IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ALLIANCE OF AUTOMOBILE MANUFACTURERS, Plaintiff, v. **MARTHA KIRKPATRICK**, in her official capacity as Commissioner of the Maine Department of Environmental Protection, Defendant.	)	Civil No. 02-149-BH

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Harold J. Friedman
Bruce Hepler
FRIEDMAN, GAYTHWAITE, WOLF & LEAVITT
6 City Center
Portland, Maine 04112
(207) 761-0900

John T. Whatley
Julie C. Becker
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H. Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500

Russell R. Eggert
Susan Charles
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

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Plaintiff respectfully submits this memorandum in support of its Motion for Summary Judgment. As we show in the accompanying Statement of Material Facts and in this memorandum, there is no dispute as to any material fact and Plaintiff is entitled to judgment as a matter of law on its constitutional challenges to portions of a Maine statute.

Summary of Argument

The question before the Court is whether Maine can enact legislation directed to an end – reducing the amount of mercury that is released to the environment – that no one challenges, by a means that discriminates in favor of in-state businesses at the expense of out-of-state motor vehicle manufacturers. A senior official from the Maine Department of Environmental Protection ("DEP") framed the issue this way:

> [T]here was very little dissent on the question of whether or not mercury switches should be removed from vehicles, and that includes all representatives that were there at the automakers' conference. It was generally recognized that this is a good environmental thing to do. * * * [T]he ultimate policy question, the most difficult for us to answer and for the legislature eventually is not whether to do this but who pays.

Deposition of David Lennett, Director of the Bureau of Remediation and Waste Management of DEP, Feb. 11, 2003 ("Lennett Dep."), p. 63 lines 14-23 (attached as App. __). The Maine legislature answered that question with a scheme that shields its own constituents from the cost as much as possible, and that passes as much of the cost to out-of-state businesses as possible. In doing so it ran afoul of the Constitution in several respects.

1. *Commerce Clause*. a. Portions of the Maine law at issue in this case – L.D. 1921 (codified at 38 M.R.S.A. §§ 1661 and 1665-A (attached as App. __)) – violate the Commerce Clause.

L.D. 1921 imposes new requirements on handling and recycling mercury-containing electrical switches that were formerly used in many motor vehicles. There is no evidence that those switches cause environmental or other harm when the vehicle that contains them is in use, or even when that vehicle is dismantled in a scrap yard at the end of its useful life. Maine's stated concern is that those switches, if not removed from a vehicle before the vehicle's metal is melted down and recycled at furnaces outside of New England, might enter the atmosphere, be transported to Maine, and fall to earth with rain or snow. One of the House sponsors of the legislation put it succinctly:

> It is important to note that during the entire life of the automobile this mercury is not a threat to our environment. It is contained and encapsulated. It is only when the car comes to the end of its lifespan and the car is either shredded or crushed [that the mercury can be released].

Legis. Record (House) (April 3, 2002), H-2084 at p. 925 (Remarks of Rep. Cowger) (attached at App. __). L.D. 1921 addresses that concern directly in a provision not challenged in this case, by requiring removal of any mercury-containing switches before a vehicle is shipped off for recycling. The feared harm that informed L.D. 1921 can thus become manifest only if a Maine scrap yard violates this section of the new law.

L.D. 1921 does not stop there, however. With the avowed purpose of sparing Maine scrap yards from the burden of handling the switches they remove, and to compensate them for the minor cost of removal, the new law also sets up a program that shifts responsibility for these new requirements to vehicle manufacturers, none of which has any facilities or operations in Maine. L.D. 1921 thus requires manufacturers to open recycling businesses at two locations in Maine, and to pay a bounty for each of the switches that the Maine scrap yards are required to remove. It even spares the local scrap yards from the inconvenience of having to separate switches by manufacturer, a process that would simplify accounting for the bounty and other handling costs. At the same time the new law expressly shields Maine automobile dealers from any participation in the program.

L.D. 1921 thus addresses a problem that can occur only through unlawful activity by local Maine businesses by imposing as much of the cost of the chosen solution as possible on outsiders. The provisions of L.D. 1921 that transfer the costs and insulate local interests are at issue here because they facially and purposefully discriminate against out-of-state businesses and favor in-state businesses. In this context, a state law that affords "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" is "discriminatory." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Such discriminatory laws place a "burden * * * on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotations omitted). The challenged sections of L.D. 1921, such as shielding automobile dealers and precluding any effort to separate switches by manufacturer, serve no purpose other than protectionism. All of the legitimate purposes of the law could be accomplished through simple enforcement – something that Maine has not even attempted to do against scrap yards. As such, those provisions are subject to "a virtually *per se* rule of invalidity." *Wyoming v. Oklahoma*, 502 U.S. 437, 454-455 (1992) (internal quotations and citations omitted).

b. Even if L.D. 1921 could be deemed to regulate evenhandedly and only indirectly to affect interstate commerce, the portions challenged in this case still violate the Commerce Clause because the burden they impose "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The local benefits conferred by the challenged provisions of L.D. 1921 are convenience and financial incentive to the scrap yards of Maine and to Maine automobile dealerships. The Commerce Clause "cannot permit a State to require a person to go into a local * * * business solely for the sake" of parochial interests such as sparing local businesses the cost of complying with local law. *Ibid*. at 146.

2. *Due Process / Equal Protection*. The provisions of the Maine law at issue in this case also violate the Due Process and/or Equal Protection clauses of the Fourteenth Amendment.

The challenged provisions of L.D. 1921 expressly exclude Maine automobile dealerships from the costs and burdens associated with handling and recycling mercury-containing electrical switches and also require out-of-state automobile manufacturing companies to compensate Maine scrap yards for the minor cost associated with removing those switches. These provisions of L.D. 1921 – which redistribute the costs and administrative burdens associated with implementing L.D. 1921 away from Maine's in-state businesses to out-of-state automobile manufacturers – violate the Due Process and the Equal Protection clauses of the United States Constitution. The standard of review under either clause is the same. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). While judicial review under these provisions is deferential, the standard certainly is not meaningless – a statute will be held unconstitutional unless it is "rationally related to a legitimate interest of government." 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.4, at 597 (3d ed. 1999); *see also Metropolitan Life, supra; Williams, supra*.; *Starlight Sugar v. Soto*, 909 F. Supp. 853 (D.P.R. 1995), *aff'd*, 114 F.3d 330 (1st Cir. 1997); subsequent opinion 253 F.3d 137 (1st Cir. 2001).

Thus, the degree to which a classification satisfies the equal protection guarantee depends first on the government purpose attributable to the legislation and, second, on whether a rational relationship exists between the asserted government interest and the classification. The challenged provisions of L.D. 1921 plainly treat in-state business better than out-of-state industry. In analyzing the legitimacy of a state's interest, the Supreme Court "always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" *Metropolitan Life*, 470 U.S. at 878 (quoting *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 533 (1959) (Brennan, J., concurring)).

The challenged provisions serve no function other than to redistribute the costs and burdens associated with removal and recycling of mercury-containing switches from Maine industries to out-of-state corporations. These provisions do not advance any legitimate, non-protectionist state interest. More broadly, the whole program to pay in-state scrap yards from the pockets of out-of-state manufacturers to do something the scrap yards are required by law to do anyway, and to relieve the scrap yards of the obligation of recycling, is designed solely to protect Maine businesses from the burdens of a Maine law. The favoritism shown to Maine industry by the challenged provisions of L.D. 1921 is precisely the sort of parochial legislation the Equal Protection Clause was intended to prevent.

Summary of Undisputed Facts

We set forth this summary in accordance with the rule that the facts are to be viewed in the light most favorable to the non-moving party. We therefore draw most heavily on the Defendant's own documents.

