

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 28 U.S.C. § 2201. This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391 (b).

PARTIES

4. Plaintiff Raphael Ophir ("Mr. Ophir") is a natural person with an address at 111 Perkins Street Apt. 32, Jamaica Plain, MA 02130. At all times relevant hereto Mr. Ophir was the owner of several City of Boston hackney carriage license plates or "medallions."

5. Plaintiff Boston Taxi Operators Association ("BTOA") is an unincorporated association comprised of other individual owners of varying numbers of City of Boston hackney carriage medallions. Most members of BTOA own automobiles licensed by means of their medallions for service as hackney taxicabs in Boston, which they either operate themselves; operate by means of hired drivers paid hourly compensation; or lease for the use of other owners of vehicles operated as taxicabs in the City of Boston. As of the date of filing of this Complaint the BTOA was seeking to incorporate under the laws of Massachusetts.

6. Defendant City of Boston ("City") is a duly chartered

municipality of the Commonwealth of Massachusetts. Defendant City at all times relevant hereto operated a Police Department the functions of which included licensing and regulating hackney carriage or taxicab services within its geographical limits, which functions are discharged by its Hackney Carriage Unit, an administrative agency created by Chapter 392 of the Acts of 1930.

7. Defendant Edward Davis, ("Mr. Davis") is sued in his official capacity as the commissioner of the Boston Police Department. At all times relevant hereto, Mr. Davis was responsible for overseeing the operations of the Hackney Unit within the Boston Police Department.

FACTS

8. Plaintiff Raphael Ophir is president of the Boston Taxicab Operators Association, an unincorporated association consisting of some thirty-five or more individual owners and operators of taxicabs, who operate in total some one-hundred-fifty taxicabs, or nearly eight (8%) per cent of the taxicabs operating in the City of Boston, Massachusetts.

9. Members of Association have served in many cases for decades providing transportation for citizens of Boston, including the elderly and infirm; and for countless of the many thousands of visitors who come to Boston every year.

10. Scientific opinion around the world now appears to be

coalescing into a consensus that continued emissions of certain gasses, including carbon dioxide, into the earth's atmosphere will result in an unnatural and perhaps inalterable increasing trend in surface temperatures on the planet's surface.

11. The anticipated increases in the planet's surface temperatures alluded to in the foregoing paragraph are expected to have significant deleterious effects for humanity, including intensified natural events such as hurricanes, droughts and others; and increases in the sea levels around the planet.

12. Scientific and political opinion also appear to be coalescing around the view that efforts must be made to reduce unnecessary emissions of carbon dioxide and other "greenhouse gases" into the environment, which emissions are believed to aggravate the ongoing increase in surface temperature ("global warming.")

13. Scientific opinion also appears to be coalescing around the view that readily accessible supplies of liquid petroleum are nearing exhaustion on the earth; and that steps must also be taken to reduce the consumption of this natural resource.

14. Many leaders in the United States have, furthermore, expressed concern about the extent to which United States prosperity is dependent on petroleum produced outside the United States borders, making the United States economy vulnerable to hostile foreign nations.

15. The United States government has responded to these growing concerns by enacting legislation intended to impose limits on emissions of carbon dioxide; and by requiring greater efficiency from many motor vehicles which rely on liquid petroleum derivatives to fuel the engines which propel them.

16. Consistent with principles of federal supremacy and pre-emption, the legislation alluded to in the foregoing paragraphs includes provisions prohibiting other governmental entities from attempting or purporting to regulate motor vehicle fuel efficiency or exhaust emissions.

17. Defendant City of Boston has adopted regulations governing the taxicab industry in the city which are also intended to impose limits on carbon dioxide emissions from, and to require greater fuel efficiency for, vehicles in service in the taxicab industry in the city.

18. On or about August 29, 2008, defendant City, through the Boston Police Department Hackney Carriage Division, implemented the updated and extensively modified Boston Police Department Hackney Division Rule 403.

