

WHO DECIDES WHAT WE DRIVE: THE CALIFORNIA CLEAN CARS LAW

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I. INTRODUCTION

In 2001, freshman California State Assemblywoman Fran Pavley² filed the nation's first piece of legislation, known as the "California Clean Cars Law," which requires a reduction in greenhouse gas emissions from motor vehicle tail pipes. The state of California enjoys a special status under the federal Clean Air Act, allowing it to regulate vehicle emissions so long as it receives a waiver from the U.S. Environmental Protection Agency ("EPA") of Clean Air Act preemption. California's legislation was especially important for its potential national implications—under the Clean Air Act, other states can implement standards identical to California once an EPA waiver is granted.

This case study primarily focuses on the legislative phase of adoption and opposition to the California Clean Cars Law, which occurred between 2001 and 2002. Controversy over the measure arose quickly and auto industry opponents organized a vigorous and well-funded public relations campaign against the legislation fixed with the tag-line "We Decide What We Drive."

Opponents lost their bid to defeat the law in the California state legislature by a narrow

ABOUT THE DEFENSIVE LITIGATION PROJECT

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margin and waited out lengthy and detailed regulatory proceedings for over two years. Shortly after the California Air Resource Board (“CARB”) issued detailed implementing regulations, the auto industry filed a series of lawsuits in federal district courts challenging the law primarily on preemption grounds. The auto industry’s legal challenges were unsuccessful, but for the first time since the Clean Air Act was enacted, the EPA Administrator denied California’s waiver request, thereby preventing implementation of the regulations in California and thirteen states and the District of Columbia that had passed similar emission standards.

Ultimately, it took a change in the presidential administration to implement the California Clean Cars Law. Shortly after taking office, President Obama instructed the EPA to reconsider its prior waiver denial, and on June 30, 2009, the EPA granted California a waiver for its greenhouse gas emission standards for motor vehicles beginning with the 2009 model year.³ The Obama Administration also has required the federal EPA and Department of Transportation (“DOT”) to issue joint regulations mandating new national motor vehicle reductions in greenhouse gas emissions and increases in fuel efficiency comparable to levels sought under the California Clean Cars Law.

II. THE CA CLEAN CARS LAW

A. Climate Change and Public Health

Over the last three years, scientific consensus about the unprecedented and ongoing occurrence of climate change has become more widely understood by the American public. Former Vice President Al Gore’s acclaimed film and book, both titled

An Inconvenient Truth, along with unequivocal reports released and publicized by the scientific community⁴ have galvanized citizen concern and captured the attention of policy makers at all levels of government. Climate change, perceived by most as an environmental issue, is also an unparalleled public health and economic challenge.

The public health community has increasingly called for public health initiatives to address the likely impacts of climate change. A recent article published in the *American Journal of Public Health* catalogues the anticipated public health effects of climate change in the United States and supports “a vigorous, proactive public health approach.”⁵ Anticipated health effects of climate change include food and waterborne diseases, vector-borne diseases, respiratory disease exacerbation (e.g. COPD, asthma, allergic rhinitis, bronchitis), heat stress, injuries and drownings related to rises in sea levels, injuries and vehicle crashes related to severe weather, food and water shortages, malnutrition and the potential for mass populations movement.⁶

Regional variation in climate change and its public health effects—along with a legacy of federal inaction—have already encouraged the emergence of state and local initiatives. Addressing the paradox of a complex array of planetary, public health and environmental problems, accompanied by distinct geographic variation, complicates economic and political analysis of proposed solutions. Recognizing and balancing these interests is familiar territory for public health policy makers who have long championed the states and localities as critical laboratories of federalism for developing and testing innovative, effective solutions to complex emerging public health problems.⁷

B. Overview of the Clean Cars Law

Adopted in 2002, the California Clean Cars Law charged CARB with developing and implementing regulations to limit greenhouse gas emissions for light-duty vehicles beginning with model year 2009. According to the statute, CARB regulations must “achieve the maximum feasible and cost effective reduction of greenhouse gases” for motor vehicles.⁸ After two years of study and deliberation, CARB’s final regulations were unanimously adopted in September 2004 and were to be phased in over two time periods (2009-2012 and 2013-2016).⁹ The new regulatory standards reportedly would have achieved a twenty-two percent reduction in green house gas emissions from new vehicles in California by 2012 and a thirty percent reduction by 2016.¹⁰

C. Improving California’s Public Health

Proponents of the Clean Cars initiative proffered data showing the particular impact of climate change to the state of California and the health of its population. The findings section of the bill expressly lists adverse health effects from increases in air pollution caused by higher temperatures,¹¹ potential reductions in the state’s water supply,¹² harm to agriculture and food production,¹³ “projected doubling of wildfires,”¹⁴ damage to the state’s coastline and ecosystems,¹⁵ and “[s]ignificant impacts to consumers, businesses, and the economy of the state due to increased costs of food and water, energy, insurance, and additional environmental losses and demands upon the public health infrastructure.”¹⁶

The particular harm that climate change could impose on California—a showing required under federal law to allow the California Clean Cars Law to be implemented—

has been further documented by the California Climate Change Center.¹⁷ California's geography and natural environment increase the state's vulnerability to changes in temperature, precipitation, wind and sea levels. The state's 1,100-mile coastline is threatened by rising seas. Its forests and brush lands are placed at risk by wild fires fed by drought, heat and high winds and the health of residents is jeopardized by the resulting poor air quality.¹⁸ Rising temperatures and changing weather patterns may also exacerbate the smog created and breathed by the large urban populations in California's air basins.¹⁹ The President of the California Conference of Local Health Officers, Ann Lindsay, MD, has warned that "[c]limate change will increase heat-related illness, water-, food-, and vector-borne illnesses, injuries and deaths in extreme weather events, and health impacts associated with decreased crop yields, water shortages, and migration and civil conflict."²⁰

The primary author of the California Clean Cars Law, State Assemblywoman Fran Pavley, cited high asthma rates among children who live along busy freeways in places like Fresno, Bakersfield and Los Angeles as a key factor behind public support for the initiative. In these California neighborhoods "one of out every five children are asthmatic and carry an inhaler to school."²¹ Moreover, according to Assemblywoman Pavley, California voters, who resoundingly supported the California Clean Cars Law, understand and are concerned about the link between air pollution, including greenhouse gas emissions from vehicles, and public health.²²

III. PASSAGE OF THE CALIFORNIA CLEAN CARS LAW

A. Freshman Bravado

Then freshman Assemblywoman Pavley was the primary author of the bill and a leading player throughout the process of enacting the California Clean Cars Law and beyond. Two environmental groups, Bluewater Network²³ and the California Clean Air Coalition, approached Assemblywoman Pavley shortly after her election with a bill concept and she filed a skeletal version of the proposal as part of her first legislative package in February 2001. In its early stages, the bill was not seen as having a significant chance of passing: “Most people thought that the bill would die after a hearing or two.”²⁴ More seasoned legislators were not initially willing to sponsor the bill.²⁵ Assemblywoman Pavley, a former middle school teacher and elected municipal official from a liberal southern California district, was undaunted. She attributed her immediate endorsement of the proposal primarily to freshman bravado, but she also observed that having “oil companies opposing me would be helpful” in her particular district.²⁶