1. *Former use of mercury-containing switches in motor vehicles*. For a number of years many cars and light trucks used electrical switches that contain small amounts of mercury to activate lights under a vehicle's hood and trunk. Some vehicles also used mercury-containing switches in anti-lock brake systems. The use of mercury-containing switches in those applications was lawful at the time the vehicles that contain them were sold.[1] In response to requests from the State of Michigan, manufacturers began phasing out the use of the switches in the mid-1990's as they re-designed the models that used them. Deposition of Terry Cullum, General Motors 30(b)(6) Designee ("Cullum dep.") p. 42 line 21 – p. 44 line 23 (App. __). By the end of 2002 manufacturers had eliminated mercury switches from new vehicles.[2]

There is no evidence that mercury switches in vehicles that are still on the road leak or fail, or pose any threat to the environment. *See* Lennett Dep. at p. 65, line 11. As Senator Martin, one of the sponsors of L.D. 1921, explained during floor debates, "[t]he[y] are

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[1] One country, Sweden, banned the sale of new cars with convenience switches containing mercury in 1993.

[2] There is no precise census of the number of cars with mercury-containing switches in Maine, or the total amount of mercury they contain. One recent study, conducted under the auspices of the Michigan Department of Environmental Quality in 2002, found that 44% of vehicles (in a representative sample of 1474) had mercury switches. *See* Michigan Department of Environmental Quality, MICHIGAN MERCURY SWITCH STUDY at 4 (Dec. 2002) ("Michigan Study"), (attached as App. __). Because some vehicles had more than one switch, the Michigan Study found an average of 0.54 switches per vehicle. *Id*. Defendant has quibbled with these data, and asserts that perhaps 65% of cars contain mercury switches. *See* Maine Department of Environmental Protection, A PLAN TO REDUCE MERCURY RELEASES IN MOTOR VEHICLES IN MAINE AT 464 (Jan. 2002) ("DEP Plan"), (attached as App. __). The limited study the State relies upon involved a non-representative sample of vehicles. *See* Deposition of John James, Environmental Specialist for Maine DEP, Feb. 12, 2003 ("James Dep."), p. 25 lines 6-11 (attached at App. __) (Q. "[D]id you make any attempt to insure that the vehicles you were working on were representative of the vehicle fleet? A. No. Q. That was not the point of it; was it? A. No.") The difference is not material for purposes of the motion for summary judgment.

encapsulated. They are not a problem until such time as that capsule ends up in an incinerator." Legis. Record (Senate) (April 2, 2002), at S-1853, AA000858 (Remarks of Senator Martin), (attached as App. __); *see also* remarks of Rep. Cowger, *supra*, p. 2. Further, the State "agrees with representations that the Plaintiff has made that it is unlikely that a discharge of mercury from electrical switches in motor vehicles will occur at ELVs [end of life vehicle handlers]." Defendant's Response to Plaintiff's Interrogatories ("Defs. Resp.") at Resp. No. 1 (attached as App. __). As one of the State's witnesses put it, "we have been pretty clear and consistent in our response to your interrogatories as well as elsewhere that the primary modes of release [of mercury into the environment] are shredding and smelting." Lennett Dep. at p. 65 lines 14-16.

The State's concern, in short, is focused on what happens to the mercury switches when a vehicle is junked and falls into the hands of the "End of Life Vehicle" or ELV industry. These are "the junk yards * * *, the salvage yards, recycling facilities, for lack of a better word, that are within the State." Lennett Dep. at p. 46 lines 3-5.

2. *The ELV industry*. The ELV industry is a "unique and separate waste processing system from that used for other mercury-added components. Used autos are usually dismantled and the ferrous portion of the dismantled vehicle is crushed, shredded and smelted in an electric arc furnace." Defs. Resp. at Resp. No. 6.

There are no electric arc furnaces in Maine, and none are known to exist in New Hampshire or Vermont. *See* Lennett Dep. at p. 20 lines 17-20; p. 57 lines 6-9. The closest such facilities are in New Jersey. *Id*. at p. 57 lines 10-12. End of life vehicles are thus sent out of state for metal recycling, with the actual end destination impossible to predict since it varies with economic conditions. *Id*. at p. 57 lines 13-17. No one has traced, or even developed mathematical models that trace, emissions of mercury from any of those facilities to mercury found in Maine. *Id*. at p. 64 lines 6-15.

Nor are there any vehicle shredders in Maine, at least at present. *Id*. at p. 55 lines 9-11. The vast majority of end of life vehicles in Maine are therefore sent out of state for shredding. *Id*. at p. 55 lines 12-18.

Thus of the three broad segments of the end-of-life vehicle industry – dismantlers, shredders, and smelters – only vehicle dismantlers are present in Maine. Those dismantlers handle a variety of materials that can be harmful if not removed from vehicles, such as gasoline, oil, windshield washer compounds, and brake fluids. *Id*. at p. 51 line 21 – p. 52 line 5. Some of these have residual value that the dismantler can recoup, while others, like tires, do not. *Id*. at p. 53 line 3 – p. 54 line 7. The dismantler nevertheless must remove all of the potentially harmful components, including tires (and mercury-containing switches), from the vehicle, since the dismantling industry is subject to generally applicable laws prohibiting the discharge of dangerous substances. *See* 30-A M.R.S.A. § 3755-A.3.H. As one legislator pointed out, even in the absence of L.D. 1921 "it is already against the law to crush a car and dispose of it without taking these [mercury] switches out. What we are, in fact, doing is paying somebody to obey the law." Remarks of Legis. Record (House) (April 3, 2002), H-2084 at p. 926 (Remarks of Rep. Tobin). Under the general Maine environmental laws the State has "from time to time taken enforcement action against junk yards, depending on the severity of the situation. In fact I believe we have one, a criminal case pending against one junk yard operator." Lennett Dep. at p. 52 lines 12-15.

Despite its stated concerns over mercury-containing switches, the State has not been able to identify any enforcement actions under its general laws against scrap yards over the handling of mercury. *See* Defs. Resp. at No. 1. "By way of further explanation" for this lack of enforcement, the State has offered its decision not to license the ELV industry, *ibid*., and its view that there are "a large number of ELV's and they range substantially in sophistication," *id*. at Resp. No. 6, which makes this "a very difficult sector to deal with," Lennett Dep. at p. 50 lines 10-11.

3. *Maine's regulation of mercury*. Maine has chosen to focus its regulatory efforts on a relatively small fraction of total mercury emissions.

Maine DEP has reported that "air emissions are the most significant pathway for mercury contamination of Maine's environment. Mercury present in the atmosphere is washed out via precipitation. The mercury present in precipitation * * * may have had its origins in other continents, the US, New England, or Maine." Maine Department of Environmental Protection, MERCURY IN MAINE – A STATUS REPORT at 562 (Feb. 2002) ("2002 Report"), (attached at App. __). Current estimates indicate that approximately one-third of global mercury emissions are from natural sources such as volcanoes and forest fires, and two-thirds are from anthropogenic sources. *Id*. One recent study estimated the worldwide anthropogenic portion to be approximately 1900 metric tons per year, of which 210 tons originated in North America. *See* United Nations Environment Programme, GLOBAL MERCURY ASSESSMENT at 252 (Dec. 2002), (attached at App. __).

Within the U.S., the Environmental Protection Agency estimated in 1994 that the largest sources of anthropogenic mercury are utility boilers (33% of the total), municipal waste combusters (19%), commercial and industrial boilers (18%), and medical waste incinerators (10%). *See* 2002 Report at 562. Manufacturing sources together accounted for another 10%. *Ibid*. Within the Northeast states, as of 1998, approximately 45% of mercury emissions were from municipal waste combusters; 18% from non-utility fuel combustion; 13% from utilities; 11% from other waste combustion; 7% from manufacturing; and 6% from "area sources," a category that includes product use and disposal.[3] *See* 1997 Report at p. 44-45.

