UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP; GREEN MOUNTAIN FORD MERCURY; JOE TORNABENE'S GMC; CODY CHEVROLET, INC.; ALLIANCE OF AUTOMOBILE MANUFACTURERS; DAIMLERCHRYSLER CORPORATION; and GENERAL MOTORS CORPORATION ,

Plaintiffs,

v.

THOMAS W. TORTI, Secretary of the Vermont Agency of Natural Resources; JEFFREY WENNBERG, Commissioner of the Vermont Department of Environmental Conservation; and RICHARD VALENTINETTI, Director of the Air Pollution Control Division of the Vermont Department of Environmental Conservation,

Defendants.

Docket No. 2:05-CV-302

COMPLAINT

Plaintiffs GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP, GREEN MOUNTAIN FORD MERCURY, JOE TORNABENE'S GMC, CODY CHEVROLET, INC., ALLIANCE OF AUTOMOBILE MANUFACTURERS, DAIMLERCHRYSLER CORPORATION, and GENERAL MOTORS CORPORATION (collectively, "plaintiffs"), by their attorneys Gravel and Shea, state the following claims against defendants THOMAS W. TORTI, JEFFREY WINNBERG, and RICHARD VALENTINETTI (collectively, "defendants").

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Nature of the Action

This is an action for declaratory and injunctive relief under the Supremacy Clause in Article VI of the United States Constitution. It challenges a regulation adopted by the Vermont Department of Environmental Conservation, on the ground that the regulation is preempted by federal law. Defendants are state officers charged with enforcement of the preempted regulation. Jurisdiction over the claims presented here and authority to grant the requested relief arise under 28 U.S.C. §§ 1331, 1343, 2201 and 42 U.S.C. §§ 1983, 1988.

Introduction

1. Since the 1970s, the federal government has enforced a comprehensive program to control air pollution from motor vehicles and to regulate motor vehicle fuel economy. Federal law permits some States to adopt their own rules to control motor vehicle air pollution, provided the state rules are consistent with federal regulations. With very few exceptions, federal law prohibits any state regulation of motor vehicle fuel economy.

2. In 1996, the Vermont Department of Environmental Conservation ("DEC") adopted a set of rules to control automotive air pollution. DEC's rules created the Vermont "Low Emission Vehicle" program, which was based on a similar program previously adopted by the State of California, and which conformed with federal requirements for such state air pollution control programs. DEC amended its Low Emission Vehicle rules in 2000, 2001, 2003 and 2004.

3. When first adopted, the stated purpose of the Vermont Low Emission Vehicle rules was to maximize the control of potentially harmful emissions from motor vehicles sold in Vermont. Plaintiffs and other members of the automobile industry have supported Vermont's

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efforts to reduce air pollution, and have attempted to ensure compliance with the Vermont Low Emission Vehicle regulations as adopted in 1996 and amended in 2000-2004.

4. This lawsuit is necessitated by a recent, significant change in DEC's vehicle regulations, which has carried those rules far beyond their original stated purpose. As most recently amended by DEC, the Vermont Low Emission Vehicle Program will force Vermont citizens to pay thousands of dollars more for new vehicles than residents of most other States in the nation -- but will do nothing concrete to improve air quality or the health of Vermont residents. (*See* ¶¶ 31, 65-74.)

5. In addition, the new regulations inflict severe competitive injury on some Vermont new-vehicle dealers, their employees and their families. (*See* ¶¶ 62-64 below.) One reason why the U.S. Congress has long provided for national regulation of the automobile is to ensure that the nation as a whole shares in the burdens and costs of regulation. DEC's new rules single out specific types of businesses in Vermont (the dealerships most affected by the regulations) for the sake of a symbolic effort to address the phenomenon of "global warming" as described below. These rules deserve careful pre-enforcement review under federal law before they impose further injuries on Vermont businesses and consumers.

Background of the Litigation

6. The specific change in the Vermont regulations that was recently completed by DEC would extend the reach of the Low Emission Vehicle rules from the regulation of harmful air pollutants, to the control of carbon dioxide from new motor vehicles sold in Vermont. Carbon dioxide, or "CO2," is not classified as an air pollutant by the federal government, and is not listed as hazardous air contaminant in Vermont's Air Pollution Control Regulations. Carbon dioxide is a natural by-product of the combustion of any material that includes carbon. It is

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exhaled by humans and other animals, and is critical to plant life and thus to the production of oxygen needed by humans and other animals. Carbon dioxide is inert, nonflammable and nontoxic.