19. The revised Rule 403 requires that all vehicles placed in service as taxicabs in Boston after August 30, 2008, be new 2008/2009 or later model hybrid-powered vehicles, whose propulsion is provided by a "hybrid" engine system which augments petroleum fuel with battery-stored electric propulsive power,

some derived from vehicle braking.

20. This requirement of the new regulations represents a dramatic departure from defendant City's past practice, under which second-hand vehicles, often purchased from municipal police departments, were universally accepted for use as taxicabs.

21. Second-hand hybrid vehicles offer comparable environmental and economic benefits respecting reduced carbon dioxide emissions and fuel consumption to the benefits offered by new hybrid vehicles.

22. Allowing introduction of second-hand hybrid powered vehicles for use as taxicabs in the City of Boston will further the interest of reducing carbon dioxide emissions and improving fuel efficiency of the overall fleet of taxicabs in the city.

23. Other cities in the United States have adopted taxicab regulations calling for use of hybrid vehicles but have done so without prohibiting the use of second-hand hybrid vehicles.

24. On information and belief the City of Boston has recently rescinded an executive order requiring that all newly purchased city vehicle be hybrid-powered vehicles.

25. Legislation has been introduced in the Massachusetts legislature to require that new taxicabs be either hybrid-powered or in the alternative, vehicles drawn from the top ten percent of vehicles ranked by fuel efficiency.

26. A number of other vehicles which are not hybrid

powered have Environmental Protection Agency fuel efficiency ratings approaching those of some hybrid-powered vehicles and are in the top ten percent of vehicles ranked by fuel efficiency. These vehicles include United-States-built vehicles such as the Ford Taurus and Dodge Caravan; along with the Honda Odyssey, Toyota Camry (conventionally powered), Toyota Siena and others.

27. The creators of the new regulations, the Hackney Unit of the Boston Police Department administered by defendant Davis, and the Commissioner of the City of Boston Environment Department, James Hall, have recently denied the right to experienced, licensed taxicab operators in the City of Boston, to introduce second-hand hybrid vehicles into service as taxicabs in the city, relying for their authority on the new regulations adopted on or about August 30, 2008, including new Rule 403.

28. Other provisions of the rule however permit introduction of conventional gasoline-burning vehicles after the effective date of the rule under certain circumstances.

IRREPARABLE HARM

29. The purchase price of a new hybrid vehicle is substantially greater, often by a multiple of two or three, than the price of a second-hand hybrid-powered vehicle.

30. The HCU-mandated new hybrid-powered vehicles will cost owners approximately 30% more than the traditional second-hand all-gasoline-powered vehicle used in taxicab service (the Ford

Motor Company's model "Crown Victoria"); and will therefore cause taxicab owners and operators severe, irreparable financial harm.

31. In addition to the cost of the vehicles themselves, the cost of mandatory comprehensive loss and liability insurance for a new motor vehicle used as a taxicab is substantially greater, sometimes by a multiple of two or three, than the cost of insurance for a second-hand vehicle used as a taxicab.

32. The enforcement of the modified Boston Police Department regulation ("Rule 403") will have the effect and result of foreclosing a significant number of established taxicab operators in the city from continuing to pursue their livelihoods as taxicab operators.

33. Enforcement of the regulations will cause irreparable harm to members of the Boston Taxicab Owners Association because refusal to use second-hand hybrid vehicles as taxicabs will cause loss of goodwill, customer relationships, and employee and staffing relationships, which cannot be readily calculated or restored by money damages.

34. Many of the costs that will be incurred if the provisions of Rule 403 requiring new hybrid-powered taxicabs is not immediately enjoined will not be recoverable. For example, once a hybrid vehicle has been purchased, the owner will be constrained to utilize that car (with the resulting increased insurance and maintenance expenses) for the next three to five

years.