Much of Maine's legislation directed to the anthropogenic portion of mercury in the environment has focused on the 6% that comprises the product use and disposal category. Thus in 1998 Maine enacted the "Mercury-Added Products and Services Law" (codified at 38 M.R.S.A. §§ 1661 - 1671) (attached at App. __), which addressed mercury usage in a variety of products. Under this law, mercury-containing products sold to hospitals must be accompanied by a disclosure of their contents. *See* 38 M.R.S.A. § 1661-B. In addition, the sale of fever thermometers is banned, except by prescription. *Id*. § 1661-C.1. Mercury-containing manometers used by the dairy industry cannot be sold, and existing ones are collected and replaced by Maine DEP and the Department of Agriculture at state expense. *Id*. § 1661-C.2. Further, schools cannot use bulk mercury, *id.* § 1661-C.3; the sale of elemental mercury is restricted, *id.* at § 1661-C.4; and new mercury-added thermostats cannot be sold, *id.* § 1661-C.5. Mercury-added products also became subject to new labeling requirements, *id.* § 1662, and disposal and source separation requirements were added, *id.* §§ 1663-1664. The dental

[3] For over 30 years, "Maine's most significant source of historical and ongoing mercury pollution [was] HoltraChem Manufacturing Corporation, a chlorine manufacturer which utilize[d] mercury in its production process, located in Orrington on a bluff above the Penobscot River." Land & Natural Resources Council 1997 Report, Appendix A: INITIAL EVALUATION & RECOMMENDATIONS ON MERCURY IN MAINE at 15 ("1997 Report"), (attached at App. __). Although the HoltraChem plant closed in September 2000, *see* 2002 Report at p. 575, until its closure it had enjoyed special status under Maine law as "the only permitted wastewater discharger of mercury in the state, pursuant to a 1971 statutory exemption." 1997 Report, at 15; s*ee also Maine People's Alliance v. HoltraChem Mfg. Co.*, 211 F. Supp. 2d 237, 241-246 (D. Me. 2002) (describing history of facility and the federal government's enforcement efforts against it).

profession is subject to a voluntary mercury reduction program. *Id*. § 1667. Section 1665 banned the sale of mercury light switches in motor vehicles, effective July 1, 2002, and instructed the Maine DEP to submit a plan for further regulation of the motor vehicle industry by the end of 2001.[4]

Under the 1998 legislation there are also a number of industry-specific programs to address mercury-containing products. There is, for example, "a voluntary program by the thermostat manufacturers," which does not include a bounty payment for old thermostats and which uses local electrical wholesale dealers as collection centers. Lennett Dep. at p. 30 lines 10-11; p. 31 line 18– p. 32 line 21. There is the state-funded program that provides non-mercury manometers for free to the state's dairy farmers. *Id.* at p. 125 lines 5-19. There is a voluntary agreement for hospitals in Maine to phase out the use of mercury by 2005. *Id.* at p. 123 line 15 – p. 124 line 24. None of these other industry-specific programs goes as far in singling out an industry for special responsibility as L.D. 1921 does for the vehicle industry.

4. *Maine's regulation of mercury in motor vehicles*. As § 1665 of the 1998 law directed, DEP submitted proposed legislation to address mercury in motor vehicles in December 2001. *See* DEP Plan pp. 488-493. This proposal, with some changes, ultimately became L.D. 1921, which the legislature passed and the Governor signed in April 2002.

Maine is not home to any vehicle manufacturing facilities, and no Maine residents work in the industry. Only a handful of industry suppliers have any operations in the State. *See* Ward's 2002 Motor Vehicle Facts & Figures at AA001813-14 ("2002 Wards"), (attached as App. __). In total, slightly over 400 people in Maine work indirectly for the industry. *Id.* When

[4] L.D. 1921 repealed §1665, changed the effective date of the ban to January 1, 2003, and moved it to §1665-A. Neither of these features of L.D. 1921 is challenged in this case.

Plaintiff voiced its opposition to the DEP Plan during the legislative process, this fact was not lost on the legislature.

The initial DEP proposal included a number of features that were ultimately enacted into law and that are not at issue in this case. Thus it included the new January 1, 2003 prohibition date on sale of new motor vehicles with mercury switches (DEP Plan at Sec. 1665-A(1), p. 490); the prohibition on replacement mercury light switches (DEP Plan at Sec. 1665-A(2), p. 490); the requirement to remove mercury components at the end of a vehicle's life (DEP Plan at Sec. 1665-A(4), p. 490; Sec. 1665-A(3), p. AA000732 of the law as enacted); a requirement that DEP provide assistance and information, and to design and distribute labels required for cars with mercury components (DEP Plan at Sec. 1665-A(7), p. 490); a requirement for door-post labels on cars with mercury components (DEP Plan at Sec. 1665-A(7), p. 490); authorization for a rulemaking to revise certain existing regulations applicable to "universal waste" to include mercury-containing switches (DEP Plan at Sec. 1665-A(9), p. 492; Sec. 1665-A(8), p. AA000733 of the law as enacted); and a miscellaneous reporting requirement applicable to motor vehicle manufacturers as well as DEP (DEP Plan at Sec. 1665-A(10), p. 492; Sec. 1665-A(9), p. AA000734 of the law as enacted). Plaintiff has never challenged the goal, or disputed the importance, of reducing mercury emissions into the air, and does not challenge any of these provisions. Nothing that happens in this case will affect those provisions.

The DEP proposal also contained some more controversial sections that would have drawn Maine businesses directly into the mercury switch program. Those include the following:

- Section 3 would have required Maine automobile dealers to remove mercury switches before a used vehicle could be resold:

> **Removal of mercury switches prior to motor vehicle resale**. Effective January 1, 2003, a person may not sell a used motor vehicle at retail without first removing any mercury light switch. This prohibition applies to a person who sells 20 or more used motor vehicles in calendar year 2002 or any calendar year thereafter.

DEP Plan at Section 1665-A(3), p. 490.

- Section 5A would have required vehicle manufacturers to "establish, maintain and publicize the availability of a source separation program" which would have allowed vehicle owners to have mercury switches removed, during the vehicles' life, "at no direct charge to the owner when the vehicle is brought to a manufacturer–affiliated dealership."

See DEP Plan at Section 1665-A(5)(A), p. 491.

- Section 5B would have required manufacturers to set up "business arrangements" with automobile dealers and scrap yards, to create "an effective source separation program to remove and collect the mercury switches." It also would have required manufacturers to set up a system by which switches could be consolidated and transported for recycling "at no cost to the person responsible for removal."

See DEP Plan at Section 1665-A(5)(B), p. 491. These controversial provisions, which by their terms would have imposed requirements on Maine businesses, were either eliminated or changed substantially during the legislative process.

The legislature's Natural Resources Committee held a hearing and ultimately issued Majority and Minority Reports (attached as App. __ and App. __, respectively). The Minority Report would have required DEP to submit an alternate plan for collecting, transporting and recycling mercury-containing vehicle switches. The Majority Report amended the bill with provisions that – with one later addition discussed below – became the law as enacted. The Majority Report changed the provision on removal of mercury-containing switches by used car dealers before the end of a vehicle's life, to make it an optional step. *See* Majority Report at Section 1665-A(4), p. 879. It added the consolidation center requirement and bounty system. *See* Majority Report at Sec. 1665-A(5), p. 879. It eliminated the requirement that manufacturer-affiliated dealerships provide free switch removal, and deleted the "business arrangement with dealers" provision. And before floor debate in the Senate, "Senate Amendment A" was added, which provided that "[a] consolidation facility may not be a facility that is licensed in the State as a new or used automobile dealership." This addition completed the changes needed to excuse as many Maine businesses as possible from obligations under the new law, and with those changes the legislature ultimately passed L.D. 1921.

