). With regard to whether both standards and enforcement procedures must be identical, however, EPA did not share the hesitation of the First Circuit. EPA concluded that only standards are subject to the identicality requirement of Section 177 based on the express language and purpose of Section 177. The language of Section 177 applies, on its face, only to standards. The purpose of Section 177 was to prevent states from adopting and enforcing standards in a manner that would create a "third vehicle" subject to standards other than those adopted by California or the federal government, because of the "burden it would place on the motor vehicle manufacturers." According to EPA, if enforcement procedures were subject to an identically requirement, the concern over requiring a "third vehicle" would be moot. EPA also noted that Congress intended

86. See id.
88. See Letter from Gary S. Guzy, General Counsel, EPA, to Thomas F. Reilly, Attorney General, Commonwealth of Massachusetts (September 15, 1999) (accompanied by Opinion on Issues Raised by AAMA v. Massachusetts Dep't of Env't Protection, 163 F.3d 74 (1st Cir.) (on file with author) [hereinafter Opinion].
89. See Opinion, supra note 88, at 12.
90. See id. at 6.
91. See id. at 12.
92. See CAA § 177, 42 U.S.C. § 7507 (1994). See also Massachusetts Dept' of Env't Protection, 163 F.3d at 83. Section 177 allows states to "adopt and enforce" nonfederal standards if "such standards are identical to the California standards for which a waiver has been granted for such model year . . . ." Id. (emphasis added).
93. Chafee-Baucus Statement of Senate Managers, in A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 899 (1993) [hereinafter Chafee-Baucus Statement]. See also MVMA III, 17 F.3d at 537. This policy is reflected in the language of Section 177, which expressly forbids states from forcing the creation of a "third vehicle" subject to standards other than California or federal standards. See CAA § 177, 42 U.S.C. § 7507 (1994).
94. See Opinion, supra note 88, at 12.
to allow states discretion to adopt their own enforcement measures.\textsuperscript{95}

EPA next established that Massachusetts' ZEV mandate is a "standard" for purposes of Sections 209 and 177. While these two sections do not explicitly define the term "standard," other sections of the Clean Air Act do not confine standards to numerical limits on emissions. For example, Section 202 authorizes EPA to set standards that either limit emissions numerically or subject certain numbers of vehicles (a percentage of each manufacturer's sales volume) to numerical limits.\textsuperscript{96} According to EPA, such authority to link the emission limit and the applicability of that limit to a particular number of vehicles is "an inherent part of the standard setting process."\textsuperscript{97} EPA also drew on the Second Circuit's distinction between standards and enforcement procedures in \textit{Cahi//}, finding that production requirements (such as the ZEV mandate) are not enforcement procedures designed to ensure that emissions reductions occur, but instead are standards since they "directly affect the emissions reductions from a regulation."\textsuperscript{98}

In addition, EPA concluded that the policy underlying Section 177 requires interpreting ZEV mandates as standards. First, "if production mandates are not standards, then other states could enact production requirements that were different from California's requirements, substantially undercutting Congress' intent under Section 177 to prevent manufacturers from being required to build different vehicles for various state programs."\textsuperscript{99} This would create the very "undue burden" on auto manufacturers that Congress sought to avoid.\textsuperscript{100} Second, the

\textsuperscript{95} See id.

\textsuperscript{96} See id. at 8. See CAA § 202(g)(1), 42 U.S.C. § 7521(g)(1) (1994). For example, many current mobile source regulations promulgated under Section 202 contain phase-in requirements or fleet average emission standards which have already been found by EPA to be "standards." See 62 Fed. Reg. 31,192, 31,222 (1997). According to EPA, such fleet averages can easily be converted into percentage requirements. See \textit{Opinion}, supra note 88, at 9.

\textsuperscript{97} \textit{Opinion}, supra note 88, at 9.

\textsuperscript{98} Id. at 10.

\textsuperscript{99} Id.