35. Of the six hundred or so cabs operated by members of Association and other single or limited numbers of medallion owners, on information and belief, some thirty-three per cent (33%) are due to be replaced in 2006. That 33% represents small business owners that will likely go out of business, have to sell part of their business to survive, or suffer severe financial loss as a direct and proximate result of the enforcement of the revised Rule 403 and its "Clean Taxi" features.

CAUSES OF ACTION

COUNT I: VIOLATION OF THE FEDERAL CLEAN AIR ACT, 42 USC §7543(a)

36. Plaintiffs hereby repeat and re-allege all allegations contained in preceding paragraphs of this Complaint as though fully set out herein.

37. Since the 1970s, the government of the United States has been actively engaged in combating air pollution by enacting legislation empowering its agencies to establish clean air standards for various regions of the country; and determining permissible levels of deleterious gases and other materials in the local atmosphere.

38. Section 209(a) of 42 U.S.C. 7543 (the federal Clean Air Act or "CAA") states in pertinent part: No State or any political subdivision thereof shall adopt or attempt to enforce

any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment. 42 U.S.C. §7543 (a).

39. Local regulation of air quality across the United States is pre-empted by the enactment by Congress of legislation mandating federal standards for ambient air quality and thereby occupying the field of air quality regulation.

40. The CAA preempts not only regulations targeted at vehicle manufacturers and sellers, but also regulations targeted at the purchase of vehicles.

41. The challenged regulation, a portion of which is sometimes referred to as the "Clean Taxi" rule, is intended regulate the efficiency and "cleanliness" of taxicab vehicles.

42. The use of the word "cleanliness" refers to the exhaust emissions of the vehicles.

43. The challenged regulation is intended to regulate and control the purchase of vehicles by taxicab operators for use as taxicabs in the City of Boston.

44. On or about September 22, 2006, the office of defendant

City's Mayor, Thomas Menino, in announcing the development of Rule 403, stated that defendant City is constantly examining ways to reduce the effect of vehicle emissions on air quality.

45. On or about August 29, 2008, Mayor Menino and defendant Davis announced that taxicabs would be required to be fully hybrid by 2015.

46. In the same announcement, defendant City's mayor stated that requiring taxi cabs to use only hybrid propulsion is an essential step in improving air quality; and opined that the new Rule 403 would result in a 50% reduction in carbon emissions from the Boston taxi fleet.

47. The Rule 403 regulation (and its "Clean Taxi" features) adopted by defendant City is a "standard relating to the control of emissions from new motor vehicles," as proscribed by 42 U.S.C. §7543 (a).

48. Defendants' Rule 403 regulating exhaust emissions from taxicabs and particularly carbon emissions, violates Section 209(a) of 42 U.S.C. 7543 prohibiting local governments from attempting or purporting to regulate air quality standards.

49. Moreover, even if there were no express preemption clause in the Clean Air Act, Rule 403 would be preempted because it interferes with the federal emissions control program.

50. Plaintiffs have legally protected interests under the Constitution, the C.A.A., and other federal laws (including 42

U.S.C. § 1983) in the full enforcement of the federal C.A.A. against the HCU's Rule 403.

IRREPARABLE HARM

51. Continued enforcement of Rule 403 will cause irreparable harm by creating conflicts and contradictions with federal clean air regulations; and by giving rise to uncertainty among regulated individuals and businesses concerning applicable regulations, the net effect of which will be to delay and weaken federal efforts to improve air quality.

52. Plaintiffs have no adequate remedy at law against defendants' improper and impermissible imposition of Rule 403 contrary to federal statute.

53. The United States Constitution makes federal law and regulations "the supreme Law of the Land." U.S. Const., Art. VI, Cl. 2. Plaintiffs have legally protected interests under the Constitution, EPCA, and other federal laws (including 42 U.S.C. §1983) in the full enforcement of the federal fuel economy laws against defendants' implementation of the HCU's Rule 403.

54. A clear and judicially cognizable controversy exists between plaintiffs and defendants regarding whether the Rule 403 adopted by the HCU is preempted by the federal clean air standards laws. Plaintiffs contend that the regulation is preempted by the federal clean air standards laws and cannot be enforced.