The legislative debate on L.D. 1921 is illuminating. The Senate debates candidly articulate that the changes from the original proposal were designed to protect Maine business from the new Maine law. Senator Treat explained her opposition to storing switches at junk dealers and car recyclers:

> The materials that were passed out previously also make reference to the issue of storage of mercury at various junk dealers and car recyclers. I want to make some points about that as well. I think the indication there was that there would be some *very onerous requirements on either auto dealers, junkyard owners, or auto recyclers, that would be a tremendous burden on them*, based on the number of mercury switches that would have to be saved.

Legis. Record (Senate) (April 2, 2002), S-1853 at p. AA000858 (Remarks of Sen. Treat), (emphasis added).

Senator Martin, one of the legislation's sponsors, explained the rationale for prohibiting the use of dealerships as consolidation centers:

> "[I]t deals with the question of making sure that the *car dealers in Maine do not have to be collection agents*, because they requested that this be the case."

Legis. Record (Senate) (April 2, 2002), S-1859 at p. AA000864 (Remarks of Sen. Martin) (emphasis added).

Senator Goldthwait recounted an e-mail from a constituent named Jeff:

> [H]is words put it better then mine could. It says, "I own a junkyard. This is about mercury switches. We follow the law. We don't have any organization any more to watch what goes on in the state capital, but we had guys at those meetings the DEP held on mercury switches and we know who was going to have to take them out. * * * We like the idea of getting $1 for each one. I guess that's better than nothing. We don't like the idea that every company that makes cars is going to set up a place for us to take the switches. * * * I want one box for all the switches and take them to one place where no one cares if I cut them from a Ford or a Chevy. * * * We really don't want to deal with DEP, but it's better than dealing with 13 different car models and different rules for each one."

Legis. Record (Senate) (April 2, 2002), S-1854 at p. AA000859 (Remarks of Sen. Goldthwait).

Replying to Senator Goldthwait's remarks, Senator Martin expressed his sympathy and support:

> I don't know who Jeff is, but he certainly had his antenna [*sic*] dealing with the car manufacturers. * * * We are trying to keep things so that the *employers and manufacturers and business owners in this state* will not have to pay more fees.

Legis. Record (Senate), April 2, 2002 at S-1854, 1855, pp. AA000859, 860 (emphasis added) (Remarks of Sen. Martin).

When the House debated L.D. 1921, its Members expressed similar sentiments. Representative Cowger, one the sponsors in the House, noted that:

> [T]he basic premise of this program [in the Majority Report] is to establish a bounty on mercury switches that are found in our cars and provide that bounty as an incentive for auto salvage yards and junkyards to remove these switches. * * * [I]t is an easy process, but we need to provide incentives to get the salvage yards to participate.

Legis. Record (House), April 3, 2002, H-2084 at p. 925 (Remarks of Rep. Cowger). He also highlighted the central point, which was that "[t]his bill is supported by auto recyclers, salvage yards *in your districts* and also scrap metal recyclers in Maine." *Id*. (emphasis added). He concluded by pointing out that:

> [i]t is the person operating the junkyard that will pop out the switches and they will get paid $1 per switch. *Current law would require them to remove the switches because they do contain mercury* and it wouldn't allow them to get paid anything for it. That is why they like this bill.

Id. at p. 928 (emphasis added).

To drive home the point that L.D. 1921 was favored by local interests, Representative Twomey identified approximately two dozen Maine constituent groups that supported it. Legis. Record (House) (April 3, 2002), H-2084 at pp. 927-28 (Remarks of Rep. Twomey).

At the end of the process, Maine enacted a law that is unique. It is the only law in Maine – and perhaps nationally – that requires one industry to pay a second industry to do something that the second industry is already required by law to do. L.D. 1921 differs from the mercury product programs applicable to other industries, in that it focuses on the manufacturers of products that are not inherently harmful, rather than on the businesses and individuals whose conduct may actually cause the mercury in those products to be released to the environment. Thus, although all concerned acknowledge that the mercury contained in vehicles switches does not enter the environment during the vehicle's use, and does not enter the environment even at the end of a vehicles' life unless an unrelated third party acts unlawfully, L.D. 1921 imposes a series of unparalleled requirements on manufacturers:

- No industry except the motor vehicle industry is required to establish consolidation centers at which products can be returned at the end of their useful lives.

- No industry except the motor vehicle industry is required to pay a "bounty" to induce people to comply with existing waste disposal laws and regulations.

- No industry except the motor vehicle industry is required to accept responsibility (and liability) for its products when they are discarded.

Argument

The Alliance of Automobile Manufacturers brings this case pursuant to settled principles of organizational standing, on its own behalf and on behalf of its members. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333 (1977); *Maine People's Alliance v. HoltraChem Mfg. Co.*, 211 F. Supp. 2d at 252-254.

Under the familiar standard of Rule 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "A factual dispute is material if it has the potential to affect the outcome of the litigation under the applicable law; it is genuine if there is evidence sufficient to support rational resolution of the point in favor of the nonmoving party." *DeNovellis v. Shalala*, 124 F.3d 298, 305 n.3 (1st Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). This case is manifestly ripe for summary judgment. The challenged provisions[5] are discriminatory on their face, and the legislative history and contemporaneous documents (as well as Defendant's pleadings and discovery responses in this case) make it clear beyond genuine dispute that the state legislature intended to transfer as much as possible of the burden and responsibility of its new law from its own constituents to out-of-

[5] Section-by-section review is appropriate because, by statute, Maine instructs that its legislation is severable. 1 M.R.S.A. § 71(8). Moreover, because the legislature assembled L.D. 1921 in modular fashion, taking some features from the DEP proposal while replacing others with wholly new provisions, it is especially appropriate to parse this law one section at a time.

state interests. Any facts that might be contested are tangential or wholly immaterial to the questions the Court is called upon to decide.

The State has not identified a single legitimate governmental interest motivating the challenged provisions. Moreover, of the stated government interests, all could be achieved by less discriminatory measures (such as simply enforcing the law against its domestic businesses) and none is rationally related to any such interest. Purely as a matter of law, Plaintiff is entitled to judgment.

I. <u>The Challenged Provisions of L.D. 1921 Violate the Commerce Clause</u>

Article I, Section 8 of the U.S. Constitution (the "Commerce Clause") provides that "[t]he Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 1, 3. At least since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), it has been clear that the Commerce Clause not only authorizes "Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force create[s] an area of trade free from interference by the States." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370 (1976) (citing *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)). This recognition reflects the Framers' view "that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

Under the "dormant" Commerce Clause, *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the Supreme Court and other federal courts have adopted a two-tier analytical approach. First, statutes that discriminate against out-of-state interests facially, in practical effect, or in purpose, are subject to "a virtually *per se* rule of invalidity." *Wyoming v. Oklahoma*, 502 U.S. 437, 454-455 (1992) (internal quotations and citations omitted). When a state statute discriminates against interstate commerce, "it will be struck down * * * unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism," *id.*, which "cannot be served through non-discriminatory means." *Starlight Sugar Inc. v. Soto*, 114 F.3d 330, 331-332 (1st Cir. 1997); *see also, United Egg Producers v. Department of Agriculture*, 77 F.3d 567, 571 (1st Cir. 1996); *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206, 214 (1st Cir. 1994). "Discrimination" in this context means the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99.

