

07-4342-CV (L)

CONSOLIDATED WITH NO. 07-4360-CV

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP; GREEN MOUNTAIN FORD
MERCURY; JOE TORNABENE'S GMC; ALLIANCE OF AUTOMOBILE
MANUFACTURERS; DAIMLERCHRYSLER CORPORATION; AND
GENERAL MOTORS CORPORATION,
PLAINTIFFS-APPELLANTS,

v.

THOMAS W. TORI, Secretary of the Vermont Agency of Natural Resources, JEFFREY
WENBERG, Commissioner of the Vermont Department of Environmental Conservation;
RICHARD VALENTINETTI, Director of The Air Pollution Control Division of The Vermont
Department of Environmental Conservation, and GEORGE CROMBIE, Secretary of the
Vermont Agency of Natural Resources

CONSERVATION LAW FOUNDATION; ENVIRONMENTAL DEFENSE; NATURAL
RESOURCES DEFENSE COUNCIL; SIERRA CLUB; VERMONT PUBLIC INTEREST
RESEARCH GROUP; STATE OF NEW YORK; AND PETER GRANNIS, in his official
capacity as Commissioner of Environmental Conservation of the State of New York, STATE OF
NEW YORK,
DEFENDANTS-INTERVENORS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT THE
HON. WILLIAM J. SESSIONS, III, PRESIDING DISTRICT COURT CASE NO. 02:05-CV-302, CV-304

BRIEF FOR THE STATES OF CALIFORNIA, ARIZONA, CONNECTICUT, DELAWARE, IOWA, ILLINOIS, MAINE, MARYLAND, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, WASHINGTON, COMMONWEALTH OF MASSACHUSETTS, and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE CROMBIE AND AFFIRMANCE

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INTERESTS OF AMICI STATES

The states of Arizona, California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, Washington, Commonwealth of Massachusetts, and the Commonwealth of Pennsylvania Department of Environmental Protection submit this brief as amici curiae in support of Defendant-Appellee George Crombie.

The public health and welfare of the amici states are threatened by the accelerating climate change being wrought by increasing atmospheric concentrations of greenhouse gases. The deleterious effects include reduced water supplies and larger wildfires in the West and Southwest, a hotter climate, flooding along the coasts as a result of rising sea level and larger storm surges, more severe storms and worsening air quality, along with more severe weather nationwide. These and other effects of global warming will tax the amici's ability to maintain public infrastructure and provide basic services. They also threaten life, health, property, and the economy of the amici states.

California's standards for reducing automotive emissions of greenhouse gases are an essential component of programs already adopted or under active consideration in most of the amici states for reducing all sources of greenhouse gas (GHG) emissions. The Vermont regulation at issue in this case is identical to

California's standards. Because Vermont's regulation, and those of the other states that have followed California's lead, serve to reduce GHG emissions generally, they also advance the interests of the amici states in protecting the health and welfare of their citizens from climate change.

Amici states file this brief pursuant to Federal Rules of Appellate Procedure, Rule 29(a).

PRELIMINARY STATEMENT

The primary question in this case is whether a statute designed to promote energy conservation bars the State of Vermont from regulating automotive emissions of greenhouse gases. Amici agree with appellees and intervenor-appellees that the answer turns on the inter-play between two federal statutes, the Clean Air Act, 42 U.S.C. § 7401 et seq., and the Energy Policy and Conservation Act, 42 U.S.C. § 6201 et seq. Amici endorse their reasoning, as well as that of the two United States District Courts that have considered this issue and correctly concluded that Vermont is not barred. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 398 (D.Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151, 1189 (E.D. Cal. 2007).

This brief focuses on the purposes and policies of the Clean Air Act and the Energy Policy and Conservation Act as they affect the Clean Air Act's two-car

strategy for controlling automotive air pollution. This strategy is implemented through California's adoption of automotive emission standards that are different from those set by the federal government. Automobile manufacturers must comply with one set of emission standards in the states that adopt the California standards and with the federal standards in the remaining states. A fundamental purpose of the strategy is to accelerate a reduction in the nation's air pollution.

Amici will begin their argument by describing Congress's enactment of the two-car strategy and the reasons for it. Amici will then describe how implementation has occurred as Congress envisioned and the role of the GHG standards in carrying the strategy forward. The brief concludes with an explanation of the consistency between the GHG standards and the Energy Policy and Conservation Act and the absence of any inter-statutory conflicts.

The brief is informed by California's expertise in the regulation of automotive emissions, historically, legally and technically. For example, by 1959, California had enacted legislation directing the establishment of air quality standards and controls for motor vehicle emissions. The state pioneered a sophisticated motor vehicle emissions program that became the impetus for the Clean Air Act's two-car strategy. Since then, the federal government has drawn "heavily on the California experience to fashion and to improve the national efforts at emissions control."

Motor & Equip. Mfrs. Ass'n v. E.P.A., 627 F.2d 1095, 1110 (D.C.Cir. 1979.)