55. Plaintiffs will be actually and irreparably injured with respect to their federally protected interests if the Rule 403 adopted by the HCU is not declared unlawful and if defendants are not enjoined from implementing that regulation.

56. To redress the violations of federal law and the interference with plaintiffs' rights, and pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and other provisions of law, including the Supremacy Clause and 42 U.S.C. §§1983, 1988, plaintiffs request a declaration that the HCU's Rule 403 is preempted and unenforceable.

57. Defendants are now implementing and will continue to implement Rule 403 in violation of federal law unless enjoined by this Court from doing so. Plaintiffs are therefore also entitled to injunctive relief restraining and redressing these violations of federal law under 42 U.S.C. §§1983, 1988, and the Supremacy Clause and other provisions of law.

58. The public interest will be served by such declaratory and injunctive relief.

COUNT II: VIOLATION OF THE FEDERAL FUEL EFFICIENCY ACT

59. Plaintiffs hereby repeat and re-allege all preceding allegations of this Complaint as though fully set out herein.

60. Since the 1970s, the United States government has established and enforced a comprehensive program to regulate

motor vehicle fuel economy. With very few exceptions, federal law prohibits any state or local government entities from attempting to regulate motor vehicle fuel economy.

61. Congress in or about 1972 occupied the field of fuel efficiency regulation by, among other things, passing legislation which established the National Highway Traffic and Safety Administration ("NHTSA") and authorized it to develop fuel efficiency standards, which it has done on numerous occasions since.

62. To regulate motor vehicle fuel economy, Congress in 1975 passed the Energy Policy and Conservation Act of 1975 ("EPCA") and established a program of "corporate average fuel economy," or "CAFÉ," standards.

63. Since the 1978 model year, the National Highway Traffic Safety Administration ("NHTSA") has regulated automotive fuel economy, pursuant to the EPCA.

64. To ensure that the federal government can maintain control over fuel economy policy and regulation and standardize such regulation nationwide, EPCA prohibits individual states from adopting fuel economy standards or related requirements. The statute provides:

When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related

to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter. 49 U.S.C. §32919(a).

65. Congress determined that regulation of fuel economy at a sub-national level would have constrained the flexibility that was the hallmark of the CAFÉ program it established. The only exception allowed by Congress was that a state and its political subdivisions would be permitted to "prescribe requirements for fuel economy for automobiles obtained for its own use." 49 U.S.C. §32919©.

66. The federal fuel economy standards reflect the balance that NHTSA strikes among those criteria. State or local regulations that have the effect of creating more stringent fuel economy standards than those set by federal law interfere with NHTSA's efforts to balance the criteria for fuel economy standards created by Congress.

67. The federal fuel economy standards today reflect NHTSA's judgment about the appropriate balance between improvements in fuel economy and the burdens that more stringent standards place on the automobile industry, including how fuel economy standards will affect employment in the United States' automobile industry. NHTSA has understood its standard-setting duties to include an obligation to weigh the difficulties of individual manufacturers.

68. Federal law prohibits the adoption and implementation

of state and local regulations related to such standards. See 49 U.S.C. § 32919(a).

69. The Clean Taxi features of the revised Rule 403 adopted by the HCU which went into effect on August 29, 2008, require that to operate in Boston, taxicabs must meet fuel efficiency standards as well as being hybrid powered.

70. The Clean Taxi features of Rule 403 are not identical to the standards set forth by the federal government; but rather are significantly at variance with the standards set by the federal government.

71. The HCU's Rule 403 is "related to fuel economy standards," and is accordingly preempted by federal law, specifically 49 U.S.C. § 32919(a), which prohibits states and political subdivisions from "adopt[ing] or enforc[ing] a law or regulation related to fuel economy standards."