Second, state laws that impose only an indirect burden on interstate commerce are invalid if that burden is "clearly excessive in relation to the putative local benefits." *C&A Carbone*, 511 U.S. at 389-390 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Strict scrutiny is particularly appropriate in cases like this one, in which the political process cannot be expected to produce even-handed legislation. The total absence of any automobile manufacturers in Maine, combined with the unique nature of the domestic Maine industry that handles end-of-life vehicles, made it possible for the Maine legislature to manipulate the originally proposed bill in ways that transfer the costs of compliance to out-of-state interests. The fact that the scrap yards – whose acts and omissions can release mercury into the environment – are unwilling to pay for a program to prevent such releases is one indication that the legislation is suspect. The fact that those required to pay for the program are not even in the industry causing the release of mercury is a second indication. And the fact that those who must pay for the program are all out of state and unrepresented in the Maine legislature confirms the failure of normal political safeguards.

The Supreme Court's analysis of state statutes affecting interstate commerce includes an understanding that the normal role of state lawmakers is to protect and promote the interests of their own constituents. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-5, at 1051 (3d ed. 2000). The Court has therefore "viewed with suspicion any state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state's political process." *Id.* at 1052. *See also Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-768 n.2 (1945) ("[T]he Court has often recognized that to the extent * * * the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"). As two distinguished commentators have explained:

> [A] broader scope for judicial review should exist in those cases where the legislative judgment seeks to impose the costs of the law on those who have no effect on the political process. A narrower scope of judicial review is appropriate when the costs of the legislation will be paid by those who have the ability to influence the legislative process. The fact that those who are subject to the legislation are willing to pay its costs is good evidence that the legislation is worthwhile. Courts should, therefore, be more willing to defer to the legislature and to the democratic processes in such circumstances. The inner political check helps make judicial review less inconsistent with majoritarian, democratic rule, for it argues for a less active review in those instances where the democratic process is more likely to work the best.

2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 11.11, at 192 (3d ed. 1999).[6]

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[6] The absence of the normal safeguards in the legislative process makes L.D. 1921 different from the line of cases that involves an arguable analogy, state laws requiring

(cont'd)

A. The Challenged Provisions Are Invalid Per Se

1. Bounty Provision

Section 5B requires manufacturers of "motor vehicles sold in this State that contain mercury switches or mercury headlamps" to "[p]ay a minimum of $1 for each mercury switch brought to the consolidation facilities as partial compensation for the removal, storage and transport of the switches." 38 M.R.S.A. § 1665-A.5.B. On its face, this provision forces out-of-state businesses to pay local businesses to comply with a local law. And the State's discovery responses confirm that this provision is intended to transfer money from outsiders to in-state businesses: "[b]y adding a bounty to the mercury-containing switches, they become valuable

(… cont'd)

bottle deposits and returns ("Bottle Bills"). Although certain take-back laws relating to returnable, multi-use deposit bottles have been upheld under Commerce Clause challenges, those laws all plainly imposed even-handed burdens on in-state and out-of-state businesses. *See, e.g., Park & Shop Markets Inc. v. City of Berkeley*, 172 Cal. Rptr. 515 (Ct. App. 1981); *Mid-State Distributing Co. v. City of Columbia*, 617 S.W.2d 419 (Mo. Ct. App. 1981); *Bowie Inn, Inc. v. Bowie*, 335 A.2d 679 (Md. 1975); *American Can Co. v. Oregon Liquor Control Comm'n*, 517 P.2d 691 (Or. Ct. App. 1973).

Notably, none of the Bottle Bill cases involve discrimination against interstate commerce, since Bottle Bills involve local supermarkets and bottlers in the collection systems – the very sorts of local businesses that L.D. 1921 carefully shields. The courts that have upheld a Bottle Bill have carefully explained that the legislation imposed consistent burdens on in-state and out-of-state companies. *See American Can*, 517 P.2d at 703 ("The bottle bill is not discriminatory against interstate commerce and is not intended to operate to give Oregon industry a competitive advantage against outside firms."); *Bowie Inn*, 335 A.2d at 688 ("The Bowie ordinance, though it may have some effect on bottlers outside of Maryland, does not discriminate against them. It affects all bottlers and distributors, whether in or out of this State, equally."); *Mid-State Distributing*, 617 S.W.2d at 430 ("The [Bottle Bill] does not discriminate between interstate and intrastate commerce. It regulates evenhandedly by applying the deposit-refund requirements to all the containers within its scope without regard to whether they are from inside the state or outside.")

items for removal by ELVs just like the batteries and other items presently removed by the dismantlers." (Defs. Resp. at Resp. No. 6).

The State has articulated two purported justifications for the bounty requirement. The first can fairly be described as an assertion that manufacturers brought it on themselves. Not only are mercury switches unnecessary, according to the State, but manufacturers "continued to use mercury switches in the United States after terminating their use in Europe with full knowledge of the problems mercury posed to human health and the environment." *Id*. Moreover, manufacturers' "own prior reluctance to using door post labels on new automobiles that have mercury-containing components," as well as their general "opposition" to earlier legislation, led to "the request from the Legislature for a comprehensive plan on mercury-added automobile components, which in turn resulted in the passage of L.D. 1921." *Id*.

To this attempted justification there are several answers. It is true that manufacturers continued to sell vehicles with mercury switches in Maine after Sweden banned their use. But as the State has conceded (*supra* pp. 6-7), mercury switches are not dangerous products during their useful lives. And those sales in Maine were lawful when they occurred:

> Q. Prior to passage of L.D. 1921, did Maine prohibit the sale of mercury containing electrical switches?
>
> A. Prior to passage of L.D. 1921?
>
> Q. Yes?
>
> A. No.

See Lennett Dep. at p. 79 lines 4-8. And even today, motor vehicles (as well as a host of other products) contain components like mercury switches, which are not dangerous during their useful lives, but which could be harmful if disposed of inappropriately. Indeed, the vehicle itself can be dangerous in the hands of an incompetent or intoxicated driver. The mere fact that irresponsible – and, in the case of mercury switches, unlawful – behavior by someone else can cause mercury to be released to the environment is no justification for imposing costs on the manufacturers of otherwise safe and useful products. It is peculiar policy, to say the least, to require a law-abiding business to pay a second business not to violate the law.

Peculiar legislation is, of course, not unconstitutional just because it is peculiar. If a strange law applied even-handedly to in-state and out-of-state interests, the Commerce Clause would not be implicated. But the Maine Legislature did all it could to excise any provision of the original DEP bill that would have financially impacted Maine business. *See supra*, pp. 12-16. Where, as here, the law is *not* even-handed, something more is required to prevail against a Commerce Clause challenge: there must be "a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. at 454 (citing *Maine v. Taylor,* 477 U.S. 131 (1986)). An argument that seeks to justify taking money from law-abiding out-of-state companies whose product is not inherently harmful, and giving the money to in-state companies that might otherwise misuse the product and violate the law, does not qualify as "a valid factor."[7]

The second general category of proffered justification for the bounty requirement is the notion that scrap yards will not comply with the requirement to remove mercury switches without a financial incentive. This justification was voiced during the legislative debates, *see supra,* pp. 14-16, and also in the State's discovery responses. End of Life Vehicle businesses

[7] The final facet of the State's "you-brought-it-on-yourselves" argument is the suggestion that manufacturers' earlier lobbying efforts irritated the legislature, and the legislature retaliated. This argument comes perilously close to suggesting that L.D. 1921 is a Bill of Attainder. *See Consolidated Edison Co. v. Pataki*, 292 F.3d 338 (2d Cir.), *cert. denied,* 123 S. Ct. 619 (2002). While this line of argument appeared in the State's discovery responses, we do not expect the State to present it in its briefs in this Court. If it does, we will respond more fully in our answering brief.

were said to "range substantially in sophistication." *See* Defs. Resp. at Resp. No. 6. Those businesses apparently pose "enforcement challenges," although the State's witness declined to be direct when pressed on what that meant:

> Q. What did you understand them to mean when they said this industry posed enforcement challenges?
>
> A. What I explained to you before. In all candor this is not a new fact. I don't think that you will – this is a very difficult sector to deal with and this is not news or information to those of us who live in Maine. You see this from time to time.
>
> Q. In plain English, they just don't comply with the law?
>
> A. It's not a universal – I'm not saying every junk yard is in this category because people move in and out of that sector. As a sector it is particularly challenging from an enforcement perspective and it's not one the department [of Environmental Protection], as I said before, has principal authority. So the municipalities are principally responsible for regulating them.
>
> Q. Has the department sought enforcement authority over them?
>
> A. No.