\textsuperscript{100} See id. The 1990 CAA Amendments amended Section 177 to prohibit states from "taking any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a 'third vehicle') or otherwise create such a 'third vehicle.'" CAA § 177, 42 U.S.C. § 7507 (1994). Statements by several members of the House and Senate in the legislative history of the 1990 Clean Air Act Amendments indicate the desire of Congress to ensure that manufacturers are not subject to different production burdens in different states, that is, a "third vehicle" requirement. See Chafee-Baucus Statement, supra note 93, at 1022; see also Joint
importance of California's mobile source regulations as a model for other states would be diminished, since other states would be given significant room to design their own mobile source programs outside of the waiver requirement applicable to California under Sections 209 and 177.\textsuperscript{101} Congress structured Section 209(b) to require California to seek a waiver from EPA before enacting its own mobile source regulations; this requirement allows EPA to ensure that the California regulations are technologically feasible and at least as stringent as federal regulations.\textsuperscript{102} EPA can not ensure that regulations in other states meet these requirements if other states can adopt regulations that are not modeled on California regulations for which a waiver was granted.

EPA's third and final determination was that, in this limited case, the ZEV mandate provisions in the MOAs should be considered "standards adopted by California" for purposes of Sections 209 and 177.\textsuperscript{103} EPA acknowledged that the MOAs are non-regulatory contractual agreements that ordinarily would not be considered standards under Section 209, and that both the language and legislative history of the Clean Air Act indicate that such voluntary agreements are not considered standards.\textsuperscript{104} Nevertheless, EPA pointed out the unique circumstances involved in this case, namely that the MOAs "grew directly out of the [original] ZEV regulatory requirements" in California and "were intended to stand in the place of and perform the function of these regulatory requirements."\textsuperscript{105} Moreover, the automakers would likely not even have entered into the binding contractual agreements had it not been for the more stringent regulatory requirements that they replaced.\textsuperscript{106} According to EPA, the automakers intentionally entered into the MOAs in order to limit the ability of other states to adopt the new ZEV provisions. In so doing, the automakers "effectively negat[ed] the will of Congress in enacting Section 177."\textsuperscript{107} Finally, EPA cautioned that

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102. See id.
103. Id. at 14.
104. See id.
105. Id.
106. See id. at 15.
107. Id.
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California and the automakers might continue to use the MOA approach to regulation if the MOAs were not treated as standards, thus evading EPA review under Section 209 and preventing other states from opting in to California regulations under Section 177. Although these factors prompted EPA to find that the MOAs are "standards adopted by California," the agency emphasized that its decision was extremely limited and based on the unique circumstances surrounding adoption of the MOAs. EPA's decision was "not intended in any way to extend the scope of Section 209 beyond regulatory requirements and the specific kind of circumstances considered here." The consequence of treating the MOAs as standards was to uphold Massachusetts' ZEV sales mandate.

Not surprisingly, EPA's response met with opposition from the automakers. Contending that EPA's response was a final agency action subject to judicial review, the automakers filed an appeal before the District of Columbia (D.C.) Circuit challenging the response on jurisdictional and substantive grounds. The automakers then filed a motion requesting the First Circuit to stay any further proceedings in the case pending action on the appeal by the D.C. Circuit. The First Circuit granted the motion, offering two reasons for holding off on any further action in Massachusetts Department of Environmental Protection until the D.C. Circuit had decided the issues before it. First, if the First Circuit were to render a final decision based on EPA's response, the court would be deciding the very issues it had placed before EPA, as well as additional issues regarding EPA's statutory jurisdiction. Second, postponing a First Circuit decision would avoid the possibility of an inconsistent or directly contradictory decision by the D.C. Circuit. According to the First Circuit, these policy concerns outweighed the potential delay caused by the stay.