7. Carbon dioxide disperses evenly through the atmosphere. In the atmosphere, carbon dioxide retains heat in the Earth's atmosphere, through a "greenhouse effect" that is an important part of the planet's biosphere. The heat-trapping properties of greenhouse gases, including carbon dioxide, cause the average surface temperature of the Earth to be approximately 59° Fahrenheit higher than it would be otherwise. The greenhouse effect is therefore critical to life on Earth in its current form.

8. Scientists have warned that a large increase in carbon dioxide from man-made sources could lead to excessive increases in the temperature of the biosphere, described as "global warming" or "global climate change." Many scientists have called for measures to reduce man-made emissions of greenhouse gases, measures to adapt to climate change to the extent such change cannot be avoided, or both.

9. Because carbon dioxide disperses globally, effective control of CO2 levels requires international coordination. The consistent position of United States government, in both Democratic and Republican administrations, has been that the issue of global warming cannot be solved by any one country or region. The U.S. Congress has directed the Executive Branch to pursue multinational strategies that will ensure that each nation does its share to address the global warming issue, and that will protect the American economy against having to shoulder an unreasonable share of that burden. (*See* ¶¶ 49-54.)

10. Carbon dioxide is the principal greenhouse gas produced by motor vehicle operation. The United States already has a program in place that controls carbon dioxide

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emissions from cars and trucks. Since the 1978 model year, the National Highway Traffic Safety Administration ("NHTSA") has regulated automotive fuel economy, pursuant to the Energy Policy and Conservation Act of 1975 ("EPCA"). There is a direct chemical relationship between the amount of gasoline that a vehicle burns and the amount of carbon dioxide that it releases. By regulating automotive fuel economy, NHTSA also regulates carbon dioxide emissions from motor vehicles. NHTSA vigorously enforces its fuel economy regulations, and has collected more than $500 million for violations of its standards since 1978.

11. The pace of automotive fuel economy regulation by NHTSA has accelerated in recent years. Under rules either already promulgated or now being finalized by NHTSA, the fuel economy standards for trucks sold in the U.S. will have increased in each model year from 2005 to 2011. Fuel economy standards adopted by NHTSA several years ago will cost the nation more than $860 million by model year 2007. NHTSA's proposed standards for model years after 2007 through model year 2011 have been estimated conservatively to cost about $6.3 billion.

12. The costs of NHTSA's new fuel economy standards will be spread nationwide. Those standards ensure that Vermont residents, like the citizens of all other States, have a wide variety of vehicles from which to choose, including vehicles that achieve high fuel efficiency levels. Average fuel economy levels for cars has increased more than 100 percent since the inception of the federal regulatory program, and for light trucks (minivans, cars, sport utility vehicles and pickup trucks) has increased 53 percent. In the 2005 model year, the automobile industry offered more than 100 vehicle models that had estimated highway ratings of 30 miles per gallon or more, based on vehicle model classifications available at www.fueleconomy.gov.

13. The automobile industry has improved fuel economy across the full product line, both to comply with the NHTSA standards and to meet consumer demand. The average sport

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utility vehicle sold in model year 2004 gets about 50 percent better mileage than the average car before NHTSA's program began, and the average light-duty truck today gets better overall mileage than a compact car sold before federal regulation began. Thousands of engineers and technicians work every day in the automobile industry solely on the effort to improve fuel economy while maintaining the vehicle performance, safety and other features that American drivers expect.

14. To ensure that the federal government can maintain control over fuel economy policy and regulation, EPCA generally prohibits the States from adopting fuel economy standards or related requirements. The statute provides:

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

49 U.S.C. § 32919(a). This preemption provision in EPCA is in full effect because, as stated above, NHTSA long ago established federal fuel economy standards.

15. State motor vehicle standards for carbon dioxide are preempted by the above-quoted provision in EPCA -- a point recently confirmed by NHTSA, in its latest regulatory publication concerning fuel economy standards. As NHTSA stated: "Since the way to reduce carbon dioxide emissions is to improve fuel economy, a state regulation seeking to reduce those emissions is a 'regulation' related to fuel economy standards...." (*See* 70 Fed. Reg. 51,414, 51,457 (Aug. 30, 2005). Noting that state CO2 rules would interfere with the federal fuel economy program, NHTSA concluded, "A state law that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly preempted." (*Id.*) NHTSA's position is

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consistent with that of the U.S. Environmental Protection Agency ("EPA"), the federal agency that supervises other types of automobile regulation in this country. (*See* ¶¶ 38-48 below.)

