

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 BANNOCK STREET DENVER, COLORADO 80202	DATE FILED: October 29, 2019 3:12 PM FILING ID: 3315360B4636E CASE NUMBER: 2019CV34156
Plaintiff: FREEDOM TO DRIVE INC. v. Defendant: THE COLORADO AIR QUALITY CONTROL COMMISSION	<p style="text-align: center;">↑ COURT USE ONLY ↑</p>
<i>Attorneys for Plaintiff:</i> Paul M. Seby, #27487 Matthew K. Tieslau #47483 GREENBERG TRAUIG, LLP 1144 15th Street, Suite 3300 Denver, CO 80202 Phone Number: 303.572.6500 Fax Number: 303.572.6540 E-Mail: sebyp@gtlaw.com tieslaum@gtlaw.com	Case Number: Division: Courtroom:
COMPLAINT FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION	

Plaintiff Freedom to Drive Inc. (“FTD”), by and through its undersigned counsel, and pursuant to C.R.S.§ 25-7-120, C.R.S.§ 24-4-106, and C.R.C.P. 57, respectfully submits this Complaint for Judicial Review of Final Agency Action against Defendant the Colorado Air Quality Control Commission (“Commission”), and states as follows:

INTRODUCTION

1. On August 16, 2019, the Commission adopted revisions to Colorado Regulation Number 20, which adopted a modified version of the Zero Emission Vehicle (“ZEV”) Regulation promulgated by the State of California Air Resources Board. The Commission acted under the authority of Section 177 of the Clean Air Act, which grants states the ability to adopt California regulations for which the United States Environment Protection Agency (“EPA”) has granted

California a waiver from the requirements of the Clean Air Act (exempting California from uniform nationwide air emission regulations for vehicles).

2. The ZEV Regulation was published in the *Colorado Register* September 10, 2019, took effect September 30, 2019, and applies to all model year 2023 and subsequent model year motor vehicles sold in Colorado. Beginning with the 2023 model year, a percentage of each manufacturer's passenger cars and light-duty trucks offered for sale in the State of Colorado are required to be ZEVs. Prior to the Commission's adoption of the ZEV Regulation there was no requirement that the motor vehicle fleets sold in Colorado be comprised of a percentage of ZEVs. The ZEV Regulation therefore imposes regulatory burdens on FTD's members, including Colorado businesses and the automobile dealers, which now must buy vehicle fleets with mandatory ZEV percentages from automobile manufacturers.

3. Meanwhile, on September 27, 2019 EPA and the National Highway Traffic Safety Administration ("NHTSA") promulgated and published in the *Federal Register* a final rule revoking the California's waiver under the Clean Air Act, revoking California's ZEV Regulation, and thus revoking Colorado's authority to adopt the ZEV Regulation ("Waiver Revocation Rule").

4. FTD is a duly registered entity in the State of Colorado that has a diverse membership of Coloradoans, including individuals, businesses, local government representatives, and organizations throughout Colorado that are affected by the ZEV Regulation, including persons that sell, maintain, provide services for, and use all types of motor vehicles. FTD sought and obtained timely "party status" in the Commission's ZEV Rulemaking because the ZEV Regulation would have a direct adverse effect on FTD and its members, as well as all Coloradans.

5. FTD participated as a party in the ZEV Regulation rulemaking process, including submitting written comments and participating in the Commission's public rulemaking hearing held from August 13 through 16, 2019.

6. The adoption of the ZEV Regulation was arbitrary and unlawful for at least the following reasons:

- a. The ZEV Regulation is invalid and cannot be enforced by the Commission because the Commission's authority to adopt the regulation was revoked by EPA and NHTSA's Waiver Revocation Rule.
- b. The ZEV Regulation is preempted by the Energy Policy and Conservation Act ("EPCA").
- c. The ZEV Regulation rulemaking process and the Commission's adoption of the ZEV Regulation violated the statutory prerequisites for motor vehicle emission control rulemakings under the Colorado Air Pollution Prevention and Control Act ("Colorado Air Act") and the Colorado Administrative Procedure Act ("APA") by failing to complete motor vehicle emission

control studies and make recommendations based on the studies before adopting motor vehicle emission controls.

- d. The ZEV Regulation violates the identicality requirements of Section 177 of the Clean Air Act and the procedural requirements of the Colorado Air Act and the Commission's Rules by incorporating an alternate credit counting proposal late in the rulemaking process which materially differs from the credit counting system contained in California's ZEV Regulation.
- e. The Commission's adoption of the ZEV Regulation further violated the Colorado APA because the final ZEV Regulation as adopted is arbitrary and capricious, a denial of statutory rights; in excess of statutory jurisdiction, and not in accord with the procedures and limitations of the Colorado APA.