B. Coalition Building

By the spring of 2001, recognizing the seriousness of the political challenge now before her, Assemblywoman Pavley decided to temporarily hold the bill—then known as AB 1058—in the Assembly (Appropriations Committee) for the rest of the calendar year in order to focus on building a coalition equipped to conduct a full scale campaign to adopt the law in 2002.²⁷ Working with bill co-sponsors, such as Bluewater Network, Clean Air Coalition and the American Lung Association of California, Assemblywoman

Pavley organized and held a series of field hearings on the bill during the latter half of 2001 throughout the state of California to build political momentum and establish a technical record in support of the measure.²⁸ For example, scientific data to support the key findings section of the bill was introduced at and garnered from these hearings.²⁹

A remarkably broad coalition known as the California Clean Cars Campaign (2001–2002) coalesced in connection with the field hearings. In addition to numerous environmental groups, public health advocacy organizations such as the American Lung Association of California and Physicians for Social Responsibility became active members of the coalition supporting the legislation.³⁰ Ultimately, the California Clean Cars Campaign generated support from hundreds of local governments, labor unions, businesses and medical groups from across the state.

A new business group called Environmental Entrepreneurs assumed a leadership role.³¹ Environmental Entrepreneurs successfully solicited support from a variety of business associations and sectors likely to be adversely affected by climate change, including skiing, forestry, agriculture, vineyards, fishing, real estate, insurance and telecommunications.³² Faith-based organizations also reportedly played an active role in garnering support for the vehicle emissions measure.³³ Several large municipalities and municipal utility districts also joined the statewide effort.³⁴ With the help of the coalition, Assemblywoman Pavley and other supporters met with the editorial boards of California newspapers to explain the proposed law and lay the groundwork for media coverage throughout 2001 and early 2002.³⁵

C. The Auto-Industry Responds: “We Decide What We Drive”

Opponents to the Clean Cars Law formed a powerful triumvirate consisting of the Detroit-based Alliance of Automobile Manufacturers,³⁶ the California Chamber of Commerce and the Western States Petroleum Association. Noting that there is only one automobile manufacturing plant in the state of California—a General Motors/Toyota facility in Fremont—Assemblywoman Pavley observed that the auto industry “quite effectively [used] the car dealerships” throughout its legislative and public relations campaign against the bill.³⁷ Every California legislative district has at least one car dealer, Assemblywoman Pavley added, making this an especially attractive field operation strategy for the auto industry. Car dealers and local conservative radio talk shows took the lead in more public attacks on the bill. In Sacramento, home to the California State Assembly, two other key opponents, the California Chamber of Commerce and Western States Petroleum Association, are considered highly influential.³⁸

When the Clean Cars Bill (AB 1058) re-emerged in the California Assembly early in 2002 as a serious prospect for passage, it became the subject of a bruising public relations campaign throughout the legislative session.³⁹ The opposition targeted public opinion as a strategy for influencing legislators who would vote on the measure. Apparently, they hoped that outraged constituents would convince legislators to reject the initiative.⁴⁰ Reportedly in the early spring of 2002,

. . . the Alliance of Automobile Manufacturers, the auto industry’s Washington-based trade group, sprang into action and hired Sacramento strategists: about a month ago that opposition coalesced into an aggressive machine. Leaders for the effort to derail the bill won’t say how much their

campaign is costing. “We don’t give out numbers, but we are conducting significant statewide public relations and marketing campaign,” says Bill George, of KPC Communications, a Sacramento firm hired by the auto alliance.⁴¹

According to Assemblywoman Pavley, the “opposition spent an estimated \$5 million trying to defeat the bill in 2001 and 2002.”⁴²

The resultant campaign, dubbed “We Decide What We Drive,”⁴³ ran a series of radio and print ads in California newspapers and magazines decrying the increased taxes and fees drivers would have to pay if the Clean Cars Law passed.⁴⁴ The campaign focused primarily on consumer policy issues framed in terms the public could readily understand.

Some of the campaign rhetoric hinted at an underlying preemption legal claim, criticizing the concept of a state initiative to address climate change: “Global warming is a global issue. It cannot be solved in piecemeal way.”⁴⁵ Concerns about a multiplicity of conflicting state rules restricting tail pipe emissions was disingenuous, since the federal Clean Air Act only permits other states to adopt the same regulation that California promulgated. It is clear, however, that the prospect of the state of California effectively forcing the nationwide adoption of rigorous vehicle emissions standards galvanized the auto industry.⁴⁶

In summary, the auto industry sounded warnings that the new California law would or could:⁴⁷

- Grant CARB unfettered power to regulate automobiles
- Impose higher taxes or fees on vehicles, fuel or miles traveled
- Increase the cost of purchasing a vehicle in California

- Prohibit the sale of certain types of vehicles in the state, including SUVs
- Limit or reduce permissible speed limits
- Mandate vehicle weight reductions, thus decreasing vehicle safety
- Restrict or reduce the number of miles a driver/vehicle could travel in the state.
- Have no significant positive effect on climate change or public health.

The automaker's media blitz attracted considerable public attention. The bill dominated several radio talk shows in the spring of 2002, which encouraged listeners to flood legislators' offices with complaints and angry telephone calls opposing the bill on consumer choice grounds.⁴⁸ Well-known car salesman and folk hero Cal Worthington participated in the opposition's media campaign:

As Cal Worthington tells it, few Californians will be able to afford sport-utility vehicles, pickups and minivans if a state bill to cut vehicle exhaust linked to global warming becomes law.

America's most televised car salesman says the unprecedented legislation headed for Governor Gray Davis' desk leaves manufacturers no choice but to raise prices substantially on the popular vehicles or make wimpier models

"I'm scared to death, and you should be too," Worthington warns in a recent newspaper ad by vehicle manufacturers and dealers.⁴⁹

A spokesman for one of the bills original co-sponsors, Bluewater Network, described the industry's media campaign and its unwillingness to engage in the process of negotiating an acceptable compromise as follows:

[I]n return for taking industry concerns into account, California got slapped with an incredibly deceptive advertising campaign, based on

absolute falsehoods . . . The ads say they are going to increase vehicle taxes and gas taxes by \$3,500 a vehicle and 50 cents a gallon. I don't even know where they get these numbers—I think they just pull them out of the air.⁵⁰

D. Amendment

The bill was amended numerous times throughout the spring of 2002, leading to a strategic decision on the part of key legislators in June of 2002 to fold its contents into another piece of pending legislation, thereby changing the bill number to AB 1493.⁵¹ This procedural move kept the bill in play and eligible for enactment during the 2002 session without running afoul of Assembly rules limiting the number of permitted amendments.⁵²

Most notably, the bill was revised to directly refute the opposition's consumer-focused media campaign by adding both affirmative mandates and prohibitions that specifically shaped and limited CARB's regulatory actions. The key affirmative requirement is a provision mandating that CARB's regulations achieve "the maximum feasible and cost-effective reduction of greenhouse gas emissions" from motor vehicles.⁵³