Parties, Jurisdiction and Venue

16. The plaintiffs in this action are four new motor vehicle dealers, an association of automobile manufacturers that produce and sell vehicles to those dealers, and two of those manufacturers.

17. Green Mountain Chrysler Plymouth Dodge Jeep and Green Mountain Ford Mercury are new-vehicle dealerships located in East Dorset, Vermont. Joe Tornabene's GMC is a new-vehicle dealership located in Pownal, Vermont. Cody Chevrolet, Inc., is a new-vehicle dealership located in Montpelier, Vermont. Green Mountain Chrysler Plymouth Dodge Jeep, Green Mountain Ford Mercury, Joe Tournabene's GMC and Cody Chevrolet, Inc. (collectively, the "dealer plaintiffs") are "dealers" under 49 U.S.C. § 32908, the federal fuel economy law. The dealer plaintiffs are also directly subject to DEC's regulations, which prohibits dealers in Vermont from selling new motor vehicles that do not comply with the standards adopted by DEC.

18. As described more fully below, the DEC's new standards will reduce the new-vehicle sales of the dealer plaintiffs, who will suffer losses in profits and goodwill. The prospect of enforcement of the amended rules has already had an adverse effect on the value of businesses operated by the dealer plaintiffs as going concerns. (*See* ¶¶ 62-64 below.)

19. The Alliance of Automobile Manufacturers ("the Alliance") is an association of motor vehicle manufacturers including BMW Group, DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motor Sales of America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc.,

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and Volkswagen of America, Inc. The Alliance represents its members' interests in this litigation.

20. General Motors Corporation ("GM") and DaimlerChrysler Corporation ("DCC") are manufacturers of new motor vehicles sold in Vermont and are subject to DEC's motor vehicle regulations. GM and DCC sell their vehicles to independent dealers in Vermont including Green Mountain Chrysler Plymouth Dodge Jeep, Joe Tournabene's GMC and Cody Chevrolet, Inc. DEC's amended regulations will eliminate a substantial number of vehicle models from GM and DCC product lines in Vermont, and will increase the costs of some of the remaining GM and DCC models offered in the Vermont market by thousands of dollars.

21. The Agency of Natural Resources is a component of the Executive Branch of the Vermont government, and DEC is a department within the Agency of Natural Resources. The motor vehicle emissions regulations challenged in this action are administered and enforced by the Agency of Natural Resources, by DEC, and by DEC's Air Pollution Control Division. (*See* Exhibit A, "Annotated Rule Text," amending Subchapter XI of DEC's Low Emission Vehicle Rules.)

22. Thomas W. Torti, Jeffrey Wennberg, and Richard Valentinetti are the state officers in charge of the Agency of Natural Resources, DEC and the Air Quality Division of DEC, respectively. They are made defendants in this action solely in their official capacities. Each defendant resides in the District of Vermont.

23. Each of the dealer plaintiffs in this action is located in the District of Vermont and each has suffered and will continue to suffer harm in this District as a result of defendants' action to adopt and enforce the motor vehicle CO2 regulations. Each of the manufacturers represented by the Alliance as a plaintiff does business in this District and has also suffered and will continue

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to suffer harm in this District as a result of defendants' regulations. Venue in this Court is proper under 28 U.S.C. § 1391(b).

The Technical Context for Regulation

24. Motor vehicles are a source of various air pollutants regulated by EPA under the Clean Air Act. These include carbon monoxide, a number of other toxic substances, and the gases that form ground-level ozone (or "smog"). Various tailpipe pollutants, such as oxides of nitrogen and hydrocarbons, react in sunlight and heat to produce smog. Concentrations of smog depend upon rapid chemical reactions in the presence of sunlight. The formation of smog is a localized or regional phenomenon, and is therefore responsive to local (including state-level or regional) controls.

25. The harmful air pollutants from motor vehicles regulated by EPA under the Clean Air Act are usually controlled by hardware installed on the vehicle at the factory. The best-known such device is the catalytic converter, which oxidizes and reduces smog-forming and other pollutants from the engine into water and carbon dioxide.

26. The control of carbon dioxide from motor vehicles cannot be accomplished with catalytic converters or similar hardware. As EPA stated several years ago, "[n]o technology currently exists or is under development that can capture and destroy or reduce emissions of CO2, unlike other emissions from motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO2 is to improve fuel economy." (*See* 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).)