72. Moreover, Rule 403 intrudes upon a field of regulation occupied by the federal government, conflicts with federal law and regulation, and stands as an obstacle to achievement of the objectives of Congress when it established a national program for the regulation of motor vehicle fuel economy.

73. The Rule 403 adopted by the HCU is not a regulation that applies to automobiles "obtained" by "a State or a political subdivision of a State...for its own use." See 49 U.S.C. § 32919(

c).

74. To the contrary, the Rule 403 applies to vehicles purchased by private individuals and corporations that own taxicab medallions.

75. The Rule 403 is therefore not exempt from preemption under 49 U.S.C. § 32919(c), which explicitly states: "A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use."

76. Nor is this rule exempt from preemption under 49 U.S.C. § 32919(b) which states: "When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.

77. Although the Rule does not specify the mileage required and remains purposefully vague about the "efficiency and cleanliness standards" required, the list of "acceptable" vehicles the office issued makes clear the HCU's intent to allow only vehicles that operate at 25 mpg or better within the city.

IRREPARABLE HARM

78. The HCU's Rule 403 will have an acute, clear, direct and substantial adverse impact on the performance, price, and availability of certain vehicles that will be sold in Boston for

service in the taxicab industry.

79. The HCU's Rule 403 will also have an acute, direct, clear, and adverse impact on some manufacturers' efforts to comply with the national fuel economy standards as efficiently as possible, and in a manner that maximizes consumer choices and minimizes adverse effects on employment.

80. The United States Constitution makes federal law and regulations "the supreme Law of the Land." U.S. Const., Art. VI, Cl. 2. Plaintiffs have legally protected interests under the Constitution, EPCA, and other federal laws (including 42 U.S.C. §1983) in the full enforcement of the federal fuel economy laws against defendants' implementation of the HCU's Rule 403.

81. Plaintiffs will be actually and irreparably injured with respect to their federally protected interests if Rule 403 is not declared unlawful and if defendants are not enjoined from implementing that regulation.

82. A clear and judicially cognizable controversy exists between plaintiffs and defendants regarding whether the Rule 403 adopted by the HCU is preempted by the federal fuel economy laws. Plaintiffs contend that the regulation is preempted by the federal fuel economy laws and cannot be enforced.

83. To redress the violations of federal law and the interference with plaintiffs' rights, and pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and other provisions of law, including the

Supremacy Clause and 42 U.S.C. §§1983, 1988, plaintiffs hereby request a declaration that the HCU's regulation is preempted and unenforceable.

84. Defendants are now implementing and will continue to implement the Rule 403 in violation of federal law unless enjoined by this Court from doing so. Plaintiffs are therefore also entitled to injunctive relief restraining and redressing these violations of federal law under 42 U.S.C. §§1983, 1988, and the Supremacy Clause and other provisions of law.

85. Plaintiffs herein will suffer irreparable financial harm and the physical safety of the taxi riding public and taxi drivers will be jeopardized unless the Rule 403 is or enjoined as soon as possible.

COUNT III: VIOLATIONS OF ADMINISTRATIVE DUE PROCESS AND THE MASSACHUSETTS ADMINISTRATIVE PROCEDURE ACT

86. Plaintiffs hereby repeat and re-allege all allegations made in preceding paragraphs hereof as though fully set forth herein.

87. Massachusetts law requires that in promulgating rules and regulations, agencies adhere to procedural requirements, afford process due, and avoid acting arbitrarily, capriciously or without due regard for the requirements of law. Chapter 392 Of the Acts of 1930, Section 1; G.L. c. 30A

88. The State Administrative Procedure Act, G.L. c. 30A ("Act"), requires that hearings be conducted on proposed rules and regulations prior to their adoption and promulgation.

89. The same Act also requires that reasonable notice of the hearing be accorded all parties; and that parties have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. G.L. c. 30A, §11(1).

90. The requirements of G. L. 30A, the State Administrative Procedure Act, are applied in cases of administrative rulemaking where no specific provisions exist with respect to the manner or notice of rule making proceedings by Massachusetts municipalities.