Moreover, in developing its regulations it was necessary for CARB to consider "the technological feasibility of the regulations"⁵⁴ and the impact they may have on the state economy.⁵⁵ Furthermore, CARB regulations had to provide flexibility to the auto industry when choosing how to meet regulatory requirements and grant automakers credits "for any reductions in greenhouse gas emissions from motor vehicles that were achieved prior to the operative date of the regulations"⁵⁶

Finally, the time frame for adopting the regulations and their effective implementation date were both extended⁵⁷ and the statute as adopted called for the legislature to hold at least one public hearing to review CARB's regulations after adoption.⁵⁸ Adding the legislative hearing step following CARB's adoption of regulations was a compromise according to Assemblywoman Pavley, which was designed to provide a final public forum for review of the regulations without creating a requirement for Assembly approval or a strong incentive for legislative modification.⁵⁹

In addition to these concessions to opponents, the final version of the Clean Cars Law specifically restricted CARB from taking particular actions that the industry had warned about in its media campaign, expressly prohibiting the agency regulations from:

- Imposing additional taxes or fees on any motor vehicle, fuels or miles traveled;⁶⁰
- Banning the sale of any vehicle category, including but not limited to SUVs and light duty trucks;⁶¹
- Reducing vehicle weight;⁶²
- Limiting or reducing speed limits;⁶³ and
- Restricting or reducing vehicle miles traveled.⁶⁴

E. Adoption and Gubernatorial Endorsement

Despite multiple concessions and bipartisan support of legislative leaders, the final votes in the State Assembly fell largely along party lines and were extremely close.⁶⁵ The close final vote suggests that the automakers partially achieved their goal with legislators. Their strategy, however, ultimately failed. Public opinion polls taken and publicized during the period when the California Clean Car Law was being debated

in the state legislature consistently showed that Californians overwhelmingly favored curbs on vehicle emissions.⁶⁶ Moreover, virtually all of the consumer choice complaints raised by the industry in opposition to the measure were addressed and refuted in the final version of the bill.⁶⁷

The bill was finally adopted by the state legislature on July 1, 2002 and signed by Governor Gray Davis on July 22, 2002.⁶⁸ While Governor Davis had maintained a neutral posture throughout pre-enactment debate, when signing he voiced strong support, deriding the auto industry's opposing arguments: "Opponents of this bill say the sky is falling,' Davis explained. 'But they said it about unleaded gasoline. They said it about catalytic converters. They said it about seat belts and air bags. But the sky is not falling. It's just getting a whole lot cleaner.'"⁶⁹

F. Factors Critical to Regulatory Success

Adoption of the bill by the state legislature began a more than two-year-long regulatory process by CARB. Although an analysis of the developments that occurred during the prolonged regulatory phase is beyond the scope of this case study, several factors that were critical to regulatory success are worth noting.

First, Governor Arnold Schwarzenegger, who defeated Governor Gray Davis in a recall election in the fall of 2003, made a highly publicized campaign pledge to support the law and defend it in court.⁷⁰ His public support was a key ingredient in the development of the CARB regulations whose eleven voting members are all appointed by the Governor.⁷¹ Moreover, the resources and political will to defend the lengthy auto

industry courtroom challenges to the law would not have been possible without a strong commitment from the Governor's office.

Second, the regulatory agency CARB was a key actor in developing a technologically, politically and legally defensible measure. Indeed, the legislative strategy of relying on CARB to craft and approve the details of the law's requirements was based on the agency's reputation for successfully navigating similar processes.⁷² In a detailed article following passage of the statute, the *Los Angeles Times* described the state agency that would develop the implementing regulations as follows:

The state air board has a lengthy record of pushing auto makers to pursue changes against their will. California regulations were the first to require vehicle makers to use catalytic converters, seat belts, clean diesel fuel, unleaded fuel, alternative fuels, reformulated gasoline and electric and hybrid cars—often despite industry denials that the changes could be accomplished or would be accepted by consumers.⁷³

Third, a grant from the Energy Foundation was given to the Clean Cars Campaign to support its work throughout the regulatory phase, which enabled supporters to develop and coordinate a successful legal, media and political strategy.⁷⁴ The professionally staffed coalition met regularly with CARB staff, held press briefings and "Question and Answer" sessions for the media on the developing measure. Together, these groups carefully analyzed opposition and prepared for the multiple auto industry federal lawsuits they knew were coming.⁷⁵

Fourth, other states followed the developing measure with great interest⁷⁶ and many began the legal process of adopting identical regulations with the hope that the grant of a U.S. EPA waiver to California would empower them to adopt the more stringent California vehicle emissions standards.

IV. LEGAL CHALLENGES

The primary motive behind opposition to the California Clean Car law was the automobile industry's desire to protect its economic interests. Quite simply, automakers did not want to be required to change vehicle design or adjust their marketing strategies in order to meet new vehicle emissions requirements. As proponents knew, this position was entirely consistent with the industry's long-standing pattern of resisting the adoption of public safety and health requirements sought by consumer and environmental groups, such as seat belts and catalytic converters.

In addition to opposing the content of the law (mandatory vehicle emissions reductions), auto makers were also determined to oppose the shift in proponents' political strategy from the federal to the state level of government.⁷⁷ Considering the intense media coverage in the Detroit press as well as the significant resources marshaled by opponents, there is no doubt that the "We Decide What We Drive" lobbying effort was primarily a national campaign. Automakers did not want a law requiring reductions of greenhouse gas emissions from vehicle tail pipes to be adopted at the state level; they preferred to continue to work at the federal level where the industry has enjoyed a history of influencing and delaying tough measures.⁷⁸

In pursuing the goal of keeping regulation concentrated at the federal level, the automobile manufacturers filed a series of lawsuits through the Automobile Alliance, the Association of International Automobile Manufacturers headquartered in Washington, D.C. and local car dealerships located in the states that had adopted measures similar to

the California Clean Cars Law, arguing primarily that state regulation was preempted by federal law.⁷⁹

The main legal argument put forth by the auto industry was that the bill was a “back door” attempt to require more fuel-efficient vehicles and that as such, it was preempted by federal law.⁸⁰ “Gregory Dana, vice president of environmental affairs at the Alliance of Automobile Manufacturers, said, ‘They say it’s a CO2 [carbon dioxide] bill, but it’s a fuel economy bill. That’s all it is.’”⁸¹

Several preemption theories were presented by the auto industry. First, it argued that the California emissions standards were expressly preempted by the federal Energy Policy and Conservation Act (“EPCA”) claiming that the standards “related to fuel economy standards or average fuel economy standards for automobiles” in contravention to section 32919(a), which reserves the right to regulate fuel economy to the federal government.⁸²

A similar argument had been successfully used in 2001 by the auto industry to prevent the implementation of California’s zero emissions regulations (“ZEV”).⁸³ The ZEV ruling coincided with the legislative shaping of the Clean Cars Law and was taken in to account by Clean Cars Law proponents who reportedly saw the ZEV lawsuit—and an award of attorney’s fees to the auto industry—as a clear warning of how committed the auto industry was to defeating state vehicle emissions measures.⁸⁴ Indeed, one interviewee noted that the industry may have felt especially confident filing its preemption suit against the Clean Cars Law in the same jurisdiction where it received a favorable preemption ruling on the ZEV regulations.⁸⁵