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108. See id.
109. Id. at 14.
110. Id.
111. See Association of Int'l Auto. Mfrs., Inc. v. Massachusetts Dep't of Env'tl. Protection, 196 F.3d 302, 304 (1st Cir. 1999). Massachusetts argues that EPA's response is an informal advisory opinion with no binding effect on the state or the automakers. Massachusetts has filed a motion to dismiss the appeal.
112. See id.
113. See id.
114. See id.
115. See id. at 305.
116. See id. According to the court, the D.C. Circuit could grant Massachusetts' motion to dismiss, in which case the delay would be minor.
A. Strong Arguments Support Invoking the Primary Jurisdiction Doctrine

The First Circuit correctly referred the issues outlined above to EPA under the primary jurisdiction doctrine. The First Circuit recognized its own limited authority and shrewdly invoked the doctrine to resolve several questions of national importance regarding regulation of mobile source emissions under the Clean Air Act, including what is a standard and to what extent may states evade provisions of the Act by entering into voluntary agreements outside of the regulatory process. By using the primary jurisdiction doctrine, the court wanted to achieve national uniformity in interpretation and application of mobile source regulation under the Clean Air Act.

The First Circuit recognized that the language and legislative history of the Clean Air Act could lead to different interpretations of Sections 209 and 177, and that competing policy concerns surrounded adoption of the two provisions. On one hand, in the 1990 Amendments, Congress retained the opt-in authority under Section 177 (originally adopted in 1977) to help states facing possible mandatory sanctions under the Clean Air Act for being in nonattainment. Congress thus apparently intended to allow such states to adopt California's more stringent standards to address their escalating levels of air pollution. On the other hand, Congress in 1977 had carefully circumscribed the Section 177 opt-in authority to avoid placing an "undue burden" on automakers through multiple state emission standards. In

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117. The First Circuit could easily have followed the Second Circuit's reasoning and held that the Massachusetts ZEV mandate is a standard for purposes of the CAA, thus providing some authority for this interpretation, though not a uniform answer applicable nationally. Perhaps recognition of the problem posed by the requirement that such a standard as adopted by Massachusetts would have to be identical to a California standard for which a waiver had been granted, given California's abandonment of its ZEV mandate regulations and entry into contractual MOAs with the automakers, led the First Circuit to offer other possible interpretations of the term "standard" in this context. The First Circuit could also have decided differently than the Second Circuit, leading to a split in the circuit courts that might or might not have eventually been taken up by the Supreme Court. Referring the issues to EPA presented the surest means of obtaining an immediate national answer to the questions raised.

118. See MVMA III, 17 F.3d at 527.

119. See id. at 531.

120. See id. at 527, 531.
1990, the Conference Committee went further by amending Section 177 to specifically prevent states from adopting emission standards that differed from the federal or California standards and thus creating a "third vehicle" requirement for manufacturers.\footnote{121} The legislative history also indicates disagreement within the Senate over whether the Act required both standards and enforcement procedures under Section 177 to be identical to those in California.\footnote{122}

The ambiguous legislative history and potential for competing statutory interpretations made it appropriate for the First Circuit to defer to EPA the issues raised in this case. The primary jurisdiction doctrine allows a court to postpone action on a claim that "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."\footnote{123} Two main purposes of the doctrine are: (1) to ensure a uniformity and consistency in interpretation of laws and regulations administered by a particular agency, and (2) to defer to an agency that may be "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to interpret a law or regulation.\footnote{124} The doctrine is also properly invoked if judicial resolution of an issue could potentially adversely affect an agency's performance of its regulatory duties.\footnote{125}

The case at hand provoked a need to obtain a uniform and consistent interpretation of Sections 209 and 177, particularly with regard to the term "standard" and the extent to which the MOAs in California can alter the existing scheme for regulating mobile sources under the Clean Air Act. The First Circuit recognized that only EPA or the Supreme Court could provide