27. Carbon dioxide is also unlike the Clean Air Act pollutants when it enters the environment. Unlike smog and the pollutants emitted from vehicle tailpipes, which accumulate in the lower atmosphere to the place where they were emitted, carbon dioxide disperses globally

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throughout the upper atmosphere. To the extent that carbon dioxide emissions have a resulting impact on global climate, it is unrelated to the state or country that emitted the carbon dioxide -- and it is therefore not responsive to local, state-level or regional controls. For example, a given quantity of CO2 emitted from sources in China, Mexico or Australia has the same effect on the global climate as the same quantity of CO2 emitted from sources in the United States, Japan or Great Britain.

28. Cars and trucks are a significant source of the air pollution that can form smog in this country, as well as the other air pollutants regulated by EPA. But they are a relatively small source of the carbon dioxide that comprise greenhouse gases and that are the focus of the international effort to address the global warming issue. An article published in the journal *Science* in 2003 estimated that U.S. cars and light-duty trucks (which are the vehicles covered by DEC's regulation) emit less than one-fifth of the carbon dioxide from man-made sources in this country, and less than half the amount produced in generating electricity from fossil fuels.

29. The article in *Science* concluded that long-term management of the global climate would require major changes in automobiles, but that other sources also warranted control, and that those other sources should probably be controlled to very stringent levels prior to the automobile, if the goal is to get the most improvement possible with available resources, as quickly as possible. The *Science* article stated as follows:

> Global CO_2 emissions must decline by about an order of magnitude in order to stabilize atmospheric concentrations, so major emission reductions will eventually be required from cars. Cost-effective climate policy, however, starts with low-cost emissions reductions and proceeds at a measured pace. Analysis of optimal climate policy typically shows that to stabilize concentrations below a doubling of pre-industrial levels, overall emissions do not need to be reduced by more than 30% below business-as-usual until after 2040. When emission mitigation opportunities across the economy are ordered by their cost (to form a supply curve), deep reductions in automobile emissions [of carbon dioxide] are not in the

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> cheapest 30%. All else equal, it is therefore wasteful to devote substantial resources to achieving deep reductions in auto emissions [of carbon dioxide] until after 2040.

Keith & Farrell, *Rethinking Hydrogen Cars*, 301 SCIENCE 315, 316 (2003) (references omitted).

30. The automobile industry is not waiting until some future year like 2040 to address the issue of global warming. The automobile industry is spending billions of dollars on advanced technologies that do not require fossil fuels, and is striving to bring those technologies to market well before the target date suggested by the authors of the *Science* article. State carbon dioxide regulations such DEC's new rules, however, divert resources away from those efforts. One study indicates that if U.S.-based manufacturers attempted to comply with regulations like those adopted by DEC in the manner expected by DEC, the cost will exceed $2.5 billion by 2009 -- which would be $2.5 billion that could not be spent on developing advanced technologies that would diversify the nation's energy sources for the transportation sector.

31. The diversion of resources away from long-term solutions to rules like those adopted by DEC will have no practical impact on the global climate, in part because those rules are based on changes in fossil-fuel-powered vehicles. The only public studies that have attempted to quantify the change in global climate that would result from the new CO2 standards for cars and trucks show that even if every State in the nation adopted the same standards as DEC, there would be no measurable change in temperature in the global biosphere. Indeed, neither DEC nor the California regulatory agency that first adopted the automotive CO2 rules has claimed that the regulations involved in this case will have any specific impact on the global climate.

The Federal Statutory Framework

A. Background

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32. Federal regulation of new motor vehicle emissions and fuel economy proceeds under two separate federal statutes. One statute is the federal fuel economy law (EPCA), administered by NHTSA, an agency within the U.S. Department of Transportation. The other relevant federal statute is the Clean Air Act. Under the Clean Air Act, the U.S. Environmental Protection Agency ("EPA") regulates motor vehicle emissions that are classified either as harmful pollutants or as substances that form harmful pollutants.

33. The separate regulatory programs for vehicular fuel economy and air pollutants are more fully described in ¶¶ 34-37 and ¶¶ 38-48 below, respectively. In addition, Congress and the federal government have asserted and maintained control over national policy to address the global issue of climate change, in coordination with foreign governments and intergovernmental organizations. (*See* ¶¶ 49-54 below.)