Second, conflict or implied preemption arguments were made, which claimed that the California vehicle emissions standards were inconsistent with the “feasible” Corporate Average Fuel Economy (“CAFE”) standard and therefore, frustrated a federal purpose.⁸⁶ Third, industry opponents argued that the California law was preempted because it frustrated foreign policy.⁸⁷ Fourth, the auto industry argued that the state of California could not and would not meet the standards to obtain a waiver under section 209 of the Clean Air Act, particularly the “unique and compelling” circumstances requirement.⁸⁸ Fifth, the auto industry raised Sherman Act (antitrust) and Commerce Clause federal claims.⁸⁹

Federal preemption rhetoric was employed in written testimony opposing the law submitted by industry opponents at both the legislative⁹⁰ and regulatory stages. A Senate Rules Committee analysis of the bill summarized the opponents’ multiple legal and policy arguments as follows:

Opponents to this measure state that the provisions of the bill “offers no California emissions benefits, are bad for consumers, and are pre-empted by federal law.” They note that regulation of states may not intrude, *and that enactment of the measure will almost certainly lead to litigation in the federal courts over its effect.* The opponents also state that the bill will limit consumer choice and increase the costs of vehicles in the state while potentially making vehicles less safe due to presumed reductions in their weight to increase fuel efficiency and reduce emissions⁹¹

Opponents also disputed the general public health benefit of the bill, including a claim that the California measure would have a “negligible effect.”⁹²

In addition to foreshadowing future litigation by asserting that the measure was preempted in auto industry legislative and regulatory testimony,⁹³ a few news articles reported that an auto industry legal challenge was anticipated both before and after the

statute was enacted. An early media report of possible industry suit appeared in the *Wall Street Journal* as the legislative battle was escalating in May of 2002.⁹⁴

While acknowledging her initially naive approach to auto industry opposition, Assemblywoman Pavley also confirmed that industry legal challenges were expected and carefully prepared for from the inception of the coordinated campaign to pass the law.⁹⁵ Moreover, upon its enactment, executive director for Bluewater Network Russell Long acknowledged that an industry lawsuit was anticipated by proponents, telling the *New York Times*: “We will fully expect and will be prepared for a legal challenge from the auto industry.”⁹⁶

A full-scale attack on preemption grounds was not formally launched until CARB promulgated implementing regulations several years after passage of the Clean Cars Law. The delay may have been motivated in deference to the legal doctrine of “ripeness,” a constitutional principle which requires a genuine “case or controversy” to exist in order for a party to file a law suit. Downplaying the preemption challenge was also likely a strategy intended to focus the industry’s media campaign on issues that resonate with consumers, such as vehicle choice, safety and cost and to delay implementation of the state law (even if defeating it was not achievable) pending a lengthy cycle of court rulings and appeal.

V. LITIGATION AND AGENCY LEGAL DECISIONS

The post-enactment history of the California Clean Cars Law is replete with lawsuits, including a U.S. Supreme Court case ruling on the authority of the EPA to regulate greenhouse gas emissions, litigation of the EPA’s denial of California’s waiver

request, auto industry lawsuits filed in Vermont and Rhode Island, and a direct legal challenge to California's law.

A. *Massachusetts v. EPA*: Greenhouse Gases are Pollutants Subject to Regulation under the Clean Air Act

The United States Supreme Court decision *Massachusetts v. EPA* was the single most important case affecting the legal fate of the California Clean Cars Law.⁹⁷ Decided in 2007, the Court ruled that the EPA has the authority under the federal Clean Air Act to regulate greenhouse gas emissions.⁹⁸ Writing for the five-to-four majority, Justice Stevens asserted that “[b]ecause greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’ we hold that the EPA has the statutory authority to regulate the emissions of such gases from new motor vehicles.”⁹⁹ The ruling established an invaluable precedent for the supporters of the California Clean Cars Law by rejecting the EPA’s argument that regulating greenhouse gases would conflict with the federal EPCA.¹⁰⁰ Moreover, the ruling emphasized the EPA’s responsibility to safeguard public health as distinct from the authority to set fuel economy standards Congress vested in federal transportation agencies.¹⁰¹

B. EPA Waiver Petition Denial

The federal Clean Air Act vests the authority to regulate automobile emissions with the federal government but contains a provision allowing California to adopt and implement laws to regulate automobile emissions so long as it receives a formal waiver from the EPA of the Clean Air Act’s provision preempting (or preventing) state regulation of air quality. The application must contain a rationale for the state law

meeting criteria contained in the Clean Air Act. Once a waiver is granted to California, other states are permitted to adopt identical laws.

On December 21, 2005, the state of California formally requested a waiver of preemption from the EPA.¹⁰² The EPA delayed action on the waiver request for nearly two years.¹⁰³ Shortly after the Supreme Court's 2007 decision in *Massachusetts v. EPA*, the EPA finally announced a public hearing and comment period on California's waiver request.¹⁰⁴

Just a few days short of the two-year anniversary of the state's waiver petition, on December 19, 2007, the Administrator of the EPA sent a brief letter to California Governor Schwarzenegger denying the waiver and effectively blocking implementation of the Clean Cars Law.¹⁰⁵ The proffered reasons for the denial were the Administrator's beliefs (1) that California did not meet the required showing of "compelling and extraordinary conditions" and (2) that the Clean Air Act waiver provision was not intended to permit California to adopt state standards for new vehicle emissions designed to address climate change.¹⁰⁶

Both the decision and the Administrator's decision-making process were severely criticized. The state of California and its allies took immediate action to appeal.¹⁰⁷ On January 2, 2008, the state of California, fifteen other states and five environmental groups sued the EPA to challenge its decision to deny the waiver.¹⁰⁸ The EPA waiver issue was resolved in 2009 when newly elected President Obama asked the EPA reconsider its previous waiver denial. The waiver was finally granted on June 30, 2009.¹⁰⁹

C. Federal Preemption Lawsuits

While the EPA waiver controversy was pending, the auto industry went on the offensive with a series of lawsuits in federal courts around the country where states had enacted laws similar to the California Clean Cars Law. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*¹¹⁰ was filed in Vermont's federal district court by auto industry plaintiffs, including car dealers as well as the Association of International Automobile Manufacturers. These groups claimed that the Vermont law adopting California's vehicle emissions standards was invalid because it was preempted by the EPCA,¹¹¹ the Clean Air Act and foreign policy preemption.¹¹² The court disagreed and found that no doctrine of preemption applied.¹¹³

In *Central Valley Chrysler Jeep, Inc. v. Goldstone*, the auto industry directly challenged the California law on federal preemption grounds.¹¹⁴ Five claims for relief were initially alleged, including federal preemption under EPCA, preemption under section 209(a) of the Clean Air Act, preemption under federal foreign policy, violation of the dormant Commerce Clause and violation of the Sherman Antitrust Act.¹¹⁵ Notably, these were precisely the legal challenges that Clean Car Law supporters anticipated the industry would raise in court.¹¹⁶