\footnotesize{\begin{itemize}
\item[121.] See id. at 528.
\item[122.] The disagreement arose primarily in the context of whether or not to allow states opting in under Section 177 to have authority to recall vehicles that did not meet the California standards. The Conference Report stated that the identicality requirement did not apply to a state's enforcement of the California standards. See \textit{Clean Air Conference Report, in A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1990}, at 1022-23. Other Senators instead interpreted Section 177 to clearly require a state adopting California standards under Section 177 to "enforce the California rules exactly as California does." \textit{Extended Remarks on Passage of S. 1630, in A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1990}, at 10,726, 10,735 (1993).
\item[123.] United States v. Western Pacific R.R. Co., 352 U.S. 59, 64 (1956) (holding that deciding a tariff rate issue was within the primary jurisdiction of the Interstate Commerce Commission because of its close familiarity with the factors underlying rate setting).
\item[124.] \textit{id}.
\item[125.] \textit{See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1, at 272 (3d ed. 1994).}
\end{itemize}}
uniform answers to these questions. The Second Circuit had offered one interpretation of Sections 209 and 177 in Cahill; any different interpretation by the First Circuit in *Massachusetts Department of Environmental Protection* would have held no authority for New York or other states outside the First Circuit. Invoking the primary jurisdiction doctrine was one way to avoid inconsistent interpretations of the Clean Air Act provisions among the circuits, which could create great difficulties for implementation of the Act. Although only New York and Massachusetts had adopted ZEV mandates, the cases have potentially wider implications for the definition of mobile source standards, opt-in authority under Section 177, and the ability of states to contract around the Clean Air Act via MOAs.

Even more significantly, the ZEV issues facing the two circuits were quite different. New York, after all, had maintained the ZEV requirements in California's original 1990 LEV regulations. Massachusetts, on the other hand, had amended its regulations to incorporate the ZEV requirements in California's 1996 MOAs. The issue facing the Second Circuit was therefore arguably more straightforward than that facing the First Circuit, namely whether New York's ZEV mandate fell within the literal requirements of Sections 209 and 177. This would explain why the Second Circuit's opinion was so definitive—and not entirely wrong, as EPA recognized in its response. Even more significantly, the ZEV issues facing the two circuits were quite different. New York, after all, had maintained the ZEV requirements in California's original 1990 LEV regulations. Massachusetts, on the other hand, had amended its regulations to incorporate the ZEV requirements in California's 1996 MOAs. The issue facing the Second Circuit was therefore arguably more straightforward than that facing the First Circuit, namely whether New York's ZEV mandate fell within the literal requirements of Sections 209 and 177. This would explain why the Second Circuit's opinion was so definitive—and not entirely wrong, as EPA recognized in its response.126 The First Circuit, on the other hand, faced the novel issue of a state substituting private contract obligations for regulatory requirements. Perhaps the shaky legal ground for holding these MOAs to be regulations,127 combined with the implications for Massachusetts and for air pollution regulation in general under the Clean Air Act, led the First Circuit to seek an authoritative answer from EPA.

EPA's primary role in implementing the carefully crafted federal mobile source regulatory scheme gives the agency special insight into the issues in this case. Although the scheme provides states some discretion to decide whether to adopt federal or California standards and how to enforce those standards, EPA is charged with developing federal standards, reviewing and approving California standards, and overseeing

126. EPA agreed with the Second Circuit that the ZEV mandate was a standard and not an enforcement mechanism. EPA was forced, however, to address an issue that did not face the Second Circuit, namely how the MOAs affected the legality of the ZEV requirements. See Opinion, supra note 88, at 14.

127. See infra Part III.B.
opt-in to California standards by other states.\textsuperscript{128} This authority and responsibility make questions related to mobile source regulation "within the special competence" of EPA.\textsuperscript{129}

In addition, the delay that may accompany a referral under the primary jurisdiction doctrine did not occur in this case. Although deferring to EPA had the potential to delay resolution of the dispute, the court set a time limit for Massachusetts to seek a response from EPA.\textsuperscript{130} Despite the comment period and one extension of the deadline, the agency responded to Massachusetts' request for responses in less than six months.