Lennett Dep. at p. 50 lines 7-25.

To this enforcement-is-difficult justification there is a complete answer: the State cannot possibly know, because it has never tried. It has *never* brought an enforcement action of any kind against a scrap yard over mercury (*see* Defs. Resp. at Resp. No. 1), despite the fact that it has authority under its general environmental laws to do so and has apparently brought cases over other substances:

> Q. What is your understanding of what the EL[V] industry does with a car that comes in that no longer runs and is at the end of its life?
>
> A. Well it depends on the operation, some are pancaked. They should be removing the fluids first of all, taking basic steps.
>
> Q. Why?
>
> A. So the fluids don't wind up on the ground.

Q. And the fluids are gasoline?

A. Yes.

Q. Oil?

A. Yes.

Q. Windshield washer compounds?

A. Yes.

Q. Brake fluids?

A. Yes.

Q. Things of that nature?

A. Yes.

Q. Is there any requirement that your department has that they do that?

A. There is a prohibition against the discharge, the general discharge prohibition.

Q. Are you aware of any enforcement programs to ensure that that occurs, that your department –

A. We have from time to time taken enforcement action against junk yards, depending on the severity of the situation. In fact I believe we have one, a criminal case pending against one junk yard operator that may be ongoing this week, to the best of my knowledge.

Id. at p. 51 line 13 – p. 52 line 16. Having never applied its "general discharge prohibition" to enforce the requirement that mercury be handled appropriately, the State is in no position to argue that enforcement is ineffective[8].

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[8] Given the lack of any enforcement history from which empirical data could be drawn, it is not surprising that there is not much record evidence on the effectiveness of enforcement. But there is testimony from one witness who "worked for EPA for many years. I believe there's a way to set up an enforcement program that would be effective and could work requiring dismantlers to remove switches." Deposition of Gregory Dana, Feb. 13, 2003 ("Dana Dep."), at p. 55 lines 20-23 (attached as App. __). More broadly,

(cont'd)

Maine should know, better than other States, that under the Commerce Clause when one of its laws discriminates between in-state and out-of-state interests, it faces a "burden * * * to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U. S. at 138 (internal quotations omitted). In *Taylor*, the State successfully defended a law that prohibited interstate shipment of baitfish only by proving, though the testimony of two experts, that nothing short of an outright ban would be effective. *Id.* at 140-143. Here it offers neither empirical evidence nor expert testimony as support – merely the assertion that Maine scrap businesses will ignore the law.[9]

The bounty provision of L.D. 1921 is thus neither related to a legitimate local purpose, nor the only option because nondiscriminatory means are unworkable. It should be declared unconstitutional as a violation of the Commerce Clause.

2. Consolidation Facilities

L.D. 1921 requires manufacturers to "establish and maintain consolidation facilities * * * to which mercury switches removed pursuant to this section may be transported by the persons performing the removal." 38 M.R.S.A. § 1665-A.5.A. Like the bounty requirement, this is a provision directed exclusively at out-of-state businesses.

(… cont'd)

the implicit understanding in every regulatory statute is that enforcement promotes compliance. It is more than a little odd that the State would suggest otherwise.

[9] To the extent the State points to its lack of regulatory authority over scrap yards, it is bootstrapping. If getting mercury switches out of vehicles before recycling were a priority, the State could plainly choose to confer primary enforcement jurisdiction on its Department of Environmental Protection.

The State's justification for requiring the consolidation facilities is straightforward: "[b]ut for the creation of consolidation facilities, ELVs would have to contract with * * * out-of-state mercury recycling facilities and transport removed switches to these facilities." Defs. Resp. at Resp. No. 6. "By having a small number of consolidation facilities, the switches can be consolidated to facilitate cost effective transport out-of-state for the recycling of the mercury." *Id*.

For Commerce Clause purposes, these "justifications" are tantamount to a confession of judgment. They amount to a concession that the sole purpose was to provide in-state businesses with a convenient and low-cost (or no-cost) means of meeting their obligations under the new law, at the expense of out-of-state businesses. The Commerce Clause precludes Maine from affording such discriminatory treatment.

3. Protection of In-State Automobile Dealerships

"A consolidation facility may not be a facility that is licensed in the State as a new or used automobile dealership." 38 M.R.S.A. § 1665-A.5.A. This provision, added by floor amendment in the State Senate, was added for one simple reason: "the car dealers in Maine * * * requested that this be the case." Legis. Record (House) (April 3, 2002), at S-1859 (Remarks of Sen. Martin).

There is no technical reason why dealerships cannot serve as consolidation centers:

Q. Is there anything inherent in the operation of the automobile dealership business that would preclude functioning as a consolidation facility?

A. Do you mean is it out of the realm of possibility?

Q. Yes?

A. No, it's not out of the realm of possibility.

See Lennett Dep. at p. 70 lines 9-14. Indeed, DEP has subsequently allowed an automobile dealership to volunteer as a consolidation facility for switches from trucks, and has explained that the dealership provision

> was added to the legislation by Senate amendment after the bill had emerged from the Legislature's Natural Resources Committee with an ought-to-pass recommendation. The amendment was in response to concerns raised by the Maine Automobile Dealers Association (MADA).
>
> * * *
>
> The purpose of the Senate amendment was to forestall MADA opposition to the bill by adding language that prohibits automakers from using a dealership as a consolidation facility *against the dealer's wishes*. The amendment was not intended to bar a licensed dealership from voluntarily stepping forward to provide this needed service.

Letter from DEP to Truck Manufacturer's Association, July 25, 2002 (emphasis in original) (attached as App. 15).[10]

The State has candidly admitted that the dealership provision was inserted to protect local businesses from a local law. It, too, violates the Commerce Clause.

4. Segregation of Switches

> In complying with the requirements of this subsection, manufacturers of motor vehicles shall establish a system that does not require a person who removes a mercury switch to segregate switches separately according to each manufacturer of motor vehicles from which the switches are removed.

38 M.R.S.A. § 1665-A.5. As the legislative debates discussed earlier make clear, (*supra*, at pp. 14-16), this provision was added at the request of scrap yards, which did not want to keep track

[10] The automobile dealership discussed in this July 25, 2002 letter is in fact being used as a consolidation facility. James Dep. at p. 30 lines 9-11.

of whether "I cut them from a Ford or a Chevy." Legis. Record (Senate) (April 2, 2002), at S-1854 (Remarks of Sen. Goldthwait). Convenience of local businesses is the only justification the State has offered. That this convenience comes at a price to manufacturers – which find it that much more difficult to do a proper accounting among companies – was of no moment to the Maine legislature, but is significant for Commerce Clause purposes. It is a final example of the ways in which L.D. 1921 is skewed in favor of local interests and against out-of-state companies.[11]

B. The Challenged Provisions Impose An Undue Burden On Interstate Commerce

In the alternative, the four challenged provisions impose a burden on interstate commerce that is disproportional to the local benefits. As such, they are invalid even under the balancing test of *Pike v. Bruce Church, supra*.