Although the reasoning was not completely consistent, the Vermont decision, which was issued only a few months before the California ruling, provided a persuasive precedent for the California federal district court.¹¹⁷ The earlier pivotal U.S. Supreme Court decision in *Mass v. EPA* clearly influenced the outcome in favor of the defendant supporters of California's Clean Cars Law. Ultimately, the auto industry lost its key legal

claim that the California Clean Cars Law and CARB's implementing regulations were preempted under federal law. The court ruled that:

State laws that are granted waiver of preemption under the Clean Air Act that have the effect of requiring even substantial increases in average fuel economy performance are not preempted where the increase in fuel economy is incidental to the state law's purpose of assuring protection of public health and welfare under the Clean Air Act.¹¹⁸

The California federal lawsuit, decided in favor of the Clean Cars Law's supporters, was nearly identical to the earlier cases. The auto industry appealed both the Vermont and California rulings.

In another attempt to challenge the validity of California Clean Cars law, the industry filed a third preemption suit in Rhode Island federal district court challenging the state of Rhode Island's adoption of the California standards.¹¹⁹ In an early ruling in that case the court refused to dismiss the lawsuit, once again rejecting the argument that the issues were not ripe for litigation.¹²⁰ Most recently the Rhode Island District Court dismissed the plaintiff auto manufacturers and association's EPCA and Clean Air Act preemption claims, relying on the earlier Vermont and California decisions raising the same legal issues.¹²¹ The car dealers' claims, however, were not dismissed because they were not parties to the other lawsuits¹²²

In 2009, all legal challenges were decisively ended when, at the urging of the Obama Administration, the EPA issued the state of California its waiver. The Obama Administration also required the EPA and federal DOT to adopt joint regulations, essentially making the California emissions standard national law in 2010.¹²³

VI. THE AUTO INDUSTRY'S IMPACT ON THE CALIFORNIA CLEAN CARS LAW

Despite the interlocking federal claims and ensuing complications, the primary impact of the auto industry's opposition for the purpose of this case study is clear: the auto industry's threats of litigation shaped the content of the Clean Cars Law and its implementing regulations. The state statute was amended directly in response to the public campaign that the industry waged around consumer choice and occurred in anticipation of challenges to the grant of an EPA waiver.¹²⁴ Moreover, the regulations were meticulously developed by CARB staff and carefully monitored by a coalition of outside professionals who were all keenly aware that the regulations would be legally challenged in court.¹²⁵

The legal issue of federal preemption was the final and focal point of litigation ultimately filed, an issue that really could not be resolved in any conclusive way other than in federal court or by industry capitulation. Having effectively disposed of the policy arguments raised by the opposition through its vocal media campaign, proponents were poised for a clean legal decision and the possibility of success. However, as of early 2009, California Clean Cars Law supporters were still waiting for the final outcome, hoping that a change of administration at the EPA would lead to a reversal of the agency's 2007 decision that denied the state of California the waiver needed to implement the law. A waiver was finally issued on June 30, 2009,¹²⁶ and the prolonged legal conflict was finally over. The waiver permitted the state of California to apply its regulations to year 2009 vehicles and the regulations are slated to become the

national standard in 2010. Although delayed, proponents of the California Clean Cars Law achieved a significant public health goal.

VII. LESSONS LEARNED

Proponents of the California Clean Cars Law understood and anticipated the legal challenges their initiative would face from the auto industry. Legislative history shows that several express limits on the implementing state agency's authority were added to the bill to satisfy the opposition and reduce the risk of legal challenges. The law's findings section was specifically designed to meet the EPA waiver requirement of "compelling and extraordinary" circumstances, focusing on California's particular vulnerability to climate change.¹²⁷ Thus, the strategy of compromising on the legislation and delegating the details of implementation to a strong state agency (with only eleven voting members) was largely successful.

The initiative benefited enormously from having a determined and media savvy legislative champion in freshman Assemblywoman Pavley, a diverse coalition of outside supporters, the eventual support of the leadership of both the State Assembly and the State Senate, and support from two consecutive state governors. The role of the governors, which was somewhat unique given the recall context, was also a pivotal factor. In this case the governor's support was needed at each stage of the process (legislative, regulatory and litigation). Without Governor Davis' signature, the bill would not have become law, and without Governor Schwarzenegger's vocal and well-publicized support, CARB might not have been positioned to spend two years crafting legally defensible implementing regulations. Governor Schwarzenegger's commitment was

critical to the allocation of resources needed to defend expensive, complex and lengthy legal challenges.

The proponents benefited from—and as one interviewee stated, were even emboldened by—¹²⁸ their early courtroom victories.¹²⁹ At least one of the decisions (the U.S. Supreme Court ruling recognizing EPA’s jurisdiction to regulate CO₂) may well have been a welcome surprise. On the other hand, despite their careful preparation—including of the waiver petition—proponents did not appear to predict the historic denial by the EPA. A waiver under the Clean Air Act had never been denied to the state of California before, and despite the Bush Administration’s clear opposition to action on climate change, some proponents did not expect to encounter this final hurdle.

Indeed, throughout the lengthy process, proponents expressed great confidence in the role of the state of California as a pioneering leader in air quality as well as automobile, public health and safety laws—a unique status that Congress recognized when creating the preemption waiver system under the Clean Air Act. Despite the opposition’s daunting financial resources and political power, supporters of the California Clean Cars Law did not seriously consider abandoning the initiative at any stage of the proceedings.¹³⁰

Another important lesson is the proven value of concerted collaboration between environmental, public health, faith and business groups. Such collaboration was a key ingredient in the success of the California Clean Cars Law, particularly at the legislative level. Many public health initiatives have potential co-benefits and multiple constituencies. For example, obesity prevention measures may implicate transportation

and agricultural laws and policies as well as public health, encouraging these infrequently allied constituencies to work together. The collaboration inspired by the California Clean Cars Law demonstrated the potential for success when cross-cutting constituencies join forces to achieve mutually agreed upon goals. The resulting synergy multiplies the political and financial capital available to proponents, especially when faced with industry opponents that have tremendous resources at their disposal.

Finally, the Clean Air Act's approach to preemption—permitting a leading state to adopt more stringent standards than the federal government, which may also be followed by other states—could prove to be particularly important to emerging public health policy and laws, especially in the area of climate change. The history of the California Clean Cars Law offers a promising model for balancing federal, state and even local authority to adopt future climate change and public health measures. Among its advantages, this model recognizes and encourages states with a strong track record of innovation to develop and test potential solutions. The willingness of many other states to adopt California's vehicle emissions standards, to join the fight to defend them early as well as stay in the fray throughout multiple lawsuits, indicates that states are prepared to form coalitions and commit considerable resources to help raise public health and environmental standards nationwide.