7. FTD asks this Court to declare that ZEV Regulation is invalid, arbitrary and not in accordance with law and therefore enjoin, and set aside ZEV Regulation in its entirety and provide any other relief this Court deems just and proper.

THE PARTIES

8. Plaintiff FTD is a duly registered entity in the State of Colorado that has a diverse membership of Coloradans, including individuals, businesses, local government representatives, and organizations throughout Colorado that are affected by the ZEV Regulation. FTD's members include the Associated Governments of Northwest Colorado, Grand Junction Area Chamber of Commerce; Colorado Association of Wheat Growers; Colorado Cattlemen's Association; Colorado Land, Water and Food Alliance; Colorado Agricultural Aviation Association; the Colorado Motor Carriers Association; Mesa County; Colorado Automobile Dealers Association; the Independent Automobile Dealers Association; the National Federation of Independent Businesses; the Colorado Petroleum Association; and the American Fuel & Petroleum Manufacturers.

- a. FTD's organizational purpose is to research, study, and engage with the public, regulators and other stakeholders on government policies, laws, and regulations in the State of Colorado affecting motor vehicles to ensure those policies, laws, and regulations adhere to Colorado law and are based on reasonable, justifiable policy decisions that balance the costs of those policies, laws, and regulations with their intended benefits. FTD advocates for government policies, laws, and regulations that enable reasonable and lawful importation, sale, purchase, and use of motor vehicles for public and private transportation and recreation in Colorado, and opposes policies, laws, and regulations that do not.
- b. FTD and its members are harmed by the Commission's adoption of the ZEV Regulation because the ZEV Regulation imposes direct and unlawful,

regulatory requirements on FTD and its members, and disproportionately and unlawfully imposes the costs of implementation of the ZEV Regulation on FTD's members, and because the ZEV Regulation was adopted in violation of the requirements of the Colorado Air Act and Colorado APA.

9. The Commission is an agency of the State of Colorado created pursuant to C.R.S. § 25-7-104. The Commission promulgates rules and regulations to implement the Colorado Air Act.

JURISDICTION AND VENUE

10. Jurisdiction is proper pursuant to the judicial review provision of the Colorado APA, which states that “any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty-five days after such agency action becomes effective; . . . A proceeding for such review may be brought against the agency by its official title, individuals who comprise the agency, or any person representing the agency or acting on its behalf in the matter sought to be reviewed. C.R.S. § 24-4-106(4).

11. Jurisdiction is also proper pursuant to C.R.S. § 24-4-103(8.2)(b) which holds that “[a]n action to contest the validity of a rule on the grounds of its noncompliance with any provision of this section shall be commenced within thirty days after the effective date of the rule.”

12. An individual may initiate pre-enforcement challenge to regulation's validity under C.R.S. § 24-4-106(4). When an individual is subject to the demands of a regulation, “nothing in the APA denies standing to an individual to initiate a pre-enforcement challenge to the validity of [that] regulation.” *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85, 91-92 (1980).

13. Declaratory judgment is an appropriate procedure by which to seek review of a regulation under C.R.C.P. 57. *CF&I Steel Corp.*, 610 P.2d at 92. To the extent jurisdiction FTD is challenging the underlying validity of the ZEV Regulation in light of the Waiver Revocation Rule, and not under C.R.S. § 24-4-106(4), requesting relief under declaratory judgement is not duplicative.

14. Venue is proper in this Court pursuant to C.R.C.P. 98(a) because Plaintiff FTD resides in the City and County of Denver.

15. Venue is also proper as the Commission is resident in the City and County of Denver pursuant to C.R.S. § 24-4-106(4).

GENERAL ALLEGATIONS

I. Applicable Statutory and Regulatory Authority.

A. Limitations on the Commission’s Authority to Promulgate Motor Vehicle Emission Control Regulations under the Federal Clean Air Act

16. Section 202 of the Clean Air Act directs the Administrator of the EPA to prescribe regulations governing emissions from new motor vehicles, which EPA has done under current Federal Tier 3 greenhouse gas (“GHG”) emissions and Corporate Average Fuel Economy (“CAFE”) standards. 42 U.S.C. § 7521.

17. Section 209 of the Clean Air Act prohibits states from promulgating or enforcing emission standards for new motor vehicles separate from those set by EPA unless the state had already adopted standards prior to 1966, or the state applies for a waiver from the Administrator and the Administrator determines that the state’s standards are at least as protective as the Federal standards. 42 U.S.C. § 7543. California is the only state to have obtained a waiver under Section 209 of the Clean Air Act.