B. The Federal Fuel Economy Program

34. To regulate motor vehicle fuel economy, the EPCA statute passed by Congress in 1975 established a program of "corporate average fuel economy," or "CAFE," standards. Standards for cars are set separately from those for light trucks. The light-truck category includes most minivans, pickups, and sport-utility vehicles, as well as other vehicles. Fuel economy is determined by measuring how much carbon dioxide a vehicle emits, and then using a specified formula to convert those CO2 emissions into a more familiar term, which is the number of miles that a vehicle can travel on a gallon of gasoline, or "miles per gallon."

35. The federal CAFE standards do not apply to individual vehicles or models. Rather, they regulate the fuel economy of each manufacturer's entire fleet of cars or trucks, on a fleet average basis. As a result, a manufacturer can produce and sell any combination of vehicles

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that the market will bear, so long as the fuel economy of its fleet as a whole meets or exceeds the required average miles per gallon ("mpg").

36. The authors of the federal fuel economy law emphasized that CAFE standards had to "be carefully drafted" in order to improve fuel economy without "unduly limiting consumer choice." (*See* H.R. Rep. No. 340, 94th Cong., 1st Sess. 87 (1975).) The averaging of the mpg results for a given manufacturer across its entire vehicle fleet was critical to the goals of EPCA. As one federal court has explained, this approach has led to "a series of graduated mileage requirements" that "ensure[s] wide consumer choice by leaving maximum flexibility to the manufacturer" in deciding how to meet the specified CAFE levels. (*See Center for Auto Safety v. NHTSA*, 847 F.2d 843, 863-64 (D.C. Cir.), *vacated on unrelated grounds*, 856 F.2d 1557 (1988) (quoting S. Rep. No. 179, 94th Cong., 1st Sess. (1975).)

37. Regulation of fuel economy at a sub-national level would have constrained the flexibility that was the hallmark of the CAFE program established by Congress. Congress therefore preempted state regulation in the field of motor vehicle fuel economy. (*See* 49 U.S.C. § 32919(a), quoted in ¶ 12 above.) The only exception allowed by Congress was that States and their political subdivisions would be permitted to "prescribe requirements for fuel economy for automobiles obtained for [their] own use." (*Id.* § 32919(c).)

C. The Federal Clean Air Act

38. The federal Clean Air Act is a complex, evolving instrument that has allocated federal and state responsibility for air pollution control for more than three decades. Its provisions relevant to motor vehicles can be divided into three parts: (1) the provisions that govern federal regulation of motor vehicle emissions; (2) the provisions that govern separate

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state regulation of those emissions; and (3) the provisions for federal oversight of state actions that regulate motor vehicle emissions.

(1) Federal Regulatory Authority

39. Section 202(a) of the Clean Air Act Amendments of 1970 directed the U.S. Environmental Protection Agency ("EPA") to regulate the emission of "pollutants" from new motor vehicles. (*See* 42 U.S.C. § 7521(a)(1).) "Pollutants" include carbon monoxide, particulate matter, hydrocarbons, and oxides of nitrogen, but not carbon dioxide. Those substances other than CO2 either contribute significantly to the formation of potentially harmful gases in the ambient atmosphere (such as ground-level ozone or "smog") or are themselves harmful to humans in concentrations that can be encountered in the ambient atmosphere (such as carbon monoxide).

40. Carbon dioxide is neither a significant precursor to harmful gases nor itself harmful at levels found in the ambient atmosphere. (*See* ¶¶ 7-9 above.) As recently as 2003, EPA concluded that there was no current scientific basis to include limits on tailpipe emissions of carbon dioxide in its regulations under section 202 of the Clean Air Act. (*See* 68 Fed. Reg. 52,922 (Sept. 8, 2003).) In reaching that conclusion, EPA also noted that regulation of tailpipe emissions of CO2 under the Clean Air Act would be inconsistent with the assignment of federal regulatory authority over fuel economy to NHTSA in the EPCA statute. EPA stated that "Congress' care in designing the CAFE program makes it clear that EPCA is the only statutory vehicle for regulating the fuel economy of cars and light duty trucks." (*Id.* at 52,929.)