The Obama Administration has taken bold action to break the logjam and establish integrated auto emissions and fuel economy standards. Under President Obama's plan, the EPA had to reverse its decision to deny California its waiver.¹³¹ The DOT and the EPA will jointly draft regulations to establish new national standards that

roughly correspond to the contested California regulations.¹³² This decision ended the lawsuits over the proposed California law and has been hailed by proponents as well as the beleaguered auto industry.¹³³ The person who initiated the California standard Assemblywoman Pavley—now a California State Senator—enthusiastically endorsed that federal plan and stated that it “cleans up our air, reduces our dependence on foreign oil and continues to allow California to lead the way.”¹³⁴

Publicized support of the new federal measure by the auto industry is notable and directly linked to the ongoing threat of bankruptcy and strict oversight the federal government has imposed since its recent bailout of the industry from a long-festering financial abyss.¹³⁵ Former President of the Alliance of Auto Manufacturers Dave McCurdy acknowledged that “[f]or seven long years, there has been a debate over whether states or the federal government should regulate autos.”¹³⁶ He added that “President Obama’s announcement ends that old debate by starting a federal rulemaking to set a national program.”¹³⁷

While the promise of new federal emissions and fuel efficiency regulations, jointly issued by the EPA and DOT, may overshadow the issuance of the EPA waiver, together these steps demonstrate that state authority, in this case California’s unique role under the Clean Air Act, is a powerful tool for adopting innovative public health laws. California ultimately achieved its goal of setting its own emission standards. Indeed, proponents even exceeded their goal, as the California emissions regulations will effectively become the new national standard.

RESEARCH METHODOLOGY

The Project utilized descriptive case study methodology to examine instances of state and local public health legislation that was opposed with legal rhetoric or faced a direct legal challenge. Descriptive case study methodology is designed to present a complete description of a case within its context. The descriptive case study technique was selected because of the lack of prior research on the issue of defensive public health litigation and the resulting lack of established theory in the area. The primary unit of analysis for each study was the proponent of the public health initiative. Background research for each case study included local and national media coverage, legislative and/or administrative documents, documents generated by the opposition, scholarly articles, legal filings and judicial opinions. A minimum of two in-depth telephone interviews were conducted for each case. Where possible, one interview was of a public health official, and one interview was with an attorney affiliated with the public health official. Given the resources available to conduct the studies interviews with opponents were not conducted.

¹ The author thanks Andrew Fitnades, J.D., for research and analysis conducted for the 2008 Public Health Legal Clinic at Northeastern University School of Law that contributed significantly to the case study.

² Former Assemblywoman Fran Pavley was elected to a four-year term in the California State Senate in November 2008. Ms. Pavley will be referred to as “Assemblywoman” to reflect her title during the actual course of events.

³ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards

for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009), *available at* <http://www.epa.gov/otaq/climate/ca-waiver.htm> (last visited Oct. 30, 2009).

⁴ *See e.g.* Intergovernmental Panel on Climate Change Assessment Reports (2007), <http://www.epa.gov/climatechange/ipcc2007.html> (last visited Oct. 30, 2009).

⁵ Howard Frumkin, et al., *Climate Change: The Public Health Response*, 98 AM J. PUB. HEALTH 435 (2008).

⁶ *Id.*

⁷ The important role of states as laboratories of federalism has long been recognized. *See, e.g., New State Ice Co., v. Liebman*, 285 U.S 262, 280 (1935) (Brandeis, J., dissenting).

⁸ 2001 CA A.B. 1493, 2002 Stat. Ch. 200, §§ 3(a) (Cal. 2002) (hereinafter “AB 1493”); Cal. Health & Safety Code Ann. § 43018.5(a)(2008).

⁹ *See* Michael Hannemann, *California’s New Greenhouse Gas Laws*, 2 REV. ENVTL. ECON. & POL’Y 114, 117-118 (Feb. 2008).

¹⁰ *Id.* at 118.

¹¹ AB 1493, *supra* note 8, at § 1(d)(2).

¹² *Id.* at § 1(d)(1).

¹³ *Id.* at § 1(d)(3).

¹⁴ *Id.* at § 1(d)(4).

¹⁵ *Id.* at § 1(d)(5).

¹⁶ *Id.* at § 1(d)(6).

¹⁷ See California Climate Change Center, Public Health-Related Impacts of Climate Change in California, (March 2006), <http://www.energy.ca.gov/2005publications/CEC-500-2005-197/CEC-500-2005-197-SF.PDF> (last visited Sept. 2, 2009).

¹⁸ *Id.* at viii.

¹⁹ *Id.* at 1.

²⁰ Ann Lindsay, MD, President, California Conference of Local Health Officers, Comments on California Air Resources Board (CARB) AB 32 Draft Scoping Plan, July 2008 Discussion Draft (July 25, 2008) <http://www.cdph.ca.gov/programs/CCLHO/Documents/CCLHOARBCommentsFinalAB32.pdf> (last visited Sept. 2, 2009).

²¹ Telephone Interview with Fran Pavley, California State Senator (Oct. 2, 2008) (hereinafter “Pavley Interview”).

²² *Id.* More than 80% of California residents, polled at the time the law passed by the nonpartisan Public Policy Institute of California, supported the vehicle emission law. See Natural Resources Defense Council, NRDC Backgrounder, California Global Warming Emissions Rule: Legal Precedent Favors New Tailpipe Standard Despite Automaker Gripes (July 2004), http://www.calcleancars.org/factsheets/NRDC_0704.pdf (last visited Sept. 2, 2009).

²³ Bluewater Network is now a division of Friends of the Earth. See <http://www.foe.org/bluwater-network>.

²⁴ Pavley Interview, *supra* note 21.

²⁵ *Id.* Leaders from both the House and Senate, particularly Democrats, later strongly supported the bill.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² California Clean Car Campaign, California Vehicle Global Warming Pollution Supporting Organizations, (March 4, 2005), <http://www.calcleancars.org/supporters.pdf> (last visited Sept. 3, 2009).

³³ Pavley Interview, *supra* note 21.

³⁴ See *California's AB 1493: Trendsetting or Setting Ourselves up to Fail?*, 21 UCLA J. ENVTL. L. & POL'Y 97, 138 (2002-2003) (listing bill supporters).

³⁵ Pavley Interview, *supra* note 21.

³⁶ The Alliance of Automobile Manufacturers is a trade group that includes all of the major car makers except Honda. See [Autoalliance.org](http://www.autoalliance.org), About the Alliance, <http://www.autoalliance.org/index.cfm?objectid=2F8C5878-1D09-317F-BB343FF053BA2B33> (last visited Sept 2, 2009).

³⁷ Pavley Interview, *supra* note 21.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Jeffrey Ball, *The Battle Over Fuel Efficiency Moves to a New Frontier: States*, WALL ST. J., May 3, 2002.

⁴² Pavley Interview, *supra* note 21.

⁴³ The “We Decide What We Drive” campaign was an “astroturf” campaign with “We” apparently a reference to Detroit auto makers, not California drivers who supported the vehicle emissions measure. “Astroturf” campaigns are run by front organizations for groups posing as local grassroots activists. See Union of Concerned Scientists, *Dirty Secrets of Astroturf Lobbying*, http://www.ucsusa.org/assets/documents/catalyst/catalyst_sp03_astroturf.pdf (last visited Sept. 2, 2009).