18. Section 177 of the Clean Air Act allows states who have not obtained a Section 209 waiver to adopt California’s motor vehicle emission standards for “new motor vehicles or new motor vehicle engines,” so long as the standards “are identical to the California standards for which a waiver has been granted for such model year.” 42 U.S.C. § 7507(1). Under the Clean Air Act there is no “third vehicle” path for the regulation of new motor vehicle emissions: states can either adopt the Federal standards or an approved state’s waiver standard. *Id.*

19. On Friday September 27, 2019, EPA and the NHTSA published their final Waiver Revocation Rule in the *Federal Register* revoking California’s Clean Air Act Section 209 Waiver.

B. Preemption of State Fuel Economy Standards under the Energy Policy Conservation Act

20. The EPCA states that NHTSA is vested with the exclusive authority to regulate motor vehicle fuel economy. *See* Pub. L. 94-163, 89 Stat. 871; 49 U.S.C. § 32919(a) (“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 [established by NHTSA].”). Nothing in EPCA, or any other statute, allows for exemptions to, or waivers of, this preemption provision.

21. NHTSA has consistently asserted that the EPCA broadly preempts any state standard that touches on or effects fuel economy, including ZEV standards, and several courts have agreed.

22. Similarly, courts have agreed with NHTSA and found that a wide variety of state regulations “related to” fuel economy standards to be preempted by the EPCA. *Cent. Valley*

Chrysler-Plymouth v. CARB, No. CV-F-02-5017, 2002 WL 34499459, at 3-5 (E.D. Cal. June 11, 2002) (finding a preliminary version of California’s ZEV Regulations preempted); *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 88-94 (D. Mass. 2009) (municipal ordinance mandating all-hybrid taxi fleet by 2015 preempted by EPCA); *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-CV-7837, 2008 WL 4866021, at 9 (S.D.N.Y. Oct. 31, 2008) (granting a preliminary injunction against city ordinance expressly incorporating fuel economy standards and effectively requiring hybrids).

C. EPA’s and NHTSA’s Waiver Revocation Rule

23. On August 24, 2018, EPA and NHTSA published a proposed rule in the *Federal Register* which in part proposed to (1) withdraw the waiver it had provided to California for that state’s GHG and ZEV regulations under the Clean Air Act, and (2) find that the EPCA preempts California (or any other state) motor vehicle emissions standards related to fuel economy, including requirements that manufacturers sell a certain number of low or zero emitting vehicles. See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42986, 42999 (Aug. 24, 2018).

24. On Friday September 27, 2019, EPA and the NHTSA published their final Waiver Revocation Rule in the *Federal Register* (1) revoking California’s Clean Air Act Section 209 Waiver, and (2) finding that the EPCA preempts California’s (and all other states) fuel economy standards, including ZEV standards. See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019).

D. Statutory Prerequisites to Motor Vehicle Emission Control Rulemakings in Colorado

25. The Commission is tasked with promulgating rules and regulations to implement the Colorado Air Act. See C.R.S. §25-7-105, 106, 109. The scope of the Commission’s authority, however, is not without limitation. Rather, the Commission’s authority is subject to several express limitations set forth under the Federal Clean Air Act and the Colorado Revised Statutes.

26. The Commission has the statutory duty to “[p]romulgat[e] such rules and regulations as are consistent with the legislative declaration [and the purpose of the Colorado Air Act] and necessary for the proper implementation and administration of this article,” including a comprehensive state implementation plan that is in accord with Federal standards, “[e]xcept as provided in section[] 25-7-130.” C.R.S. §25-7-105(1) (emphasis added).

27. The Commission, although granted the statutory authority for “maximum flexibility in developing an effective air quality control program and may promulgate such combination of regulations as may be necessary or desirable to carry out that program,” is limited in that flexibility “[e]xcept as provided in section[] 25-7-130.” C.R.S. §25-7-106(1) (emphasis added).

28. The Commission also has the statutory duty to “adopt, promulgate, and from time to time modify or repeal emission control regulations which require the use of effective practical

air pollution controls” again, “[e]xcept as provided in section[] 25-7-130.” C.R.S. §25-7-109(1)(a) (emphasis added).

29. The Colorado legislature also created Title 42, Article 4, of the Colorado Revised Statutes, which governs the regulation of vehicles and traffic, and creates an automobile inspection and readjustment program (“AIR Program”). C.R.S. § 42-4-301 *et seq.*

30. Under the AIR Program, the Commission “shall develop and adopt, and may from time to time revise, regulations . . . *in accordance with section 25-7-130,*” and such regulations “shall be designed to assure compliance with the federal [Clean Air Act], federal requirements, and the state implementation plan.” C.R.S. § 42-4-306(6)(a) (emphasis added).