(2) State Regulatory Authority

41. Section 209(a) of the Clean Air Act generally preempts States and their political subdivisions from adopting or enforcing "any standard relating to the control of emissions from

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new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). In 1967, however, Congress granted the State of California unique authority to regulate automotive air pollutants, "in recognition of the unique problems faced by California as a result of its climate and topography," and in particular "[t]he acute smog problem" of southern California. (*See* H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967) ("unique problems"); S. Rep. No. 192, 89th Cong., 1st Sess. (1965) ("acute smog").) Congress specified limits on the types of air pollution regulations that California was allowed to adopt and enforce, which are now contained in section 209(b) of the Clean Air Act. (*See* 42 U.S.C. § 7543(b).) California soon thereafter adopted its own regulations in conformity with section 209(b).

42. In 1977, Congress added a new provision to the Clean Air Act, in what is now section 177 of the statute, in order to permit some States to adopt and enforce the same motor vehicle emissions control regulations as those in effect in California under section 209(b). Thirteen years later, Congress amended section 177 to ensure that enforcement of state-level regulations would not unduly burden the new-vehicle market in any States that elected to follow California's lead. Thus, the 1990 Clean Air Act Amendments provided that the authority to opt into the California air pollution standards under section 177 of the statute should not "be construed as authorizing any [opt-in] State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle" that meets the California standards. (*See* 42 U.S.C. § 7507.) That provision was designed to permit the sale of any type or quantity of vehicles demanded by the market in any State opted into the California program, so long as each vehicle complied with California's standards for tailpipe emissions and other pollutants.

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(3) Federal Regulatory Review

43. Before any State can begin enforcement of the California automotive air pollution control rules, those rules must have been reviewed and approved by EPA, under the criteria established by Congress in section 209(b) of the Clean Air Act. Those criteria include consistency with the federal emissions regulations for motor vehicles under section 202(a) of the Clean Air Act. (*See* 42 U.S.C. § 7543(b)(10)(C).)

44. In 2004, California adopted standards for the control of greenhouse gases (including carbon dioxide) from motor vehicles. DEC has referred to those California standards as a prime motivation, if not the sole reason, for the adoption of the motor vehicle greenhouse gas/carbon dioxide standards involved in this litigation.

45. The federal courts held long ago that the Clean Air Act confines EPA's review of California's motor vehicle rules to a determination of whether the California rules comply with criteria specified in section 209(b) of the statute. EPA has no authority to consider whether a California regulation violates any provision of law other than the Clean Air Act. (*See Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1115-17 (D.C. Cir. 1979).) Based on that precedent, California claimed in a recent administrative proceeding that the Clean Air Act gives EPA no power to consider whether state regulations that include references to fuel economy standards would be preempted by EPCA.

46. The Clean Air Act permits EPA to disapprove California's greenhouse gas/carbon dioxide regulations if the Agency finds them to be inconsistent with the scope of EPA's own regulatory power under section 202(a) of the statute. (*See* ¶ 40 above.) However, California has not yet submitted its CO2 regulations to EPA for review under section 209(b) of the Clean Air Act. The Clean Air Act does not give EPA the power to initiate, on its own, any review of the

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rules adopted by California. EPA's oversight cannot begin unless and until California sends a rule to EPA, and requests review.

47. The review of California emissions regulations at EPA under the Clean Air Act can take several years. The Clean Air Act contains no fixed deadlines for the submission by California of its regulations to EPA for review, nor any deadlines for EPA action with respect to California rules once they have been submitted for review. In some instances, California motor vehicle regulations have gone into effect in California and other States before EPA has completed a review for consistency with the Clean Air Act.

48. California officials have advised officials in other States that in their view, California does not have to wait for approval of their greenhouse gas/carbon dioxide standards by EPA before California can enforce those standards. According to the California officials, enforcement of the standards can proceed concurrently with any review by EPA to determine whether the standards are lawful under the Clean Air Act. California and other States like Vermont intend to implement the CO2 regulations without awaiting the completion of any review process by EPA.

D. National Management of the Issue of Global Climate Change

49. In addition to maintaining exclusive federal control over motor vehicle fuel economy, for the past 20 years the United States has worked with other countries in an effort to develop a comprehensive, multilateral plan to reduce manmade greenhouse gas emissions, including carbon dioxide emissions, from all sources, not just automobiles. Congress has endorsed and extended this foreign policy on several occasions. In the Global Climate Protection Act of 1987, Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change. (*See* Pub. L. 100-204, § 1103(c) (Dec. 22, 1987); 15 U.S.C.

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§ 2901 note.) Pursuant to that law, EPA and the State Department sent a report to Congress in the early 1990s, stressing the global nature of the climate change problem calling for "international consensus" and a "comprehensive" approach to "addressing potential climate change."