Furthermore, the First Circuit properly recognized the relationship between the primary jurisdiction doctrine and deferral to an agency's interpretation of a statute under the \textit{Chevron} doctrine. Under \textit{Chevron}, if a statute is silent or ambiguous with regard to an issue, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" charged with administering the statute.\textsuperscript{131} Both the Supreme Court and the First Circuit have suggested that referral to an agency under the primary jurisdiction doctrine is a means of obtaining a "reasonable interpretation" by an agency to which a court would defer under \textit{Chevron}.\textsuperscript{132} Here, the Clean Air Act was silent with

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\textsuperscript{128} See Massachusetts Dep't of Envtl. Protection, 163 F.3d at 86.
\textsuperscript{130} Staying proceedings for only a limited time was also the technique used by the Fifth Circuit in Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199 (5th Cir. 1988). The concern over serious delay caused by referral under the primary jurisdiction doctrine has arisen out of cases such as \textit{J.M. Huber v. Denman}, 367 F.2d 104 (5th Cir. 1966), where action on a claim involving an alleged breach of contract by a mineral lessee against a mineral lessor (as well as on thousands of similar claims pending in other courts) was delayed for five years. In another case, \textit{Mississippi Light & Power Co. v. United Gas Pipe Line Co.}, 532 F.2d 412 (5th Cir. 1976), resolution of a dispute over an alleged breach of contract by a gas supplier against a purchaser was delayed for 11 years by a referral under the primary jurisdiction doctrine.
\textsuperscript{131} \textit{Chevron}, 467 U.S. at 844.
\textsuperscript{132} \textit{Id.} In a case involving a challenge to the assessment of user fees by an airport, the Supreme Court acknowledged that it would have deferred under \textit{Chevron} to the Secretary of Transportation's decision regarding whether the fees were unreasonable and in violation of the Anti-Head Tax Act, had the issue been referred prior to any court's decision to the Secretary under the primary jurisdiction doctrine. See Reiter v. Cooper, 510 U.S. 355, 367 (1994). \textit{New England Legal Foundation v. Massachusetts Port Authority}, 883 F.2d 157 (1st Cir. 1989), involved a direct conflict between orders of the district court and the Department of Transportation (DOT) regarding a challenge under the Airport and Airway Improvement Act to the "reasonableness" of landing fees assessed for Logan airport. The First Circuit cited \textit{Chevron}'s requirement for courts to defer to reasonable agency interpretations of a statute and held that the district court should have referred the "reasonableness" issue to DOT under the primary jurisdiction doctrine. See \textit{New England Legal Found.},
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regard to the definition of the term "standard" under Sections 209 and 177 and potentially ambiguous with regard to the identicality requirements of Section 177. The Act was also silent on the issue of private contracts to address mobile source emissions. Moreover, competing policy concerns underlay enactment of these provisions, which, as a result, lent themselves to differing interpretations. The ambiguity of statutory language and competing policy concerns are the very factors that would cause a court to defer to a reasonable EPA interpretation under the *Chevron* doctrine. Thus, it was appropriate to refer the issues initially to EPA under the primary jurisdiction doctrine.

B. EPA Response Maintains Policies Underlying the Clean Air Act

As a matter of law and policy, EPA responded appropriately to the first two questions submitted to the agency under the primary jurisdiction doctrine. EPA correctly found that Section 177 only requires identicality of standards and not enforcement procedures. Although the legislative history reveals disagreement within Congress on the issue, a close reading of the statute indicates that it does not require that both standards and enforcement procedures be identical. If the statute did require identicality of both standards and enforcement procedures, states would be limited to the enforcement methods used in California. Such limits on state discretion are contrary to the goals of the Clean Air Act and several other federal statutes that specifically permit delegation of environmental enforcement authority to the states. Congress rarely preempts all state authority when enacting environmental statutes. Instead, Congress often grants EPA

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883 F.2d at 167-73.


134. Id. (emphasis added).


136. See John Dwyer, *The Role of State Law in an Era of Federal Preemption:*
authority to set substantive standards and to review, approve, and oversee state regulatory programs to implement and enforce those standards. Some scholars argue that state authority to implement and enforce environmental programs is critical because it allows states to allocate emissions among polluters, to set compliance schedules and enforcement priorities, and to determine appropriate sanctions "in light of local conditions and political preferences." In the case of air pollution from mobile sources, states that choose to opt in to California standards (including ZEV mandates) should have flexibility to enforce those standards according to their needs and priorities. Requiring opt-in states to adopt California enforcement procedures would infringe on the state enforcement authority inherent in our environmental regulatory system.