31. The Commission is also required by statute to “continuously evaluate the entire AIR program to ensure compliance with the state implementation plan and Federal law . . . [s]uch evaluation shall be based on continuing research conducted by the department of public health and environment *in accordance with section 25-7-130.*” C.R.S. § 42-4-306(9)(a)(I) (emphasis added).

32. The Commission’s authority to promulgate rules and regulations relating to air emissions from motor vehicles is subject to C.R.S. § 25-7-130.

33. Under Section 130, the Colorado legislature mandates that the Colorado Air Pollution Control Division (“Division”), along with the Colorado Department of Revenue, develop motor vehicle emission control studies as a statutory prerequisite to motor vehicle emission control rulemakings. C.R.S. § 25-7-130.

34. In developing motor vehicle emission control studies, the Colorado legislature mandates that the Division must first “develop a continuing joint program for the study of the control of motor vehicle exhaust emissions, *including emissions from model year 1975 and later models.* Such emission control studies shall include such investigations and evaluations of existing and *available motor vehicle emission control equipment and technology.*” C.R.S. § 25-7-130(1) (emphasis added).

35. Additionally, the motor vehicle emission control studies “shall” investigate and evaluate “the *social problems, economic impacts, effectiveness, and costs involved* in the use of such technology in motor vehicle emissions inspections and maintenance programs.” C.R.S. § 25-7-130(1) (emphasis added).

36. The Division must also “develop a pilot program for the purpose of testing a representative sample of motor vehicles with various vehicle emission control alternatives which may include emission testing and maintenance, air pollution control tune-up, *and vehicle modification alternatives* as determined by the [C]ommission.” C.R.S. § 25-7-130(2)(a) (emphasis added).

37. Then, “[b]ased upon the results of the pilot program and emission control studies, the [C]ommission *shall develop recommendations for . . . the control of motor vehicle emissions.*” C.R.S. § 25-7-130(2)(b) (emphasis added).

38. “*Any program*” recommended by the Commission “*shall be based upon establishing statewide minimum standards* and shall include more stringent standards for motor vehicles registered in air quality control basins defined by the commission.” C.R.S. §25-7-130(2)(b) (emphasis added).

39. The ZEV Regulation, by imposing motor vehicle emission control standards on all model year 2023 and subsequent model year motor vehicles sold in Colorado, was a motor vehicle emission control rulemaking subject to the statutory prerequisites of C.R.S. §25-7-130.

40. Therefore, before promulgating emission control regulations under the Colorado Air Act or the AIR Program, the Division was required to complete the statutorily prerequisite motor vehicle emission control studies, and the Commission was required to make recommendations based on those motor vehicle emission control studies “for the control of motor vehicle emissions.” C.R.S. § 25-7-130(2)(b).

E. Colorado Statutes Governing Commission Rulemaking Procedures

41. The Colorado APA declares that “agency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment . . . agency rules can negatively impact the state’s business climate by impeding the ability of local businesses to compete with out-of-state businesses, by discouraging new or existing businesses from moving to this state, and by hindering economic competitiveness and job creation. Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest.” C.R.S. § 24-4-101.5 (entitled legislative declaration).

42. The Colorado Air Act mandates that an initial economic impact analysis (“Initial EIA”) and a final economic impact analysis (“Final EIA”) are prepared and provided to the Commission during proposed rulemaking action. C.R.S. § 25-7-110.5(4)(a). Similarly, the Colorado APA requires that, upon request of any party to the rulemaking, the agency proposing the rulemaking must prepare a Cost Benefit Analysis (“CBA”) and a Regulatory Analysis (“RA”). C.R.S. § 24-4-103(2.5)(a), (4.5)(a).

43. An EIA, CBA, and RA are all required to include quantifications of the costs of the proposed regulation on Colorado business and industry.

- a. An EIA is required to include an analysis of either the “cumulative cost including but not limited to the total capital, operation, and maintenance costs of any proposed controls for affected business entity or industry,”

“[i]ndustry studies that examine the direct costs of the proposal on directly affected entities that may be either in the form of a business analysis,” or “the industrial and business sectors that will be impacted by the proposal.” C.R.S. § 25-7-110.5(4)(c)(I)(A), (II), (III)(A).

- b. A CBA is required to include an analysis of “[t]he anticipated costs of the rule or amendment, which shall include . . . the direct and indirect costs to business and other entities required to comply with the rule or amendment,” and “[a]ny adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness.” C.R.S. § 24-4-103(2.5)(a)(II), (IV).
- c. A RA is required to include an analysis on “the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule,” and “to the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.” C.R.S. § 24-4-103(4.5)(a)(I)-(II).