- ⁴⁴ Jeff Plungis, *Carmakers Target California Air Rules*, DETROIT NEWS, April 23, 2002.
- ⁴⁵ *Id.* Characterizing state and local laws as “piecemeal” or “patchwork” approaches is a common and long-used strategy by industry opponents to public health law initiatives. See e.g., M. Siegel, et al., *Preemption in Tobacco Control: Review of an Emerging Public Health Problem*, 278 JAMA 858 (1997).
- ⁴⁶ See e.g., William Booth, *California Takes Lead on Auto Emissions, Gov. Davis to Sign Law On Pollution That May Affect All U.S. Drivers*, WASH. POST, July 22, 2002, at A01; Danny Hakim, *California Is Moving to Guide U.S. Policy on Pollution*, N.Y. TIMES, July 3, 2002.
- ⁴⁷ See, e.g., Union of Concerned Scientists, *Automakers Spin Misleads Consumers*, http://www.ucsusa.org/clean_vehicles/solutions/cleaner_cars_pickups_and_suvs/automakers-spin-misleads.html (last visited Sept. 2, 2009); Kevin E. McCarthy, Principal Analyst, California Global Warming Legislation, Office of Legislative Research Report, # 2002-R-0652, Connecticut General Assembly (July 25, 2002); *California’s AB 1493: Trendsetting or Setting Ourselves up to Fail?*, *supra* note 34.
- ⁴⁸ Pavley Interview, *supra* note 21.
- ⁴⁹ Chris Bowman, *California Auto Makers Say Bill to Reduce Emissions Will Hike Vehicle Prices*, SACRAMENTO BEE, May 13, 2002.
- ⁵⁰ William Rapai, *Lawmakers angling to set new emissions rules face a tough hurdle today*, THE CAR CONNECTION, May 20, 2002.
- ⁵¹ See Hannemann, *supra* note 9 at 129.
- ⁵² Pavley Interview, *supra* note 21.
- ⁵³ AB 1493 § 3(a) (emphasis added); Cal. Health & Safety Code § 43018.5(a)(2008).
- ⁵⁴ AB 1493 § 3(c)(1); Cal. Health & Safety Code § 43018.5(c)(1)(2008).
- ⁵⁵ AB 1493 § 3(c)(2); Cal. Health & Safety Code § 43018.5(c)(2)(2008).
- ⁵⁶ AB 1493 § 3(5)(A); Cal. Health & Safety Code § 43018.5(5)(A)(2008).
- ⁵⁷ AB 1493 § 3(a) and (b); Cal. Health & Safety Code § 43018.5(a) and (b)(1)(2008).
- ⁵⁸ Cal. Health & Safety Code § 43018.5(2)(B)(2008).
- ⁵⁹ Pavley Interview, *supra* note 21. Pavley described the hearing as procedural in nature with no modifications emerging. *Id.*
- ⁶⁰ Cal. Health & Safety Code § 43018.5(d)(1)(2008).
- ⁶¹ Cal. Health & Safety Code § 43018.5(d)(2)(2008).
- ⁶² Cal. Health & Safety Code § 43018.5(d)(3)(2008).
- ⁶³ Cal. Health & Safety Code § 43018.5(d)(4)(2008).
- ⁶⁴ Cal. Health & Safety Code § 43018.5(d)(5)(2008).
- ⁶⁵ See California Legislative Counsel, http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1451-1500/ (last visited Sept. 3, 2009) (indexing roll call votes of AB 1493).
- ⁶⁶ Pavley Interview, *supra* note 21; see also William Rapai, *Lawmakers angling to set new emissions rules face tough hurdle today*, THE CAR CONNECTION, May 20, 2002 (referring to a February 2002 poll showing that 70% of respondents supported legislation to reduce vehicle emissions); Hakim, *supra* note 46 (reporting that a California Public Policy Institute poll released in late June of 2002 found that 81% of Californians supported the vehicle emissions law).
- ⁶⁷ Pavley Interview, *supra* note 21.
- ⁶⁸ Cat Lazaroff, *California Law will Limit CO2 Emissions From Cars*, ENVTL. NEWS SERV., July 22, 2002, <http://www.ens-newswire.com/ens/jul2002/2002-07-22-06.asp> (last visited Sept. 2, 2009).
- ⁶⁹ *Id.*
- ⁷⁰ Telephone Interview with Wendy James, President, The Better World Group (October 24, 2008) (hereinafter “James Interview”).
- ⁷¹ *Id.*
- ⁷² Pavley Interview, *supra* note 21.
- ⁷³ Gary Polakovic and Miguel Bustillo, *Davis Signs Bill to Cut Greenhouse Gases Emissions: Vehicles must meet tailpipe standards in 2009. Auto makers promise a fight*, LOS ANGELES TIMES, July 23, 2002.
- ⁷⁴ James Interview, *supra* note 70.
- ⁷⁵ *Id.*