The GHG standards further extend California's pioneering efforts. California adopted the standards pursuant to legislative mandate. 2002 Cal. Stat. Chptr. 200, amending Cal. Health & Safety Code, § 42823 and adding § 43018.5. The California Legislature found that “[g]lobal warming would impose on California, in particular, compelling and extraordinary impacts.” *Id.* at § 1. The impacts include, “(1) [p]otential reductions in the state's water supply . . . , (2) [a]dverse health impacts . . . , (3) [a]dverse impacts upon agriculture and food production . . . , (4) [p]rojected doubling of catastrophic wildfires . . . , (5) [p]otential damage to the state's extensive coastline and ocean ecosystems . . . , [and] (6) [s]ignificant impacts to consumers, businesses, and the economy of the state . . .” *Id.*

The regulations establish fleet-average limitations on the GHG emissions of new light-duty vehicles sold in California beginning with the 2009 model-year. Cal. Code Regs. tit.13, § 1961.1(a) and (b). The limitations become more stringent each following model-year through 2016. Cal. Code Regs. tit.13, § 1961.1(a). More lenient standards apply to heavier light-duty trucks and sports utility vehicles than to passenger cars and lighter trucks and sports utility vehicles. *Id.*

Automakers can satisfy these emission limits through a combination of actions that include improving drive-train technology, using alternative fuels, earning credits

for air conditioner improvements, carrying credits over from another year or portion of their fleet, and trading credits among manufacturers. Cal. Code Regs. tit.13, § 1961.1(a)(1), a through d, and 1961.1(b).

At least fourteen other states have adopted or are in the process of adopting GHG regulations with standards identical to those of California. Ariz. Admin. Code § R18-2-1801 et seq. (2008); Conn. Agencies Regs. § 22a-174-36b (2007); Florida Executive Order 07-127; 06-096-127 Me. Code R. §§ 3-4 (2007); Md. Reg. 1609 (August 31, 2007); 310 Mass. Code Regs. 7.40 (2007); N.M. Code R. §§ 20.2.88.101, 20.11.104.101 (2007); N.J. Admin. Code tit. 7, §§ 26, 29 (2006); N.Y. Comp. Codes R. & Regs. tit. 6, § 218-8.3 (2007); Or. Admin. R. 340-257-0100 (2007); 25 Pa. Code § 126.411 (2007); 12-031-037 R.I. Code R. § 37.2 (2007); 158 Vt. Gov't Reg. 2 (March 2004); and Wash. Admin. Code 173-423-050 (2007).

SUMMARY OF ARGUMENT

The Clean Air Act establishes a comprehensive regulatory scheme for reducing emissions of air pollutants from mobile and stationary sources. An essential element of the act is its two-car strategy for reducing automotive air pollution. It is implemented through California's adoption of automotive emission standards that are different from and generally more stringent than those of the federal government. California's standards are subject to review and a waiver of

Clean Air Act preemption by the United States Environmental Protection Agency. 42 U.S.C. § 7543(b)(1).¹ Other states cannot set different standards, but they can adopt the California standard. 42 U.S.C. § 7507.

The two-car strategy resulted from Congress's determination that it was in the national interest to permit "California to continue its experiments in the field of emissions control" as well as benefitting the people of California. *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1110.

California and the other states have benefitted the nation as Congress intended. Particularly in regard to light-duty vehicles, California has set more rigorous standards in advance of the federal government. The other states and the federal government have then followed suit. This process has accelerated the successful development and spread of emission-reducing technologies. It has resulted in larger reductions in the nation's air pollution more quickly than would have occurred under a single standard.

California's GHG standards for light-duty vehicles advance this federal policy by reducing automotive emissions of greenhouse gases. These gases afflict the public health and welfare by causing a hotter climate, worsening air quality, reduced

¹As noted in other papers filed with this Court, the E.P.A. denied California's request for a waiver of preemption under the Clean Air Act. California and others have petitioned for review of E.P.A.'s decision.

water supplies, rising sea levels, larger wildfires, and more severe weather. Other states' adoption of California's GHG standards will help them combat worsening air quality and the other adverse effects on the public health and welfare.

Plaintiffs mistakenly claim that Vermont's GHG standards conflict with the Energy Policy and Conservation Act. However, the overarching goal of the act is fuel conservation. Vermont's adoption of California's standards does not conflict with that goal. Moreover, as the district court determined and subsequent events confirmed, these GHG standards do not conflict with the other factors that are considered in the setting of mileage standards under the Energy Policy and Conservation Act. Finally, this act, rather than preempting California emission standards approved under the Clean Air Act, requires that they be considered in the setting of mileage standards.

It is preemption of the GHG standards that would conflict with federal policy and law. Preemption under the Energy Policy and Conservation Act would remove greenhouse gases from the air pollutants that can be controlled under the two-car strategy. It would (1) deprive California and the other states of the ability to promptly and effectively combat this pollutant, (2) strip E.P.A. of the power to approve such regulations, and (3) deprive the nation of the public health and welfare benefits that Congress envisioned when it determined to have California continue as

a pioneering laboratory for the control of automotive air pollutants.

ARGUMENT

I. CALIFORNIA’S AUTOMOTIVE EMISSION STANDARDS ARE PART OF THE CLEAN AIR ACT’S STATUTORY SCHEME

A. The Clean Air Act Establishes A Federal-State Partnership for Combating Air Pollution

The declared purpose of the Clean Air Act is “to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.]” 42 U.S.C. § 7401(b)(1). The act provides for the regulation of hazardous air pollutants, the establishment of national air quality standards, and the setting of emission standards for motor vehicles.