EPA also correctly found that the ZEV sales mandate is a standard and not an enforcement procedure under the Clean Air Act. Regardless of whether the NMOG fleet average and ZEV certification standard are "standards" as the First Circuit suggested, it is clear that the ZEV sales mandate is a standard for purposes of Sections 209 and 177. As EPA pointed out in its response, Clean Air Act standards are not limited to numerical emissions limits. For example, Section 202(g)(1) of the Clean Air Act permits the agency to set standards that require certain percentages of an automaker's sales volume of light-duty trucks and vehicles to meet certain emission limits. The fact that a broad range of requirements may fall under the rubric of "standard" supports the notion that ZEV mandates, which set sales volume requirements for automakers, are standards similar to those permitted under Section 202(g)(1). Furthermore, like the Second Circuit in  

Lessons from Environmental Regulation, 60 L. & CONTEMP. PROB. 203, 215 (Summer 1997).

137. See id. at 216.
138. Id. at 217. Dwyer argues that a single, national approach to implementation and enforcement of environmental laws will not be effective because of variations among states in climate, weather, geography, environmental risks, types and sources of pollution, economic conditions, and public preferences. See id. at 219.
139. See Opinion, supra note 88, at 10.
140. See id. at 8.
legislative intent of Section 177 require a finding that ZEV sales mandates are standards and not enforcement procedures. If ZEV mandates are not standards subject to the requirements of Sections 209 and 177, they pose the very danger of imposing a "third vehicle" requirement on automakers that Congress sought to avoid in enacting Section 177.143

EPA's third finding—that the MOAs are California standards in the very limited circumstances at hand—is, at first glance, weak as a matter of law and policy. First, EPA acknowledged in its response that voluntary agreements ordinarily are not "standards" subject to preemption under Section 209(a).144 The language of Section 209 refers specifically to adoption and enforcement of state standards, compliance with which will be "treated as compliance with applicable Federal standards."145 This language implies that California is expected to adopt standards through regulation to ensure adequate enforcement and compliance. Furthermore, the legislative history of the Clean Air Act contains clear statements by some members of Congress that "[t]he relevant California rules must be final rules in California, and have received the necessary waiver under Section 209" in order for other states to be permitted to adopt them under Section 177.146 As a result, the Second Circuit may have been correct in holding that Congressional legislation is needed before MOAs are considered standards that may be adopted by other states under Section 177.147

Second, under EPA's response, Massachusetts is not required to incorporate into its regulations all of the obligations in the MOAs, such as the state of California's commitment to purchase ZEVs and develop infrastructure to support a ZEV market.148 To the extent that the automakers' original concerns about the lack of a sustainable commercial ZEV market are valid,149 EPA is unfairly allowing other states to adopt, as

143. See supra text accompanying note 100; see also Cahill, 152 F.3d at 201.
144. See Opinion, supra note 88, at 14.
146. Statement by Symms, supra note 100, at 10,726; see also Statement by Nickles, supra note 100, at 10,735.
147. See Cahill, 152 F.2d at 201.
148. See Opinion, supra note 88, at 16. EPA stated: "California's commitments under the MOAs are clearly not 'standards relating to the control of emissions from new motor vehicles' as that term is used under Sections 177 and 209. Nor are they pre-conditions upon which the manufacturers' obligations are dependent. They are merely obligations regarding infrastructure that apply to California, not the manufacturers."
regulations, California contract provisions requiring automakers to sell ZEVs without making the same commitment as California to help develop infrastructure and a market for ZEVs.