44. An EIA, CBA, and RA are therefore statutorily designed to inform the Commission and parties to a proposed rulemaking on the expected costs and effects of a proposed regulation with some measure of precision – allowing public decision making on proposed regulations to proceed in an informed manner. When an EIA, CBA, or RA fails to provide any reasonable precision in estimating the costs of a proposed regulation, they defeat the legislative purpose of requiring those instruments and analyses in the first place.

45. Separately, the Colorado Air Act requires that any party submitting an alternative proposal to a proposed regulation must provide “in cooperation with the division, a [Final EIA] five working days prior to the prehearing conference.” C.R.S. § 25-7-110.5(4)(a).

46. The Commission’s Procedural Rules similarly state that “[a] proponent of an alternative proposal must also prepare, in cooperation with the Division a Final Economic Analysis,” and that “[f]or an alternative proposal, a final economic analysis is due five working days prior to the prehearing conference.” 5 CCR 1001-1 V.C.5.

47. The Colorado APA mandates that any rule that is not adopted “in substantial compliance with the provisions” of Section 103 “shall be invalid.” C.R.S. § 24-4-103(8.2)(a).

48. An agency action shall also be held unlawful if that action is “arbitrary or capricious,” “[a] denial of statutory right,” “contrary to constitutional right, power, privilege, or immunity,” “in excess of statutory jurisdiction, authority, purposes, or limitations,” “an abuse or clearly unwarranted exercise of discretion,” and “unsupported by substantial evidence when the record is considered as a whole.” C.R.S. § 24-4-106(7)(b).

II. The ZEV Regulation Rulemaking.

49. On May 10, 2019, well after EPA and NHTSA has published the proposed rule in August 2018 to revoke California's waiver and ZEV Regulation and preempt all other state fuel economy standard regulations, the Commission issued a Notice of Rulemaking Hearing proposing to adopt California's ZEV Regulation.

50. The May 10, 2019 Notice of Rulemaking Hearing stated that the Commission's authority for moving forward with the ZEV rulemaking was authorized under "Section 177 of the federal Clean Air Act," the very waiver authority that the Commission knew EPA and NHTSA had already proposed to revoke.

51. The May 10, 2019 Notice of Rulemaking Hearing contained a proposed ZEV Regulation rulemaking packet prepared by the Division. The proposed ZEV Regulation rulemaking packet was not accompanied by the prerequisite findings of any motor vehicle emission control studies mandated by C.R.S § 25-7-130. The Commission and Division at all times during the ZEV Regulation rulemaking acknowledged they had not completed motor vehicle emission control studies relevant to the rulemaking, and refused to do so.

52. FTD timely applied for party status in the ZEV Regulation Rulemaking proceeding on May 30, 2019, and was granted party status at the Commission's June 7, 2019 status conference.

53. On May 30, 2019, FTD submitted a written request to the Department of Regulatory Agencies ("DORA"), asking that DORA require the Division to complete a CBA for the proposed ZEV Regulation, which DORA granted on June 4, 2019. On June 6, 2019, FTD also submitted a written request to the Division, asking that the Division conduct and complete a RA for the proposed ZEV Regulation. The Division was then mandated to complete CBA by DORA, and a RA under C.R.S. § 24-4-103(4.5).

54. Separately, FTD contracted with a world class energy consulting firm, Energy Ventures Analysis, to prepare an independent economic analysis of the proposed ZEV Regulation, and to respond to the Division's EIAs, CBA, and RA. FTD submitted these analyses with its prehearing statement (July 10, 2019), rebuttal statement (July 29, 2019), and sur-rebuttal statement (August 12, 2019) in the proposed ZEV Regulation rulemaking.

55. FTD participated in the final prehearing conference for the ZEV Regulation rulemaking, which was held on July 17, 2019.

56. On July 29, 2019, twelve days after the final prehearing conference, four parties to the rulemaking, the Colorado Energy Office, the Colorado Department of Transportation, the Alliance of Automobile Manufacturers, and the Association of Global Automakers submitted an alternate proposal to the ZEV Regulation that included an alternate credit counting system that differed materially from the way ZEV credits are counted and allocated under the California ZEV Regulation.

57. The parties failed to provide a Final EIA prepared in cooperation with the Division for that alternate proposal five working days prior to the prehearing conference as required by the Colorado Air Act and the Commission's procedural rules. A Final EIA prepared by those parties in cooperation with the Division for the alternative proposal was never submitted for public review or the record.

58. The alternate proposal would allow an alternative ZEV credit counting scheme that differed from California's ZEV Regulation in violation of the identity requirement of the Clean Air Act (i.e., that requirements either be identical the federal rules or California's rules), where automobile manufactures could choose between (1) a 36% proportional credit based on their California vehicle sales, or (2) a combined 26% proportional credit and early action credit, where the manufacturers would get early action credits for ZEV vehicles sold in Colorado in model years 2021 and 2022, before the credit requirements took effect in 2023, along with a 26% proportional credit based on their California vehicle sales.