Theodore L. Garrett & Sonya D. Winner, *A Clean Air Act Primer: Part I*, 22 *Envtl. L. Rep.* 10,161 (1992). Air pollutants under the Clean Air Act include greenhouse gases. *Massachusetts v Environmental Protection Agency*, 127 S.Ct. 1438, 1459 (2007).

“[T]he increasing use of motor vehicles” is a major source of the air pollution that “has resulted in mounting dangers to the public health and welfare.” 42 U.S.C. § 7401(a) (3). The control of air pollution “at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(4). The Clean Air Act accordingly “makes ‘the States and the Federal Government partners in the struggle

against air pollution.” *Engine Mfrs. Ass’n*, 88 F3d at 1078 quoting *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

B. The Clean Air Act Codifies a Two-car Strategy for Improving the Nation’s Air Pollution

Three sections of the Clean Air Act collectively establish a two-car national strategy for limiting automotive air pollutants. Section 202(a) of the act, 42 U.S.C. § 7521(a)(1), provides that the Administrator for the Environmental Protection Agency “shall by regulation prescribe . . . in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

Clean Air Act section 209(b)(1), 42 U.S.C. § 7543(b)(1), requires that California be exempted from federal preemption under the act and allowed to implement its own standards if “the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.” The scope of the exemption is “coextensive with the [scope of the] preemption.” *Motor and Equipment Mfrs. Ass’n*, 627 F2d at 1107. The Administrator can avoid granting a waiver only by finding that California’s “determination . . . is arbitrary and capricious,” that California’s standards are not

needed “to meet compelling and extraordinary conditions,” or that California’s “standards . . . are inconsistent with section 7521(a) of this title.” 42 U.S.C. § 7543(b)(1).

Finally, Clean Air Act section 177, 42 U.S.C. § 7507, allows other states to adopt automotive emission standards if the “standards are identical to the California standards for which a waiver has been granted for such model year,” and the standards are adopted “at least two years before commencement of such model year”

These provisions effectively require that automakers be prepared to “cope with two regulatory standards.” *Engine Mfrs. Ass’n v. E.P.A.*, 88 F.3d 1075, 1080 (D.C. Cir. 1996). One is the “California car” standard; the other is the “federal car” standard. *Id.*, citing *Motor Vehicle Mfrs. Ass’n v. New York State Dept. of Env’tl Conservation*, 17 F.3d 521, 526-527 (2d Cir. 1994).

Congress selected this dual regulatory approach because the “entire country could benefit from [California] continuing its pioneering efforts” as a “laboratory for innovation.” *Engine Mfrs. Ass’n*, 88 F.3d at 1080, quoting *Motor & Equipment Mfrs. Ass’n*, 627 F.2d at 1109, 1110 n. 31, 1111. Preempting a California car standard would subvert this two-car strategy by leaving California and the section 177 states wholly dependent on the federal government for the control of automotive GHG

pollution and impair their ability to control other pollutants such as ozone.

C. Legislative History Supports the Two-Car Strategy

The legislative history of the 1967 and 1977 amendments to the Clean Air Act confirm Congress's intent to incorporate California's automotive emission standards into a national, two-car strategy. The Senate bill initially proposed in the 1967 session of Congress would have preempted all states from adopting emission standards. 113 Cong. Rec. 23, 30,941 (1967) (statement of Rep. Smith). The automakers supported the bill and vigorously opposed allowing any state to continue adopting its own automotive emission standards. *Motor and Equipment Mfrs. Ass'n*, 627 F.2d at 1109.

In the Senate, California's Senator Murphy offered a bill that would exempt California from the preemption ("Murphy bill"). 113 Cong. Rec. 30,941 (1967) (statement of Rep. Smith); 113 Cong. Rec. 23, 30,975 (1967); S. Rep. No. 90- 403 at 33-34. The Murphy bill required that a federal administrator waive preemption of a California automotive emission standard except upon specific findings justifying rejection of the waiver. 113 Cong. Rec. 23, 30,975 (1967) (emphasis added); S. Rep. No. 90- 403, at 33-34 (1967).

The House, like the Senate, initially supported complete preemption. Subsequently, the House proposed a bill that would give the federal administrator

the discretion to either prescribe or reject separate regulations for California. 113 Cong. Rec. 23, 30,973 (1967). California would have the burden of justifying its own regulations.

Supporters of the House proposal acknowledged California's particularly severe smog pollution, but little else. For example, Representative Albert Herlong stated that "California's particular problem is that of photochemical smog." 113 Cong. Rec. 23, 30,951 (1967) (statement of Rep. Herlong). He considered this an inadequate justification for granting California "the right to establish a separate program without regard to the national program." *Id.* Representative Clausen quoted testimony from the president of the National Automobile Association that referred only to the "smog problem in southern California" as a justification for an exception to national standards. 113 Cong. Rec. 23, 30,955 (1967) (statement of Rep. Clausen). Those supporting the Murphy bill, on the other hand, emphasized that the national health and welfare would be served by allowing California to continue with its air pollution program. For example, Representative Allen Smith remarked,

The Nation will have the benefit of California's experience with lower standards which will require new control systems and design. In fact California will continue to be a testing area for such lower standards and should those efforts . . . be successful it is expected that the Secretary will, if required to assure protection of the national health and welfare, give serious consideration to strengthening Federal Standards. . . . In the interim periods, when California and the Federal Government have different standards, the general consumer of the Nation will not be

confronted with increased costs associated with new control systems.