There are only four aspects of L.D. 1921 under a Commerce Clause challenge in this case, so it is only the costs and benefits associated with those specific provisions that are genuinely at issue. Thus neither the costs nor the benefits of the provision that requires removal of mercury switches before a vehicle is recycled is properly part of the equation. Neither are the costs and benefits of the prohibition against the sale of new vehicles that contain mercury switches, nor the costs and benefits of requiring labels on vehicles with mercury components. While we anticipate that the State and its *amici* will devote substantial arguments to all of those points, none of them has any bearing on the issues the Court is called upon to decide.

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[11] To be sure, some of this inconvenience is alleviated by DEP's willingness, in the implementation of L.D. 1921, to allow manufacturers to require scrap yards to submit Vehicle Identification Numbers for the switches they bring to consolidation centers. The statutory provision nonetheless remains significant – and should be invalidated – because it is an example of unvarnished economic favoritism.

Instead, the proper focus is on the costs and interstate commerce of the bounty, consolidation facility, protection of dealerships, and non-segregation of switches sections. As we have shown, the only benefit on those provisions is the constitutionally illegitimate benefit of protecting local business. The costs, however, are real.

Uncontracted evidence estimates the annual cost of complying with the challenged provisions of L.D. 1921 as follows (Plaintiff's Designation of Expert Witnesses ("Expert Designation"), at pp. 3-5 (attached at App. 20)):

- bounty payments $35,000
- administrative payments to operator of consolidation centers $35,000
- administrative costs to individual companies, including the cost of monitoring the performance of the consolidation $50,000

These estimates are in addition to the startup costs associated with locating and contracting with the consolidator in advance of the January 1, 2003 effective date of L.D. 1921, or the cost of staff time at manufacturers spent to analyze and comply with L.D. 1921. These latter, one-time costs are estimated to exceed $200,000. *Id*. These estimates stand unrebutted and uncontradicted in the record.

For Commerce Clause purposes, there is no benefit to weigh against these costs. Any constitutionally legitimate benefits of L.D. 1921 derive from parts of the law that are not challenged, such as the requirement to label vehicles with mercury components, and the requirement to remove mercury switches before a vehicle is recycled. Any benefits that result from those provision will remain, regardless of the outcome of the case. The only benefits that would be affected would be the impermissible benefit conferred on local businesses at the expense of out of state manufacturers.

Nor should the costs associated with L.D. 1921 be viewed in isolation. If one State may require manufacturers in Michigan, Japan, Germany and the United Kingdom to go into the recycling business and pay bounties, "so may other States." *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982); *see also American Trucking Assns v. Scheiner*, 483 U.S. 266, 285 (1987) (striking down a state statute on Commerce Clause grounds in light of the "manifold threats to the national free trade area" that would result for similar legislation elsewhere). Additional uncontradicted evidence provides an indication of what L.D. 1921-like statutes would cost annually if enacted by additional States (*see* Expert Designation, *id*.):[12]

• Florida	$615,000
• Texas	$759,000
• New York	$580,000
• California	$1,495,000

The prospect of such additional legislation is entirely plausible: since the enactment of L.D. 1921, Maine DEP has fielded approximately 15 inquiries from other States about the new law. *See* James Dep. at p. 19 lines 14-15.

Finally, the parochial bias evident in L.D. 1921 is a relevant consideration in the Commerce Clause analysis. Maine hosts no motor vehicle manufacturing facilities. *See* 2002 Wards, *id.* at AA001813 When Maine regulates industries that are significant local players, such as hospitals, dentists, and dairy farms, it regulates with a substantially lighter hand. *See supra*, at

[12] All of these estimates simply project the costs in the other States in linear fashion, based on the number of vehicles in each State. *Id*. This is a conservative approach that understates the likely true cost. Cullum Dep., p.180 line 11 – p. 181 line 7.

pp. 11. The Supreme Court has repeatedly considered factors such as economic protectionism when evaluating burdens on interstate commerce. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Res.*, 504 U.S. 353, 361-363 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 626-628 (1978).

II. <u>The Challenged Provisions Violate the Due Process/Equal Protection Clauses</u>

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 3, 4. Judicial application links these two clauses in cases challenging economic legislation. Substantive due process review applies to government actions restricting the "life, liberty or property" of all persons, while the equal protection analysis applies to review of a governmentally established classification. *See, e.g.*, 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.4, at 596 (3d ed. 1999). Since 1937 the Supreme Court has applied an equal protection analysis in most challenges to "economic and social welfare" legislation. *Id*. at 597. But regardless of whether a court applies a substantive due process or equal protection analysis, the same standard of review applies: the state statute will be upheld only so long as it is rationally related to a legitimate state interest. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Fireside Nissan Inc. v. Fanning*, 30 F.3d 206, 219 (1st Cir. 1994).

No court has yet addressed a state law quite like L.D. 1921. There is thus no controlling authority on whether a state may, consistent with Equal Protection and Due Process constraints, redistribute the costs and administrative burdens associated with implementation of a state statute from an in-state industry to a separate, distinct, unrepresented out-of-state industry. However, the cases make clear that a state law designed to protect a local industry "fails to further a legitimate government objective." *Starlight Sugar*, 909 F. Supp. at 861 (quoting *Fireside Nissan*, 303 F.3d at 219); *Metropolitan Life*, 470 U.S. at 880; *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494 (1926). The four challenged provisions of L.D. 1921 do, and are designed to do, precisely that.

In *Metropolitan Life*, insurance companies incorporated outside of Alabama sought a declaration that an Alabama statute imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies was a violation of the Equal Protection Clause. Flatly denying Alabama's assertion that promotion of a domestic industry at the expense of out-of-state industry is a legitimate state interest, the Court explained that "[t]he validity of the view that a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence is confirmed by a long line of this Court's cases so holding." 470 U. S. at 878 (citations omitted). The Court went on to hold that "promotion of domestic business within a State, by discriminating against foreign corporations * * * do[ing] business there, is not a legitimate state purpose." *Id*. at 880.

Similarly, *Starlight Sugar* involved an equal protection challenge to a regulation discriminating against sugar grown outside of Puerto Rico and favoring sugar grown within Puerto Rico. "Regulation 13" restricted the importation of refined sugar to Puerto Rico by prohibiting the repackaging of bulk shipments into two and five pound bags for subsequent direct sale to consumers. 909 F. Supp. at 856. While Regulation 13 was not an absolute prohibition on the importation of refined sugar – sugar still could be imported in pre-packaged two and five pound bags – that type of importation was not economically feasible. *Id*.

Analyzing Regulation 13 under the rational basis test, the District Court determined:

> Regulation 13 distinguishes between local producers of sugar and out-of-state producers who wish to import. The former can pack sugar for direct sale to consumers while the latter cannot. The Secretary asserts that this distinction is made in order to protect the local sugar industry. *** As we have seen, however, this is not a legitimate government objective.

Id. at 861 (internal quotations and citations omitted), *aff'd*, 114 F.3d 330, 331 (1st Cir. 1997) ("Upon careful consideration of the briefs, arguments of counsel, and the record in this case, we find no abuse of discretion and no error of law, and therefore *affirm* in light of the sound reasons provided in the district court's thorough opinion").[13]

The challenged provisions of L.D. 1921 plainly favor in-state industry at the expense of out-of-state business. They redistribute the costs and administrative burdens associated with handling and recycling mercury-containing switches, from the Maine scrap yards that are legally responsible for removing the switches (and whose misconduct is a prerequisite for mercury to be released) and the Maine car dealerships capable of recycling the switches, to out-of-state automobile manufacturers that lawfully sold vehicles containing those switches.