- ⁷⁶ *New York Considers New Fuel Standards*, DETROIT NEWS (Washington Bureau), July 23, 2002.
- ⁷⁷ Editorial, *Don't Let California Dictate Emission Rules*, DETROIT NEWS, May 8, 2002.
- ⁷⁸ The auto industry has historically beat back Congressional attempts to significantly increase national fuel economy standards, including a failed attempt to do so shortly before the California Clean Car law was adopted. Gary Polakovic and Miguel Bustillo, *Davis Signs Bill to Cut Greenhouse Gases Emissions: Vehicles must meet tailpipe standards in 2009. Auto makers promise a fight*, L.A. TIMES, July 23, 2002.
- ⁷⁹ During the CARB regulatory phase, the industry also apparently threatened to file state law lawsuits based on claims that the regulations violated the California Administrative Procedures Act, the California Environmental Quality Act and the Clean Cars statute itself. Memorandum from David Bookbinder, Sierra Club, Anticipated Auto Industry Legal Challenges to the Pavley Regulations, October 20, 2004 (on file with author).
- ⁸⁰ *Carmakers target the industry California air rules*, DETROIT NEWS, April 23, 2002.
- ⁸¹ Polakovic & Bustillo, *supra* note 78.
- ⁸² 49 U.S.C. § 32919(a).
- ⁸³ *Central Valley Chrysler-Plymouth, et al., v. California Air Res. Bd., et al.*, No. CV-F-02 5017 REC/SMS, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal. June 11, 2002).
- ⁸⁴ James Interview, *supra* note 70.
- ⁸⁵ U.S. District Judge Robert E. Coyle issued the rulings in both the ZEV case and an early decision granting the industry plaintiffs a preliminary injunction in the Clean Cars Law case. The key 2007 ruling in the Clean Cars law case, favoring the State of California, was issued by U.S District Judge Anthony W. Ishii. *See Central Valley Chrysler-Jeep, Inc., et al v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007).
- ⁸⁶ *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007).
- ⁸⁷ *See id.*
- ⁸⁸ *See id.*
- ⁸⁹ Early on in the litigation, the judge granted in part a motion for judgment on the pleadings dismissing the plaintiff's Sherman Act and Commerce Clause claims. *See Central Valley v. Goldstene, supra* note 86 at 1154 – 1155 (describing the procedural history of the CA Clean Cars Law case).
- ⁹⁰ Pavley Interview, *supra* note 21; *see also* Kevin E. McCarthy, Principal Analyst, Connecticut General Assembly, Office of Legislative Research, California Global Warming Legislation,: OLR Research Report, 2002-R-0652 at 4 (July 25, 2002), <http://search.cga.ct.gov/dtsearch.asp?cmd=getdoc&DocId=16765&Index=I%3A%5Czindex%5C2002&HitCount=0&hits=&hc=0&req=&Item=596> (last visited Sept. 2, 2009) (noting that the bill opponent raised federal preemption arguments claiming that AB 1493 is “tantamount to fuel economy regulation, preempted by CAFÉ”).
- ⁹¹ Ca. Sen. Rules Comm., *AB 1493, Third Reading, Bill Analysis* (July 2, 2002) (emphasis added), http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1451-1500/ab_1493_cfa_20020701_153319_sen_floor.html (last visited Sept. 3, 2009).
- ⁹² *See California's AB 1493: Trendsetting or Setting Ourselves up to Fail, supra* note 34 at 138 .
- ⁹³ James Interview, *supra* note 70.
- ⁹⁴ *The Battle Over Fuel Efficiency Moves to a New Frontier: States, supra* note 41.
- ⁹⁵ Pavley Interview, *supra* note 21.
- ⁹⁶ Hakim, *supra* note 46.
- ⁹⁷ *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438 (2007).
- ⁹⁸ *Id.*
- ⁹⁹ *Id.* 127 S.Ct. at 1462.
- ¹⁰⁰ *Id.*
- ¹⁰¹ *Id.* (“EPA has been charged with protecting the public’s ‘health’ and welfare,’ 42 U.S.C. § 7521(a)(1), statutory obligation wholly independent of DOT’s mandate to promote energy efficiency” (citation omitted)).
- ¹⁰² Letter from Catherine Witherspoon, Executive Officer, California Environmental Protection Agency, Air Resources Board, to Stephen L. Johnson, Administrator, U.S. EPA (Dec. 21, 2005), available at

<http://www.regulations.gov/search/Regs/home.html#documentDetail?D=EPA-HQ-OAR-2006-0173-0017> (last visited Sept. 3, 2009).

¹⁰³ Tiring of the long delay California and a group of other states filed a lawsuit against the EPA in the Washington D.C. district court to force action on the waiver petition. See *State of California v. EPA*, No. 08-1178 (D. D.C. filed January 2, 2008).

¹⁰⁴ Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

¹⁰⁵ Letter from Stephen L. Johnson, U.S.E.P.A., to Arnold Schwarzenegger, Governor of California (Dec. 19, 2007), available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf> (last visited Sept. 3, 2009). Although the letter constituted final agency action for the purpose of triggering the appeal period, the U.S. EPA did not publish an official notice and legal analysis of its decision until March of 2008. See U.S. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008). A firestorm of protest occurred immediately after the December 2007 letter denying the waiver, prompting Congressional probes and action. See e.g., Memorandum, Committee on Oversight and Government Reform, Majority Staff, House of Representatives, Re EPA's Denial of California Waiver (May 19, 2008).

¹⁰⁶ See Letter from Stephen L. Johnson, U.S.E.P.A., to Arnold Schwarzenegger, Governor of California, *supra* note 105.

¹⁰⁷ See e.g., Press Release, Office of the Governor of California, Governor Schwarzenegger Announces EPA Suit Filed to Reverse Waiver Denial (Jan. 2, 2008), <http://www.cleancarscampaign.org/web-content/cleanairact/docs/1-2-08-Schwarzenegger-release.pdf> (last visited Sept. 3, 2009); Field Briefing, Investigating EPA's Obstruction of Global Warming Controls for Vehicles, Before the U.S. Senate Committee on Environment and Public works, 110th Cong. (Jan. 10, 2008).

¹⁰⁸ *State of California v. EPA*, *supra* note 103; Jim Downing, *Suit filed for emission waiver: California eyes options while seeking right to enforce stricter limits*, SACRAMENTO BEE, Jan. 3, 2008, at 4A.

¹⁰⁹ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (July 8, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-15943.pdf> (last visited Sep. 3, 2009).

¹¹⁰ *Green Mountain Chrysler Plymouth Dodge Jeep, et al. v. Crombie, et al.*, 508 F.Supp.2d 295 (D. Vt. 2007).

¹¹¹ 49 U.S.C. §§ 32901-32919.

¹¹² *Green Mountain v. Crombie*, *supra* note at 343.

¹¹³ *Id.* at 343.

¹¹⁴ *Central Valley Chrysler Jeep v. Goldstene*, *supra* note 86. The lawsuit was filed by automobile dealers as well as the Association of International Automobile Manufacturers on December 7, 2004, shortly after [check]the CARB regulations to implement the California Clean Car law were approved.

¹¹⁵ *Id.* at 1154. The Commerce Clause and Sherman Act claims were dismissed by the court relatively early in the early in the proceedings.

¹¹⁶ James Interview, *supra* note 70.

¹¹⁷ *Green Mountain v. Crombie*, *supra* note 110, *appeal docketed*, Nos. 07-4342 and 07-4360 (D. Vt. Oct. 5, 2007).

¹¹⁸ *Central Valley Chrysler Jeep, Inc. v. Goldstene*, *supra* note 86 at 1176.

¹¹⁹ *Lincoln-Dodge, Inc. et al. v. Sullivan*, slip op., 2007 U.S. Dist. LEXIS 94618 (D. R.I. Dec. 21, 2007).

¹²⁰ See *id.* at *17-18. Defendants also lost their ripeness claim in *Green Mountain*. See *Green Mountain v. Crombie*, *supra* note 110 at 301.

¹²¹ *Lincoln-Dodge, Inc. et al. v. Sullivan*, Case No. 06-70T consolidated with Case No. 06-69T, 2008 U.S. Dist. LEXIS 96212 (D. R.I. Nov. 25, 2008).

¹²² *Id.*

¹²³ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, *supra* note 3; John M. Broder, *Obama to Toughen Rules on Emissions and Mileage*, N.Y. TIMES, May 19, 2009 at A1.

¹²⁴ Pavley Interview, *supra* note 21.

¹²⁵ James Interview, *supra* note 70.

¹²⁶ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, *supra* note 3.

¹²⁷ AB 1493 § 3(d)(1-5).

¹²⁸ James Interview, *supra* note 70.

¹²⁹ Before the Clean Car law was challenged in court some legal scholars were not certain that the bill would survive preemption standards, particularly those based on EPCA's fuel economy standards. See e.g. *California's AB 1493: Trendsetting or Setting Ourselves Up to Fail?*, *supra* note 34 at 125.

¹³⁰ Pavley Interview, *supra* note 21; James Interview, *supra* note 70.

¹³¹ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, *supra* note 3.

¹³² Broder, *supra* note 123.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*