91. Before promulgating Rule 403, defendants purported to conduct a "hearing" on the rule.

92. Plaintiffs herein and the majority of their fellow single-ownership or small fleet taxicab operators were unaware of the hearing and accordingly did not attend or present comments or evidence relating to it.

93. Notice of the purported hearing was not reasonable and failed to provide plaintiffs a reasonable opportunity to prepare and present evidence and argument on the issues addressed by Rule 403, which has a substantial economic impact on their means of livelihood.

94. Furthermore, issues critical to the functioning of

Rule 403, including the age of the hybrid-powered vehicles to be approved for service, were not considered or addressed during the hearings held.

95. The record of the purported hearing holds no indication that the issue of use of second-hand hybrid-powered vehicles as taxicabs was raised or considered; nor that evidence supporting the view that banning such vehicles from such use would serve the objectives of the revised Rule 403.

96. So much of Rule 403 as respects second-hand hybrid-powered vehicles was adopted without the expression by the rulemaking authority of any rational basis or reasoned analysis to justify the adoption of the regulation as expressed.

97. The HCU acted arbitrarily and capriciously when it decided in May 2008 to implement Rule 403 and mandate vehicles for purchase without complying with the state Administrative Procedure Act, G.L. c. 30A, which is applied in cases of administrative rulemaking where there are not specific provisions with respect to the manner or notice of rule making procedures.

98. As a result of the arbitrary, capricious, and inadequate manner in which the Rule 403 was adopted, plaintiffs suffered significant harm. Not only were they denied the right to prepare and then present arguments at the hearings, but the hearings themselves were inadequate for failing to address key issues concerning the Rule 403.

RELIEF

WHEREFORE YOUR PLAINTIFFS hereby RESPECTFULLY REQUEST that this HONORABLE COURT:

1. Issue its order for notice, calling upon defendants herein to appear and show cause why a preliminary injunction enjoining enforcement of so much of Rule 403 as prohibits use of second-hand hybrid-powered vehicles should not enter against them as sought by the plaintiffs herein;

2. Following return of notice and preliminary hearing, enter its order in the form attached hereto enjoining enforcement of so much of defendant City's Rule 403 or any similar regulation aimed at the same objectives, as prohibits use of second-hand hybrid-powered vehicles as hackney carriages or taxicabs in the City of Boston, Massachusetts, until such time as the court may conclude its hearing on the merits and render decision respecting the requested permanent injunction; and similarly enjoining any acts by defendants in retribution or retaliation for plaintiffs' acts or conduct leading up to and including this lawsuit;

3. Following a hearing on the merits, enter:

(A) A declaratory judgment, pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, that the HCU's Rule 403 violates federal law in the manners alleged by plaintiffs in their foregoing Complaint;

(B) Preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants from implementing or enforcing the HCU's Rule and similarly enjoining any acts by defendants in retribution or retaliation for plaintiffs' actions leading up to and including this lawsuit;

(C) A judgment nullifying the HCU's actions revising and implementing Rule 403 on the grounds that those actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law; and remanding the matter to the HCU for further proceedings consistent with its orders, including provision of adequate notice, hearing, comment period and opportunity to be heard by the entire hackney carriage operating industry; and demonstration of a rational analysis and reasoned basis for its adoption of the Rule as it respects use of second-hand hybrid-powered vehicles as hackney taxicabs;

(D) Its order awarding to plaintiffs their reasonable costs and attorneys' fees as provided under 42 U.S.C. §1988 and other provisions of federal law;

(E) Such other and additional relief as the court may deem available and appropriate under the circumstances, including other fees and costs of this action to the extent allowed by federal, state, or local law.

RESPECTFULLY SUBMITTED,
BOSTON TAXI OWNERS ASSOCIATION
and RAPHAEL OPHIR,
PLAINTIFFS
BY THEIR ATTORNEY

/s/Paul H. Merry

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