S. Rep. No. 90-403 at 33.

The same policy justification for the Murphy version of the California exemption was repeated throughout the congressional debate. 113 Cong. Rec. 23, 30,941 (1967) (statement of Rep. Smith) ("[O]ther States that may later be faced with the problem will be years ahead in being able to base their decisions on the efforts and results which take place in California."); *id.* at 30,954 (statement of Rep. Moss) ("[T]here is offered to this Nation the ideal laboratory, where the demonstrated initiative exists and where the resources exist to solve this problem and contribute significantly to the entire nation. I believe we should take advantage of this unique opportunity."); *id.* at 30,975 (statement of Rep. Moss) ("[California] offers a unique laboratory, with all of the resources necessary, to develop effective control devices which can become a part of the resources of this Nation and contribute significantly to the lessening of the growing problems of air pollution throughout the Nation.").

This national policy was summed up by Senator Murphy in the conference report. He explained,

I am firmly convinced that the United States as a whole will benefit by allowing California to continue setting its own more advanced standards for control of motor vehicle emissions. In a sense, our State will act as a testing agent

for various types of controls and the country as a whole will be the beneficiary of this research.

113 Cong. Rec. 24, 32,478 (1967) (statement of Sen. Murphy).

These policy objectives carried the day. The Murphy amendment was adopted. It reflects Congress' determination that an exemption for California was needed to serve the national interest and not just that of California. *Motor and Equipment Mfrs. Ass'n*, 627 F.2d at 1109-1110.

The two-car strategy for reducing vehicular air pollution was expanded with the 1977 amendments to the Clean Air Act. These amendments served, in part, to assist states struggling to meet national air quality standards by allowing them to adopt California's more stringent emission standards. *Motor Vehicle Mfrs. Ass'n*, 17 Fed.3d at 527. The amendments allow those states to adopt regulations that are "identical" to California's standards.

Congress stated that the purpose of the 1977 amendment to the waiver provision was also to "broaden and strengthen the State of California's authority to prescribe and enforce separate new motor vehicle emissions standards from the Federal standards." H.R. Rep. No. 95-294, at 23 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1101. As Congress noted, the new language permitted California to "have its standards considered as a package and would require the Administrator in most instances to waive the preemption." *Id.* With these

amendments, Congress affirmed its underlying intent “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.” *Id.* at 301-302 (1977), 1977 U.S.C.C.A.N. at 1380-1381.

In sum, Congress intended that California’s automotive emission standards be part of a federal two-car strategy in order to (1) provide the federal government with a laboratory for assessing the efficacy of those standards for application across the nation; and (3) allow other states to adopt California’s standards in lieu of any federal standards. Barring states from adopting California’s emission standards would defeat these federal objectives.

II. CALIFORNIA’S PIONEERING EMISSIONS PROGRAM FULFILLS ITS NATIONAL ROLE UNDER THE CLEAN AIR ACT

The important federal policy goals served by California’s pioneering efforts in curbing automotive emissions under its Clean Air Act authority was confirmed in a report prepared by the National Research Council of the National Academies. The Council prepared the report in response to Congress’s request to the United States Environmental Protection Agency for an independent study of mobile emission standards set by the states. Committee on State Practices in Setting Mobile Source Emission Standards, National Research Council, *State and Federal Standards for*

Mobile-Source Emissions (2006).² The Council determined that:

- “California has usually led the E.P.A. in establishing emission standards on light-duty vehicles”
- “[S]hared leadership” between California and the E.P.A. “promotes improvements in the overall efficiency of E.P.A.’s and CARB’s regulatory efforts and allows sharing of expertise.”
- “California has been a laboratory for emissions-control innovation”
- “California’s standards can be amended rapidly in the face of changing market and technological conditions in contrast to E.P.A.’s regulatory process.”
- “California has used its authority as Congress [intended by] implement[ing] more aggressive measures than the rest of the country and . . . serv[ing] as a laboratory for technological innovation.”

Id. at 3-4.

The Council found that California had outpaced the federal government in reducing automotive air pollution for over forty years. For example, California preceded the federal government by several years when it imposed controls on crankcase emissions and set emission standards for hydrocarbon and carbon monoxide in the early 1960's. Committee on State Practices, *supra*, at 91. California again preceded the Federal government in the 1970's with its evaporative emission standards for model-year 1970 vehicles and standards for oxides of nitrogen for model-year 1972 vehicles. *Id.* There are at least a dozen examples of the federal

² Available at <http://books.nap.edu/openbook.php?isbn=0309101514>

government copying standards that are the same or similar to those previously adopted by California. *Id.* at 94-97, table 3-4.

The Council also found that California furthered the Clean Air Act's "laboratory" policy in its pioneering adoption of a "Low Emission Vehicle Program" (LEV) beginning with 1994 model-year vehicles. Rather than imposing vehicle-specific standards, the LEV regulations established "a fleet-based approach [that] allowed manufacturers the flexibility to meet new emission standards averaged across their entire product line." Committee on State Practices, *supra*, at 166. The program forced the development of "improved catalyst technology, better on-board diagnostic systems, and cleaner reformulated gasoline." *Id.* at 175. *Id.* The overall success of the LEV program demonstrates the wisdom of Congress's establishment of the two-car strategy:

When CARB adopted its LEV standards, vehicle manufacturers claimed that the standards were not technologically feasible within the available lead time (CARB 1991). Under the pressure of the LEV regulations, vehicle manufacturers were able to exceed expectations in reducing emissions from gasoline-powered vehicles to near-zero levels. . . . [T]he success of the LEV program in California benefitted emissions-control strategies across the nation and was primarily responsible for making the new federal standards for model-year 2004 more stringent than they otherwise would have been.