59. On August 13 through 16, 2019, the Commission held the ZEV Regulation rulemaking hearing, in which FTD participated.

60. At all times leading up to and during the ZEV Regulation rulemaking hearing, including during FTD's prehearing statements, and witness testimony, FTD objected to the Commission's adoption of the ZEV Regulation on several statutory grounds including: (1) the Commission lacking authority to adopt the ZEV Regulation under EPA's and NHTSA's proposed Waiver Revocation Rule revoking of California's Clean Air Act Section 209 waiver and finding that the EPCA preempted state fuel economy standards; (2) the failure of the Division and the Commission to complete motor vehicle emission control studies as required by C.R.S. § 25-7-130; (3) the Commission's improper adoption of a late alternative proposal in violation of the identity requirements of Section 177 of the Clean Air Act and the procedural rules of the Colorado Air Act and the Commission's procedural rules, and (4) the flaws in the Division's technical and economic analyses of the proposed regulation, including the Division's Final EIA, CBA, and RA which failed to adequately address the impact of the ZEV Regulation on Colorado businesses, citizens, and other regulated communities and thus failed to justify the Commission's adoption of the ZEV Regulation .

61. The Commission rejected FTD's arguments and refused to order the Division to complete motor vehicle emission control studies, and therefore failed to make recommendations for the motor vehicle emission control ZEV Regulation based on those studies.

62. FTD also presented evidence into the record showing that:

- a. The Commission's consideration of the alternative proposal which caused the ZEV Regulation to materially differ from the California ZEV Regulation was a violation of the identity requirements of Section 177 of the Clean Air Act.

- b. The Commission's consideration of the alternative proposal submitted beyond the statutory timeframes allowable under the Colorado Air Act and the Commission's procedural rules, and without a Final EIA prepared in cooperation with the Division, was *per se* invalid.

63. The Commission refused to acknowledge these flaws and included the alternative proposal in the final adopted ZEV Regulation.

64. Further, FTD's prehearing, rebuttal, and sur-rebuttal statements, and testimony at the rulemaking hearing, including the credible economic analyses prepared by Energy Ventures Analysis, showed that the Division's Final EIA, CBA, and RA were statutorily flawed and failed to address the costs of the ZEV Regulation on regulated business and citizens in Colorado as required by the Colorado Air Act and Colorado APA. These failures included:

- a. Instead of analyzing the required direct or cumulative costs of the ZEV Regulation on regulated businesses and industries in Colorado – namely car manufacturers and car dealerships – the Division's Final EIA, CBA, and RA framed the cumulative costs of ZEV Regulation solely on the basis of incremental vehicle costs as offset by fuel and maintenance savings. By relying on these flawed analyses, the Commission incorrectly concluded that the ZEV Regulation had a net cost benefit for all Coloradans.
- b. FTD presented economic analyses actually quantifying the costs of the proposed ZEV Regulation on Colorado businesses, including increased in costs of vehicles by up to \$500, electricity rate increase of up to 7%, gas price increases by up to 11 cents per gallon, lost gas tax revenues of \$25 million, and tax credit costs of up to \$88 million per year. FTD's economic analyses showed that the ZEV Regulation would actually cost Coloradans \$573 million a year, borne disproportionately by FTD's members, including Colorado businesses and Colorado's rural populations.

65. FTD presented extensive evidence into the ZEV Regulation rulemaking record of the harms that the Commission unlawful and unjustified adoption of the ZEV Regulation would visit upon FTD's members, including:

- a. That the Commission's adoption of the ZEV Regulation was a violation of the statutory prerequisites of the Colorado Air Act to complete motor vehicle emission control studies, and this failure injured FTD and its members by denying them the opportunity to review and benefit from these studies which required that any final air emission regulation adopted by the commission was considered in light of its social problems, economic impacts, effectiveness, and total costs.
- b. That the Commission's adoption of the ZEV Regulation was not justified in light of the record before the Commission, including in the Division's Final

EIA, CBA, and RA, and the Commission's failure to adequately justify the ZEV Regulation under the statutory requirements of the Colorado Air Act and the Colorado APA was a violation of FTD's and its members vested statutory rights.