50. In 1992, the U.S. Senate ratified the United Nations Framework Convention on Climate Change (the "UNFCCC"). (*See* Sen. Exec. Rep. No. 102-55, 102d Cong., 2d Sess. (1992), at 9.) The UNFCCC recognized that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." The treaty established a framework for international cooperation in an effort to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." (*See* UNFCCC, art 2.) Through the UNFCCC, the parties undertook to review their own national policies on greenhouse gases and to work together to negotiate future, binding commitments by which the nations of the world would agree to reduce greenhouse gas emissions.

51. The United States and other members of the UNFCCC worked to develop this multilateral framework through the Kyoto Protocols to the UNFCCC. While the Kyoto Protocol was being negotiated in 1997, the Senate (including both Vermont Senators) adopted by a 95-0 vote the Byrd-Hagel Resolution, which stated that the United States should not sign any protocol that would mandate new commitments to reduce U.S. greenhouse gas emissions unless the Protocol also mandated new commitments from developing countries as well. (*See* S. Res. 98, S. Rep. No. 105-54.) Because the final draft of the Protocols provided only for reductions in emissions from developed countries, President William J. Clinton did not submit the Kyoto treaty to the Senate for ratification.

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52. In subsequent statutes, Congress continued to express its opposition to any measure that would require the United States to reduce greenhouse gases, absent an international agreement involving both developed and developing countries. On several occasions, Congress has attached riders to federal appropriation bills to prohibit the Executive Branch from using funds "to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol" without the ratification of that treaty by the Senate.

53. The current Administration has stated its agreement with Congress's view of the Kyoto Protocols, as expressed in the Byrd-Hagel Resolution. Rather than calling for the adoption of the Kyoto framework, the Executive Branch has promoted new technology and encouraged voluntary measures to reduce CO2 emissions, as well as programs to reduce scientific uncertainty regarding global change, including the Climate Change Research Initiative. In July 2005, the United States joined other industrialized nations in support of new measures to address the issue of global warming at the Gleneagles Summit, held in Scotland. The nations participating in the Gleneagles Summit are now in the process of developing specific measures to coordinate and implement greenhouse gas mitigation and adaptation programs.

54. To prevent interference with its efforts to negotiate international agreements addressing the issue of global warming, the Executive Branch has declined to undertake large-scale unilateral commitments to reduce greenhouse gases. As EPA has explained, one-sided greenhouse gas (or "GHG") commitments could weaken the nation's diplomatic efforts:

> Unilateral EPA regulation of motor vehicle GHG emissions could ... weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. Considering the large populations and growing economies of some developing countries, increases in their GHG emissions could quickly overwhelm the effects of GHG reduction measures in developed countries. Unavoidably,

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climate change raises important foreign policy issues, and it is the President's prerogative to address them.

68 Fed. Reg. at 52,931 (Sept. 8, 2003).

The Vermont Standards for Carbon Dioxide Control

55. As stated above, the Vermont CO2 regulations are modeled on rules adopted in California in 2004. In both California and Vermont, the new CO2 rules apply to motor vehicles produced in or after model year 2009. Manufacturers and dealers commonly introduce new models in the calendar year prior to a given model year. Thus, model year 2009 will start for most or all manufacturers and dealers in calendar year 2008. EPA rules provide that the 2009 model year can start as early as January 2, 2008.

56. Although they apply to several other greenhouse gases in addition to carbon dioxide, the rules developed in California in 2004 that have now been adopted in Vermont primarily regulate carbon dioxide. CO2 emissions account for nearly 97 percent of the greenhouse gas emissions from the vehicles subject to the regulations. The standards adopted by Vermont require a reduction in CO2-equivalent greenhouse gas emissions from passenger cars of more than 30 percent. DEC's rules therefore require substantial reductions in carbon dioxide, which can only be achieved with reductions in fuel consumption, and thus increases in fuel economy.

57. Like the California rules on which they are based, DEC's new regulations create requirements for new vehicles to be sold in Vermont that are expressed in terms of "carbon dioxide equivalent" (or "CO2e") emissions. Apart from the minor credits allowed for the control of non-CO2 emissions, DEC's standards for passenger cars range from 323 to 205 grams per mile of CO2-equivalent emissions, depending on the type of vehicle and model year.

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Manufacturers are permitted to vary from the standards for several model years, but at specific points defined in the regulations, they must demonstrate achievement of the standards on a multi-year basis.