Id. at 174.

The benefits of the LEV program extended to northeastern states as well. As a partial result of Massachusetts, New York and Maine adopting the LEV standards, an agreement was reached with the automakers for a national LEV program. Committee on State Practices, *supra*, at 176-177. This agreement resulted in greater emission reductions across the nation than was required under the Clean Air Act. The reductions “could exist only because of California’s leadership in forcing stricter emissions controls and the rights of the other states to adopt those standards under section 177” of the Clean Air Act. *Id.* at 177. The Council properly concluded that California should continue in its pioneering role. *Id.* at 4.

III. CALIFORNIA’S GHG STANDARDS FURTHER IMPLEMENT THE CLEAN AIR ACT’S TWO-CAR STRATEGY

California’s GHG standards satisfy and advance Congress’s two-car strategy in multiple respects. First, the standards squarely fit within California’s historical area of regulatory expertise, namely, the regulation of light-duty vehicles. Cal. Code Regs., tit.13, § 1961.1(a) and (b); Committee on State Practice, *supra*, at 2. California’s regulatory expertise includes the prior adoption of fleetwide emission standards for low emission vehicles in 1991. 57 Fed. Reg. 909 (January 9, 1992). The GHG regulations, like the LEV regulations, set fleet-average emission standards and avoid requiring the development or improvement of any specific automotive technology. Cal. Code Regs. tit.13, §§ 1961(a) - (e) and 1961.1(a) - (g).

Second, the use of pollution-reducing technologies that also conserve energy represents a long-accepted method for complying with California emission standards. The National Highway Traffic Safety Administration (NHTSA) made an approving connection between California's emission standards and fuel conservation in announcing CAFE standards for light-duty trucks, stating that "compliance with increased emission requirements is most often achieved through more sophisticated combustion management [that] generally improve[s] fuel efficiency and ha[s] a positive impact on fuel economy." 68 Fed. Reg. 16868, 16896 (April 7, 2003). The connection is also reflected in the technologies developed for compliance with California's LEV Standards. Yukio Nakayama et al., *Reduction of HC Emission from VTEC Engine During Cold Start*, SAE Technical Paper Series 94081, 1, 10 (1994)(describing technology that simultaneously improves fuel economy and reduces emissions subject to LEV standards); George Saikalis et al., *Study on Air Assist Fuel Injector Atomization and Effects on Exhaust Emission Reduction*, SAE Technical Paper Series 930323, 27, (1993)(noting that fuel injection atomization which improves fuel economy can also be used to meet California LEV standards). Thus, to the extent automakers utilize fuel-efficient technologies to comply with GHG standards, they will be following a technological path already in use to meet emission standards for which U.S. E.P.A. has already granted California a waiver of

federal preemption under the Clean Air Act.

Third, California's GHG standards benefit other states, as Congress intended in adopting Clean Air Act section 177, 42 U.S.C. § 7507. *Motor Vehicle Mfrs. Ass'n*, 17 Fed.3d at 527 (states "in danger of not meeting increasingly stringent federal air pollution standards limits" can "piggyback" onto California's standards). For example, many other states, particularly in the northeast, are not in compliance with national ambient air quality standards for ozone. Their adoption and implementation of the GHG standards will assist them in meeting those standards.³ Adoption of the GHG standards by other states will also result in a more widespread reduction in greenhouse gas emissions than California can achieve on its own. As noted above, at least fourteen states have either adopted or announced their intentions to adopt California's GHG standards.

Finally, the GHG standards represent a quicker regulatory response to climate change than federal standards. California's GHG regulations begin applying with the 2009 model year. E.P.A., on the other hand, has yet to propose automotive GHG emission standards. This places E.P.A. years behind California. E.P.A. will be able

³Ground-level ozone is the product of a temperature-sensitive, photochemical reaction that converts automotive emissions into ozone. Global warming accelerates the reaction, causing more ozone to be formed more quickly with rising ambient temperatures.

to narrow the gap, however, by borrowing from California's model standards, once again advancing the Clean Air Act's objective that California serve as a laboratory for E.P.A.'s own efforts.

The national benefit of California's quicker response is apparent here. In its fourth assessment report, the Intergovernmental Panel on Climate Change (IPCC) stated that the growth in greenhouse gases would have to be reversed by 2015 in order to avoid an equilibrium global increase in temperature of 2 to 2.4 degrees Celsius from pre-industrial levels. Intergovernmental Panel on Climate Change, *Summary for Policymakers, in Climate Change 2007: Synthesis Report* 19-20 (2007).⁴ At about the same time, the National Academy of Sciences reported that atmospheric concentrations of carbon dioxide are increasing at a greater rate than previously anticipated and generating "stronger-than-expected and sooner-than-expected climate forcing." Joseph G. Canadell et al., *Contributions to Accelerating Atmospheric CO₂ growth from Economic Activity, Carbon Intensity, and Efficiency of Natural Sinks*, *Proceedings of the National Academy of Sciences*, PNAS 18866 (2007). Accordingly, the rate of global warming will lessen the more quickly state standards are implemented and tested for broader application.