- c. Witness testimony from Kelly Sloan, the Executive Director of FTD, detailed how FTD's members would be harmed by the Commission's adoption of the ZEV Regulation without an adequate consideration of the costs to FTD's members (made up of businesses, citizens, and other classes in Colorado affected by the ZEV Regulation) as required by the statutorily prerequisite motor vehicle emission control studies and Final EIA, CBA, and RA.
- d. Witness testimony from John Medved, a FTD member and owner of several automobile dealerships in the state of Colorado, detailed how the ZEV Regulation would impose several harmful regulatory requirements on his dealership, including increased and burdensome ZEV registration and tracking requirements. Mr. Medved also testified about the significant additional related burdens the ZEV Regulation would impose on his businesses and consumers in Colorado, including increased vehicle costs (across all vehicle types), decreased vehicle stock and choice (including a lack of vehicles appropriate for Colorado's geography, climate, and terrain), increased training requirements for ZEV vehicle and repair technicians, and increased overhead.
- e. Witness testimony from Dianna Orf, a representative for the Associated Governments of Northwest Colorado, and Gary Moyer, a Rio Blanco County Commissioner and member of the Associated Governments of Northwest Colorado, which itself is a FTD member, detailed how the ZEV Regulation would disproportionately adversely affect rural Coloradans, including how those Coloradans will bear increased costs for all vehicle types while being unable to utilize ZEVs.
- f. Witness testimony from Brad Erker, Executive Director of the Colorado Association of Wheat Growers, a FTD member, detailed how the ZEV Regulation would disproportionately place implementation costs on Colorado farmers, including wheat growers who operate on small margins and cannot utilize ZEVs, through increased costs for gas, electricity, and vehicles that would be direct results of the adoption of the ZEV Regulation.
- g. Witness testimony from Tony Gagliardi, the Colorado State Director of the National Federation of Independent Businesses, a FTD member, detailed how small businesses would be disproportionately harmed by the ZEV Regulation which would require businesses and rural populations in Colorado to effectively finance and subsidize ZEVs for urban, upper middle

class citizens in Colorado through increased vehicle, gas, and electricity costs that are borne by all Coloradans (but disproportionately by businesses and rural populations), while only those urban, upper-middle class and beyond citizens could benefit from ZEVs.

66. On August 16, 2019, at the conclusion of the ZEV Regulation rulemaking hearing, the Commission voted to adopt the ZEV Regulation, including the alternate proposal for a ZEV credit counting system that materially differed from the credit counting system in California’s ZEV Regulation. On September 10, 2019 the ZEV Regulation was published in the *Colorado Register*. On September 30, 2019 the ZEV Regulation became effective pursuant to C.R.S. § 24-4-103(5).

67. The ZEV Regulation was adopted in violation of the federal Clean Air Act, the Colorado Air Act and Colorado APA, and FTD, its members, and Colorado consumers are adversely impacted by the ZEV Regulation, and this Court granting the relief requested herein will address those harms.

FIRST CLAIM FOR RELIEF

(Federal Clean Air Act)

(The Commission Lacks Authority to Adopt or Implement the ZEV Regulation under EPA and NHTSA’s Waiver Revocation Rule)

68. FTD hereby incorporates by reference, as if fully set forth herein, all of the allegations contained above.

69. EPA and NHTSA’s final Waiver Revocation Rule revoked California’s Section 209 waiver and California’s ZEV Regulation.

70. The Commission lacks the authority to promulgate, implement, or in any way enforce the ZEV Regulation, as it lacks authority under the Clean Air Act, and specifically Section 177, to implement California’s now revoked ZEV Regulation.

71. The ZEV Regulation is *per se* invalid, and should be declared invalid and removed from the Colorado Code of Regulations.

SECOND CLAIM FOR RELIEF

(Federal Clean Air Act)

(The ZEV Regulation is Preempted under the EPCA and EPA’s and NHTSA’s Waiver Revocation Rule)

72. FTD hereby incorporates by reference, as if fully set forth herein, all of the allegations contained above.

73. The EPCA expressly preempts all state motor vehicle emission control standards that “relate to fuel economy standards.”

74. EPA and NHTSA’s Waiver Revocation Rule expressly found that “ZEV mandates are preempted by the EPCA” as they “directly and substantially affect fuel economy standards by requiring manufacturers to eliminate fossil fuel use in a portion of their fleet. 84 Fed. Reg. 51314.

75. The ZEV Regulation is therefore preempted by the EPCA, is *per se* invalid and should be declared invalid and removed the Colorado Code of Regulations.

THIRD CLAIM FOR RELIEF

(Colorado Air Pollution Prevention and Control Act)

(Failure to Complete the Statutorily Prerequisite Motor Vehicle Emission Control Studies)

76. FTD hereby incorporates by reference, as if fully set forth herein, all of the allegations contained above.

77. Sections 105, 106, and 109 of the Colorado Air Act, which authorize and constrain the Commission’s authority to promulgate motor vehicle emission control regulations, each unequivocally require the Division to complete motor vehicle emission studies pursuant to Section 130, and the Commission make recommendations based on the same motor vehicle emission control studies, before the Commission may adopt motor vehicle emission control regulations.