58. The applicable carbon dioxide standards that will be enforced by DEC (without minor adjustments for potential non-CO2 controls) standards can be readily translated into fuel economy levels, based on miles per gallon, as illustrated on the Table below. The Table summarizes the portion of the DEC rule that applies to passenger cars; separate standards not summarized below apply to some other types of vehicles. For purposes of comparison, the federal standard for cars is 27.5 mpg.

DEC Standards -- Fuel Economy Equivalent Levels

Model Year	DEC Standard for Cars and LDT1s	
	Grams CO2e/mile	Mpg
2009	323	**27.4**
2010	301	**29.4**
2011	267	**33.2**
2012	233	**38.0**
2013	227	**39.0**
2014	222	**39.9**
2015	213	**41.6**
2016	205	**43.2**

59. In the Table above, the term "LDT1" refers to smaller light-duty trucks, which under DEC's rules are combined into the same category as passenger cars. In the federal fuel economy regulations, those trucks are included in a category separate from cars in order to determine compliance. The federal fuel economy standards for trucks are generally less stringent than the fuel economy requirements for cars, because trucks are more fuel-intensive than cars. By including some trucks in the same set of standards as cars, DEC's rules make the fuel

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economy requirements for cars produced by some manufacturers for sale in Vermont much more stringent than the 27.5 mpg federal standard for cars.

60. The stated purpose and the practical effect of DEC's new CO2 standards will be to require dramatic increases in the fuel economy of cars and trucks sold in Vermont. Vehicles sold in Vermont will have to achieve much more stringent fuel economy levels than required by federal law and regulation. Many currently offered models of vehicles sold in Vermont will disappear from some manufacturer's product offerings, because it will be economically impractical to bring those models into compliance with DEC's standards. This will have serious negative affects on consumer choice, the economic health of many automobile dealers in Vermont, and on employment in the automobile industry in the United States.

61. Several vehicle manufacturers have attested to the adverse effects of regulations like that recently adopted by DEC. In filings with the SEC, those manufacturers have alerted investors to the potential adverse effects of State CO2 standards if those standards were to withstand legal challenge. Those projected impacts include "severely restrict[ed] product offerings or close[d] plants" and "significantly restrict[ed] products." (*See* General Motors Corporation, Form 10-K (March 16, 2005)), at I-4; DaimlerChrysler Corporation, Form 20-F (filed Feb. 28, 2005), at 33; *see also* Ford Motor Company, Form 10-K (March 10, 2005), at 18.)

62. The businesses most directly impacted by the CO2 rules in Vermont will be automobile dealerships. The new-vehicle planning processes for at least two manufacturers -- GM and DCC, two of the plaintiffs in this action -- have proceeded to the point where those two companies can estimate how the CO2 rule will affect their product lines in jurisdictions like Vermont. GM and DCC have predicted very substantial reductions in their product lines if the new CO2 rules take full effect in any State where those rules would apply. This has severe

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consequences for independent franchised dealers in Vermont, including the plaintiffs in this action.

63. Starting in the 2009 model year, vehicles that do not meet DEC's CO2 requirements will not be legal for sale by dealers in Vermont. Based on the predictions of some manufacturers, many dealers in Vermont will not have a full line of compliant vehicles to market, starting in model year 2009. In addition, many vehicles that can be brought into compliance with the CO2 standards will cost substantially more than comparable vehicles sold by other manufacturers. Dealers with restricted product lines, and/or with vehicles that have substantial cost penalties, will suffer significant competitive losses.

64. DEC's rule is already having an adverse impact on Vermont dealers. The prospect of losing a full product line, or of having to try to sell vehicles that cost substantially more than the vehicles offered by other dealers, reduces the present value of the retail automotive businesses that have been placed at a competitive disadvantage by the new CO2 rule. A study of how the CO2 rule will affect automotive retail businesses in California, which was completed earlier this year, showed that some California automotive retail businesses had already lost up to $4.6 million in their current value, even though the new regulation does not go into full effect for several more years. The owners of Vermont dealerships are similarly impacted.

Environmental Consequences of DEC's Regulation

65. The hardship that the new DEC regulation will inflict on Vermont dealers might be justifiable as a policy matter, if the rule would benefit the environment. Based on DEC's published summary of comments on regulations, no participant in the DEC rulemaking or in the earlier similar rulemaking in California made any attempt to quantify a specific reduction in

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