The Supreme Court has observed that "[t]he harms associated with climate

⁴ available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

change are serious and well recognized.” *Massachusetts*, 127 S.Ct. at 1455. The Court also recognized that GHG pollution will not be controlled through “one fell regulatory swoop.” *Id.* at 1442. Instead, meaningful control will require prompt implementation of multiple, incremental steps. California’s GHG standards represent one such step.

IV. CALIFORNIA’S GHG STANDARDS ADVANCE THE CLEAN AIR ACT’S HEALTH AND WELFARE GOALS

The stated purpose of the Clean Air Act is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). The following impacts of climate change demonstrate that California’s standards advance the Clean Air Act’s stated purpose by reducing GHG emissions.

The IPCC states with “high confidence” that the western United States “will suffer a decrease in water resources due to climate change.” IPCC, *supra*, at 8. The “[w]arming in the western mountains is projected to cause decreased snowpack, more winter flooding, and reduced summer flows, exacerbating competition for over-allocated water resources.” *Id.* at 10. In Southern California, 41% of the water supply “is *likely* to be vulnerable due to snowpack loss in the Sierra Nevada mountains and the Colorado River Basin” by the 2020’s. Committee on Environment and Natural Resources, National Science and Technology Council,

(2008).⁵ Thus, climate change will substantially diminish the water resources required for irrigation and domestic consumption in California and elsewhere.

The combination of earlier snowmelts and rising ambient temperatures will also extend the fire season and increase the size of large wildfires. A.L. Westerling, et al., *Warming and Earlier Spring Increase Western U.S. Forest Wildfire Activity*, 18 *Science* 940 (2006). Smoke from the fires will increase particulate air pollution and the loss of ground cover will contribute to more erosion and greater flooding. California Climate Change Center, *Our Changing Climate, Assessing the Risks to California*, 5 (2006).⁶

Increased temperatures will increase the length and severity of debilitating heat waves. Katherine Hayhoe et al. *Emission Pathways, Climate Change, and Impacts on California*, 101 *Proceedings of the National Academy of Science*, 12422, 12424 (2004). As the IPCC stated, “[C]ities, that currently experience heat waves are expected to be further challenged by an increased number, intensity and duration of heatwaves during the course of the century, with potential for adverse

⁵Available at <http://www.climate-science.gov/Library/scientific-assessment/Scientific-AssessmentFINAL.pdf>

⁶Available at <http://www.energy.ca.gov/2006publications/CEC-500-2006-077/CEC-500-2006-077.PDF>

health impacts.” IPCC, *supra*, at 10.

The E.P.A. has previously noted that climate change “could increase concentrations of ground-level ozone” in California. Office of Policy, Planning and Evaluation, US E.P.A., *Climate Change and California*, E.P.A. 230-F-97-008e, 3 (1997). Subsequent research confirmed E.P.A.’s concerns. Increasing emissions of greenhouse gases are expected to increase “surface ozone, carcinogens, and particulate matter, thereby increasing death, asthma, hospitalization, and cancer rates.” Mark Z. Jacobson, *On the Causal Link between Carbon Dioxide and Air Pollution Mortality*, 35 *Geophysical Research Letters* L03809 at 4 (2008); Michael Kleeman, *A Preliminary Assessment of the Sensitivity of Air Quality in California to Global Change*, 87 *Climatic Change*, (Suppl 1), 273, 290 (2008) (increase in both ozone and particulate matter).

More than 90% of California’s 37 million residents live “in areas that violate the state’s air quality standard for either ground-level ozone or airborne particulate matter.” California Climate Change Center, *supra*, at 5. Most of California’s major urban areas are in violation of federal ozone standards. *See* <http://www.E.P.A..gov/air/oaqps/greenbk/ca8.html> (showing geographical extent of California’s non-attainment area for ozone pollution.) Consequently, increasing GHG emissions are further burdening California’s ability to attain federal air quality

standards.

The bad news continues. The Pacific Ocean's rising sea level and the more extreme storms caused by global warming will erode the western coastline, inundate low-lying coastal lands, exacerbate flooding, increase the risk of salt water intrusion into estuaries and coastal aquifers, increase the risk of levee failures, and impair California's system for controlling water flow in the Sacramento-San Joaquin Delta. California Dept. of Water Resources, *Progress on Incorporating Climate Change into Management of California's Water Resources*, 2-32 (2006). These events have already begun. U.S. Climate Change Science Program and the Subcommittee on Global Change Research, *Weather and Climate Change Extremes in a Changing Climate, Regions of Focus: North America, Hawaii, Caribbean, and U.S. Pacific Islands* 8 (Thomas R. Karl, et al., eds. 2008).⁷

The 14 other states that have adopted or are in the process of adopting California's GHG standards also face a variety of adverse consequences from climate change, including more severe storms and extreme weather. States on the East Coast are vulnerable to the loss of coastal wetlands, erosion of beaches, saltwater intrusion of drinking water, and damage to low-lying infrastructure. Many mid-Atlantic and Midwestern states are susceptible to heat-related deaths

⁷Available at <http://downloads.climate-science.gov/sap/sap3-3/sap3-3-final-all.pdf>

and illnesses from intense heat waves. Wildland fires and extreme weather threaten western states. Vermont and other northeastern states are at risk from the alteration of forest character as a result of climate change, including the loss of hardwood trees that give many Northeastern forests their brilliant fall colors and support the maple syrup industry. While the impacts may be different in different states, there is no denying their exposure to widespread harm due to climate change.