Nevertheless, EPA presented a well-reasoned argument for finding the MOAs to be California standards in this unique case. The intentional evasion by the automakers of Section 177 opt-ins by other states, the development of the MOAs directly out of the previous California regulations, and the policy concerns behind the Clean Air Act strongly support EPA's decision. If the MOAs are not California standards, other states are precluded from adopting them under Section 177. One obvious consequence of preventing states from opting in to stricter California standards is to make it harder for states hoping to adopt stricter mobile source controls to avoid sanctions under the nonattainment provisions of the Clean Air Act. Even the Second Circuit, in an earlier lawsuit, was reluctant to find New York's ZEV mandate illegal or to impair states' ability to adopt the California regulations, finding it "inappropriate to construe the 1990 amendments in a manner that would effectively prohibit any state from opting into the California program since Congress so obviously planned for the several states to have that option."\(^\text{150}\)

Moreover, if the MOAs are not considered standards, California may regulate mobile sources beyond the reach of EPA, provided the state complies with all other requirements under the Clean Air Act.\(^\text{151}\) Given the requirement that California be granted a waiver from EPA before adopting its own standards and before other states are permitted to opt in to California standards, this evasion of EPA authority by California is contrary to Congressional intent.\(^\text{152}\) More importantly, such an end-run around Section 209(b) vitiates the use of California as a model for mobile source regulation under the Clean Air Act. EPA's response clearly limits California's ability to enter into voluntary contracts intentionally to avoid requirements under the Clean Air Act—requirements that stem from California's privileged position in the mobile source regulatory scheme set up under the Clean Air Act. EPA's response is thus fair in a broader legal

\(^{150}\) MVMA III, 17 F.3d at 537.

\(^{151}\) For example, the MOAs include provisions to offset emissions benefits lost from the elimination of the original ZEV requirements, which had been incorporated into the 1994 California SIP. Thus, the MOAs assure that the state is not jeopardizing its SIP approval. See California Air Resources Board, Final Statement of Reasons for Rulemaking, Prepared for Public Hearing, March 28, 1996.

and policy sense, in that the agency is sending a warning to both California and the automakers to remain within the bounds of this scheme.

Finally, the apparent unfairness of allowing Massachusetts to adopt the California MOA requirements without making concurrent commitments may not be as harsh as it seems. After all, the MOAs provided the automakers with a commitment from one of the largest states in the country to help develop a ZEV market. This commitment was absent from the original 1990 California LEV program that was subsequently adopted by New York and Massachusetts. California's recent promises—along with the emphasis in the new NLEV program on developing a market for ZEVs and other LEVs—may now offer the automakers more assistance than they otherwise would have received under the original California ZEV program. This assistance should sweeten any of the bitterness left by the result of EPA's response in Massachusetts, especially since the response does not affect any of the commitments made by California to the automakers.

CONCLUSION

In forcing the resolution of a long-standing controversy over ZEV sales mandates, the First Circuit's decision in American Automobile Manufacturers Ass'n v. Massachusetts Department of Environmental Protection led EPA to examine and reiterate the mobile source regulatory scheme set up by Congress under the Clean Air Act. This scheme sets up a delicate balance of power between the federal government, California, and other states, and is aimed at simultaneously addressing significant economic and environmental concerns. As EPA's response rightly indicates, calculated attempts to upset this balance will not be tolerated. Both the economy and the environment benefit as a result; automakers will not be burdened by multiple emissions standards in various states, and states will be able to deal with air pollution problems by utilizing the opt-in provision to adopt strict California emissions standards. EPA's response, if upheld by the D.C. Circuit, allows Massachusetts to enforce its LEV program and to require U.S. automakers to sell a certain number of ZEVs in the state over the next few years. New York's current ZEV mandate, which was invalidated by the Second Circuit, remains invalid. EPA's response indicates, however, that New York could adopt the new ZEV requirements in the California MOAs if it wishes to retain a ZEV mandate. Other states also appear free to opt in to these new California MOA
requirements. Whether these states choose to opt in remains to be seen. For now, it is enough that the delicate balance of mobile source regulation remains intact.

153. Not all states may wish to opt in, however. Under the NLEV rule, if northeastern states that did not have ZEV mandates when they voluntarily opted in to the NLEV program decide to adopt such mandates, auto manufacturers are permitted to withdraw from the program in those states. See 40 C.F.R. § 86.1706-99(e) (1999).