The Equal Protection clause ordinarily contemplates that the state's political process will guard against discriminatory legislation. *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process."); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) (for protection against abuses by legislatures, people must resort to the polls, not the courts); *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 533 (1959) (for relief from

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13 The subsequent First Circuit opinion in this case, addressing the issue of qualified immunity from damages for the official who had enforced the unconstitutional law, is at 253 F.3d 137 (1st Cir. 2001).

state statutes discriminating against government classifications, "it is proper to say that any relief forthcoming must be obtained from the State Legislature") (Brennan, J., concurring). But in this case the Maine Legislature has exploited the fact that none of the automobile manufacturing companies are Maine companies, and all of the Maine scrap yards and automobile dealerships are, by definition, local. The political restraints that normally ensure that legislation is even-handed are absent here. Such favoritism for local business, at the expense of out-of-state industry, is prohibited by the Equal Protection and Due Process Clauses, and federal courts have not hesitated to invalidate state statutes on those bases. *Metropolitan Life*, 470 U.S. at 880 (The "promotion of domestic business within a State, by discriminating against foreign corporations * * * doing business there, is not a legitimate state purpose.") (citing *Allied Stores*, 358 U.S. 532-533 (Brennan, J., concurring)).

A. Bounty Provision

L.D. 1921 requires motor vehicle manufacturers to pay local scrap yards a bounty for each mercury switch delivered to a consolidation facility. 38 M.R.S.A. § 1665-A.5.B. As we discussed in the Commerce Clause arguments, the bounty provision favors in-state businesses at the expense of out-of-state companies: on its face the provision requires out-of-state businesses to provide in-state scrap yards with a direct financial incentive for complying with a legal obligation.

Maine scrap yards could be tracked and subject to enforcement for failing to properly remove mercury-containing switches in the scrapping of used vehicles. However, rather than enforce those provisions of L.D. 1921 applicable to in-state scrap yards, the Maine legislature instead attempted to ensure compliance through financial incentives funded by out-of-state companies. *See* Defs. Resp. at Resp. No. 6 ("By adding a bounty to the mercury-containing switches, they became valuable items for removal by ELVs just like the batteries and other items presently removed by the dismantlers"). By its own admission, the bounty provision resulted from Maine's belief that many of its scrap yard operators would not comply with the removal requirement. *See, supra,* at pp. 23-25.

The requirement that out-of-state automobile manufacturers pay a bounty to ensure that local scrap yards actually remove the mercury-containing switches as required by L.D. 1921 promotes Maine's parochial interests by discriminating against out-of-state businesses. Thus, it serves no legitimate state interest and should be invalidated under the Equal Protection Clause. *See Allied Stores v. Bowers, supra*.

B. Consolidation Facilities

At the time the Maine Legislature considered L.D. 1921, a number of consolidation facilities for mercury-added products already existed within Maine. *See* Defs. Resp. at Resp. No. 4. Moreover, the operators of these consolidation facilities were aware of and were already subject to Maine's Universal Waste Rules – rules developed to include requirements for the handling of mercury-added products. *Id.* There is no reason to assume that existing consolidation facilities – *i.e.*, facilities specifically in the disposal/recycling business – could not properly address the bounty and recycling/disposal obligations of L.D. 1921.

Maine admits that the mercury in switches must be recycled at out of state facilities since no such facilities presently exist in Maine. *Id.* at Resp. No. 6. In fact, the legislature's motivation in requiring the automobile industry to establish contracts for consolidation facilities is to shift the burden associated with collecting and shipping the mercury-containing switches away from in-state facilities and onto the out-of-state automobile manufacturers. *Id*. ("But for the creation of consolidation facilities, ELVs would have to contract with these out of state mercury recycling facilities and transport removed switches to these facilities. There are a large number of ELVs and they range substantially in sophistication").

The provision requiring the automobile industry to establish consolidation facilities is, therefore, an obligation "imposed by the State on foreign corporations doing business within the State solely because of their residence, presumably to promote domestic industry within the State." *Metropolitan Life*, 470 U.S. at 879. A statute that "seeks to benefit domestic industry within the State only by grossly discriminating against foreign [industry]," clearly violates the Equal Protection clause. *Id*. *See also WHYY v. Glassboro*, 393 U.S. at 119-120 (upholding proposition that a state may not constitutionally promote its own industry by burdening foreign corporations).

C. Protection of In-State Automobile Dealerships

L.D. 1921 prohibits use of "a facility that is licensed in the State as a new or used automobile dealership" as a consolidation facility. 38 M.R.S.A. § 1665-A.5.A. By its express terms, this provision favors in-state business interests to the detriment of out-of-state companies. Moreover, the legislative history of this section indicates an intent to benefit in-state car dealerships at the expense of out-of-state automobile manufacturers.

This case is similar to *Starlight Sugar*, in which the First Circuit affirmed a decision invalidating Puerto Rico's attempt to favor in-state sugar manufacturers at the expense of out-of-state companies. *Starlight Sugar v. Soto,* 909 F. Supp. 853 (D.P.R. 1995), *aff'd*, 114 F.3d 330 (1st Cir. 1997). The *Starlight Sugar* statute also involved the ability of in-state companies to assume the burden of assisting out-of-state companies comply with legislative requirements. In *Starlight Sugar*, the out-of-state sugar producers could have imported bulk raw sugar for subsequent refinement and packaging into two and five pound bags. However, the only sugar refinery in Puerto Rico was owned and operated by an in-state sugar corporation. Thus, while in-state sugar companies *could have* assisted out-of-state producers to comply with Regulation 13, the court recognized that the in-state corporation would not act contrary to its own best interests. 909 F. Supp. at 856. Similarly, while Maine has stated that L.D. 1921 only precludes Maine car dealerships from assuming the obligations relating to operation of a consolidation facility against the dealer's wishes, the express exclusion of Maine dealerships acts to shift all of the burdens associated with establishment and operation of a consolidation facility to the out-of-state companies.

D. Segregation of Switches

L.D. 1921 prohibits manufacturers from requiring scrap yards to segregate switches by manufacturer in order to facilitate allocation of the bounty. 38 M.R.S.A. § 1665-A.5.D. Unless the automobile manufacturers identify the source of the switch, it is difficult for them to allocate the cost of the bounty to the appropriate manufacturer. Moreover, although well aware of the scrap recycling industries' acknowledgement that it is "quite capable" of dealing with the switches at issue, *see* Lennett Dep. at Exhibit 10, p. 1 (attached at App. __), Maine nonetheless determined to place *all* of the burdens associated with handling and disposing of mercury switches on the out-of-state automobile manufacturers.

Maine's refusal to allocate even this minimal burden of segregating the switches by manufacturer to in-state businesses illustrates the discrimination by the Maine legislature against out-of-state business interests operating in Maine. Maine's actions violate the Equal Protection clause of the Fourteenth Amendment. *See Metropolitan Life*, 470 U.S. at 879 ("We agree * * * that a State's goal of bringing in new business is legitimate and often admirable. [We do not], however, hold that promotin of domestic business by *discriminating* against foreign corporations is legitimate.") (citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959)).

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be granted.

Respectfully submitted,

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One of Plaintiff's attorneys

Harold J. Friedman
Bruce Hepler
FRIEDMAN, GAYTHWAITE, WOLF & LEAVITT
6 City Center
Portland, Maine 04112
(207) 761-0900

Russell R. Eggert
Susan Charles
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

John T. Whatley
Julie C. Becker
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H. Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500