V. THE GHG STANDARDS ARE IN HARMONY WITH THE ENERGY POLICY AND CONSERVATION ACT

Plaintiffs erroneously assert that Vermont’s regulation conflicts with the policy objectives of the Energy Policy and Conservation Act. Plaintiffs are wrong for four reasons: (1) the GHG regulations do not restrict fuel economy; (2) the GHG standards do not interfere with the other objectives considered under the Energy Policy and Conservation Act; (3) the act takes GHG standards into account in prescribing mileage standards, and (4) the Clean Air Act establishes procedures and standards for balancing the interests of the automobile industry against the nation’s interest in healthy air quality.

A. GHG Standards Are Consistent with Energy Conservation

The “fundamental purpose” of the Energy Policy and Conservation Act is energy conservation. *Center for Biolog. Div. v. Nat’l Highway Traffic*, 508 F.3d

508, 538 (9th Cir. 2007); accord *Center for Auto Safety v. N.H.T.S.A.* 793 F.2d 1322, 1340 (D.C.Cir.1986) (“overarching goal of [Energy Policy and Conservation Act is] fuel conservation”). There is no contention in this case that the GHG regulations conflict with the Energy Policy and Conservation Act’s fundamental purpose. Moreover, the act contains no provision, and reflects no policy, indicating there can be too much conservation or too little dependence on foreign oil. Accordingly, utilization of a fuel-efficient technology to comply with the Clean Air Act does not conflict with the Energy Policy and Conservation Act’s overarching goal.

B. GHG Standards Do Not Conflict with Other Factors of the Energy Policy and Conservation Act

Two factors the National Highway Traffic Safety Administration considers when setting “maximum feasible average fuel economy standards” under the Energy Policy and Conservation Act are “technological feasibility [and] economic practicability.” 42 U.S.C. §32902(f). The GHG standards do not conflict with these standards, On the contrary, the district court expressly found that plaintiffs failed to show that these “objectives have been thwarted by Vermont’s GHG regulation.” *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F.Supp.2d at 357. Since these findings are uncontested on appeal, any further challenge is waived. FRCP 28(a); *Gill v. Pidlypchak* 389 F.3d 379, 380, fn.1 (2d

Cir. 2004); *United States v. Williamson* 439 F.3d 1125, 1137-1138 (9th Cir. 2006).

In making these findings, the district court rejected a prediction that re-appears in plaintiffs' appeal. Plaintiffs continue to assert the GHG standards will force them to improve fuel efficiency in fleets heavily weighted toward bigger and more powerful vehicles. *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F.Supp. at 367. Post-trial events make those predictions all the more implausible. Consumers are rejecting the bigger and more powerful vehicles in favor of smaller, more fuel-efficient vehicles. *See, e.g.*, Matthew Dolan & Jeff Bennett, *Ford Looks to Go Smaller Faster; Some Truck Factories May Make Cars Instead As Sense of Alarm Grows*, Wall Street Journal, June 12, 2008 at B.3; Bill Vlasic, *G.M. Shifts Focus to Small Cars in Sign of Sport Utility Demise*, N.Y. Times, June 4, 2008.

In addition, Congress recently adopted the Energy Independence and Security Act, which requires that NHTSA increase fuel economy standards for light-duty vehicles. Pub. L. No. 110-140, §§ 102, 104(b)(1), 121 Stat. 1498, 1503 (2007), codified at 49 U.S.C. § 3902(b). These combined events not only contradict plaintiffs' assertions but indicate a further narrowing between the GHG emission standards and the emissions that will occur as a result of market forces

and the Energy Independence and Security Act.

C. The Energy Policy and Conservation Act Takes GHG Standards into Account in Prescribing Mileage Standards.

The remaining statutory factor NHTSA considers is “the effect of other motor vehicle standards of the Government on fuel economy.” 42 U.S.C. § 32902(f). This provision manifests Congress’s awareness that emission standards affect fuel economy and that NHTSA must consider them in setting mileage standards.

As Vermont outlines in its brief, Congress was fully aware of the connection between fuel economy and emission standards, and NHTSA has historically done this analysis in its rulemakings. It is simply inconceivable that Congress would have required NHTSA to consider California Clean Air Act emission standards in its consideration of future standards and at the same time intended to prevent those emission standards from taking effect. After all, Congress meant for emission standards to be one of the four factors NHTSA actually balanced.

Plaintiffs have asserted that “other motor vehicle standards of the government” do not include emission standards that would require automakers to make a large improvement in fuel economy. But plaintiffs failed to establish in the trial court that a large increase would be required. Moreover, there is no

indication in section 32902(f) that Congress intended to distinguish between small and large increases; in fact, Congress explicitly recognized both a 13.8% increase in fuel economy due to certain emission standards and a 5.7% decrease due to other emission standards – contrary to the energy conservation purpose of the Energy Policy and Conservation Act – in adopting these statutes. H.R. Rep. No. 94-340, at 86-87, 89-91 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1848-49, 1851-53. Nor did Congress intend to distinguish between types of pollutants, as the Supreme Court made clear in *Massachusetts*, 127 S.Ct. at 1460.