78. The Division and Department of Revenue never completed motor vehicle emission control studies before proposing or adopting the ZEV Regulation to the Commission.

79. The Commission never reviewed a motor vehicle emission control study undertaken by the Division, nor made recommendations based on a motor vehicle emission control study, as required by the Air Act prior to adopting the ZEV Regulation.

80. Had the Commission properly completed the statutorily prerequisite motor vehicle emission control studies, it would have quantified the social problems, economic impacts, effectiveness, and costs of the ZEV Regulation, and this information would have been available to all parties, including FTD (as well as the public) to ensure that the ZEV Regulation was justified and proper in light of those concerns, a right that FTD and its members were denied.

81. The Commission’s adoption of the ZEV Regulation therefore violated the statutory prerequisites for a motor vehicle emission control rulemaking under the Colorado Air Act, C.R.S. § 25-7-130, and should be declared invalid and removed the Colorado Code of Regulations.

FOURTH CLAIM FOR RELIEF

(Clean Air Act)

(The Alternative Proposal Adopted by the Commission Violates the Identity Requirement of the Clean Air Act)

82. FTD hereby incorporates by reference, as if fully set forth herein, all of the allegations contained above.

83. Section 177 of the Clean Air Act requires that any state adopting a motor vehicle emission control standard ensure that the standard is “identical to the California standards for which a waiver has been granted for such model year.” 42 U.S.C. § 7507(1).

84. The Commission incorporated an alternative credit counting system into the final ZEV Regulation that materially differs from California’s ZEV Regulation.

85. The ZEV Regulation therefore violates the identicality requirement in Section 177 of the Clean Air Act and is *per se* invalid, should be declared as such, and should be removed from the Colorado Code of Regulations.

FIFTH CLAIM FOR RELIEF
(Colorado Air Pollution Prevention and Control Act and Colorado Administrative Procedure Act)
(The Commission Failed to Comply with the Statutory Requirements of the Colorado Air Act and Colorado APA)

86. FTD hereby incorporates by reference, as if fully set forth herein, all of the allegations contained above.

87. The Division’s Revised Final EIA, CBA, and RA all failed to comply with the statutory requirements of the Colorado Air Act and APA to assess the cumulative and direct costs of the ZEV Regulation, including the costs for affected business entities or industries to comply with the ZEV Regulation, and therefore denied FTD its statutory right to effectively participate in the ZEV Regulation rulemaking.

88. The Final EIA, CBA, and RA were materially flawed and did not adequately assesses the costs of the ZEV Regulation on Colorado businesses in violation of the Colorado Air Act and Colorado APA.

89. The Commission’s reliance on the materially and statutorily flawed Revised Final EIA, CBA, and RA as a justification for promulgating the ZEV Regulation, and the Commission’s failure to adequately consider credible and independent economic analyses renders the Commission’s decision arbitrary and capricious, a denial of statutory right, not in accord with the procedures or procedural limitations of the Colorado APA, based upon findings of fact that are clearly erroneous, unsupported by substantial evidence, and otherwise contrary to law. C.R.S. § 24-4-106(7)(b).

90. Separately, the alternative proposal that was included in the ZEV Regulation was provided 12 days after the final prehearing conference and without a Final EIA developed in coordination with the Division, violating the requirement that a Final EIA developed in cooperation with the Division be provided five days prior the final prehearing conference.

91. Therefore, the ZEV Regulation is invalid pursuant to C.R.S. § 24-4-103(8.2)(a) and 24-4-106(7) as it was adopted in violation of the Colorado APA and the Colorado Air Act, and this Court should set aside the ZEV Regulation as unlawful.

PRAYER FOR RELIEF

WHEREFORE, and for all of the reasons set forth herein, Plaintiff FTD requests this Court to:

- A. Hold unlawful, set aside, and enjoin implementation and enforcement of the ZEV Regulation;
- B. Grant any other such relief as this Court deems just and proper.

Respectfully submitted this 29th day of October, 2019.

GREENBERG TRAUERIG, LLP



Paul M. Seby (#27487)
Matthew K. Tieslau (#47483)
GREENBERG TRAUERIG, LLP
1144 15th Street, Suite 3300
Denver, Colorado 80202
Phone Number: 303.572.6500
Fax Number: 303.572.6540
E-Mail: SebyP@gtlaw.com
TieslauM@gtlaw.com

**ATTORNEYS FOR PLAINTIFF FREEDOM
TO DRIVE INC.**

Plaintiff's Address:

Freedom to Drive, Inc.
1600 Broadway, Ste. 1350
Denver, CO 80202