D. The Clean Air Act Strikes a Balance Between Automaker Concerns and Matters of Public Health and Welfare

Plaintiffs assert that Congress intended to bar state GHG regulations when it enacted a provision of the Energy Policy and Conservation Act that preempts a state from adopting a “regulation related to fuel economy standards” 42 U.S.C. § 32919(A). They assert this provision was intended to protect the automobile industry from having to adjust the sales mix of their fleets on a state-by-state basis in order to comply with emission standards. Because the GHG standards are emission standards authorized under the two-car framework of the Clean Air Act, however, Plaintiffs’ assertion does not withstand scrutiny.

First, their assertion ignores the full statutory context of the Energy Policy and Conservation Act’s preemption provision. Congress struck a balance between

the interests of the automakers and the nation's interest in public health and welfare when it adopted and amended the Clean Air Act. Congress debated automakers' concerns that they would be required to comply with a so-called "patchwork" of emission standards in different states and compromised on the two-car strategy for controlling air pollution. *Engine Mfrs. Ass'n*, 88 F.3d at 1079-1080, quoting *Motor & Equipment Mfrs. Ass'n*, 627 F.2d at 1109; cf *Motor Vehicle Mfrs. Ass'n*, 17 Fed.3d at 527 (states' "opt in authority, set forth in § 177 of the Act, 42 U.S.C. § 7505, is carefully circumscribed").

Congress also provided the automakers and other affected persons with a forum for challenging GHG standards before the E.P.A.. 42 U.S.C. § 7543(b)(1). The forum, procedures, and standards that Congress established for challenging California's GHG standards are the product of Congress's balancing between the nation's interest in the public health and the automakers' concerns. Here, the automakers seek to undo Congress's carefully crafted compromise on the two-car strategy.

Second, Congress gave the automakers added protection against state emission standards approved under the Clean Air Act when it included "other motor vehicle standards of the Government" as a factor to be considered in establishing fuel economy standards under the Energy Policy and Conservation

Act. As noted above, that is what NHTSA has done throughout the Energy Policy and Conservation Act's history.

Third, any automaker's adjustment of its state's sales mix is not a result of GHG emissions being regulated. Instead, it is due to the fleetwide averaging, as used under the LEV standards since the 1994 model year. Fleetwide standards represent a sophisticated regulatory approach that benefits automakers. Fleetwide averaging gives automakers the freedom to select their own mix of technologies, engines, and vehicles, rather than having to meet emission standards for specific engines families. See Committee on State Practices, *supra*, at 166 (emissions standard based on "fleet-based approach" allows automobile manufacturers to reduce "overall compliance costs"). Automakers are not required to adjust sales mixes in order to comply with the GHG standards. Instead, fleet adjustment represents one more tool available to automaker for meeting the emission standards.

Fourth, compliance flexibility is embedded in the GHG standards. The standards provide more lenient emission requirements for heavier vehicles than lighter vehicles. Cal. Code Regs., tit.13, §§ 1961(a) - (e) and 1961.1(a) - (g). In states where automakers over-comply with the requirements for one class of vehicles they can use that over-compliance as a credit against the other class or

against another model year. *Id.* This allows manufacturers the time and flexibility to avoid penalties and shape fleet mixes by sales discounts, incentives, cost-spreading, and advertising, as they always have.

CONCLUSION

For the foregoing reasons, amici curiae states request that the Court affirm the district court judgment in all respects.

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DECLARATION OF SERVICE

Case Name: Green Mountain Chrysler Plymouth Dodge Jeep; Green Mountain Ford Mercury; Joe Tornabene's GMC; Alliance of Automobile Manufacturers; DaimlerChrysler Corporation; General Motors Corporation; and Association of International Automobile Manufacturers,

v.

Thomas W. Tori, Secretary of the Vermont Agency of Natural Resources; Jeffrey Wennberg, Commissioner of the Vermont Department of Environmental Conservation; Richard Valentinetti, Director of the Air Pollution Control Division of the Vermont Department of Environmental Conservation; George Crombie, Secretary of the Vermont Agency of Natural Resources; and Intervenor Defenants/Appellees Conservation Law Foundation; Environmental Defense, Natural Resources Defense Council; Sierra Club; Vermont Public Interest Research Group, Pete Grannis, in his official capacity as Commissioner of Environmental Conservation of the State of New York.

United States Court of Appeals for the Second Circuit
Case No. 07-4342-CV, Consolidated with No. 07-4360-CV

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of the United States Court of Appeals for the Second Circuit, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence.

On July 9, 2008, I served a copy of Brief of Amicus Curiae State of California, by and through Arnold Schwarzenegger, Governor of the State of California, the California Air Resources Board, and Edmund G. Brown Jr., Attorney General of the State of California, In Support of Defendants-Appellees, via U. S. mail, postage paid, to the parties indicated below.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 9, 2008, at Sacramento, California.

Robyn Baldwin

Declarant

/s/ Robyn Baldwin

Signature

DECLARATION OF SERVICE

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_____/s/_____
Jan Zabriskie
Deputy Attorney General
Attorney for Petitioner
DATED: July 9, 2008

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