No. 45 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

WALTER J. WILLIAMS
14250 Plymouth Road
Detroit, Michigan 48232
FORREST A. HAINLINE, JR.
CROSS, WROCK, MILLER & VIESON
Penobscot Building
Detroit, Michigan 48226
Attorneys for Defendant American Motors Corporation

LLOYD N. CUTLER
LOUIS F. OBERDORFER
JAMES S. CAMPBELL
ROBERT A. GERARD
WILMER, CUTLER & PICKERING
900 - 17th Street, N.W.
Washington, D.C. 20006
JULIAN O. VON KALINOWSKI
PAUL G. BOWER
GIBSON, DUNN & CRUTCHER
634 South Spring Street
Los Angeles, California 90014
Attorneys for Defendant Automobile Manufacturers Association, Inc.

TOM KILLEFER
PAUL A. HEINEN
WILLIAM E. HUTH
Chrysler Corporation
340 Massachusetts Ave.
Detroit, Michigan 48231
G. WILLIAM SHEA
PHILIP K. VERLEGER
MCCUTCHEN, BLACK, VERLEGER & SHEA
30th Floor
3435 Wilshire Blvd.
Los Angeles, California 90010
Attorneys for Defendant Chrysler Corporation

WRIGHT TISDALE
Ford Motor Company
The American Road
Dearborn, Michigan 48121
ROBERT L. STERN
ROGER W. BARRETT
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
CARL J. SCHUCK
ERNEST E. JOHNSON
OVERTON, LYMAN & PRINCE
550 South Flower Street
Los Angeles, California 90017
Attorneys for Defendant Ford Motor Company

ROSS L. MALONE
ROBERT A. NITSCHKE
General Motors Building
Detroit, Michigan 48202
HAMMOND E. CHAFFETZ
JOSEPH DUCOEUR
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
Prudential Plaza
Chicago, Illinois 60601
MARCUS MATTSON
RICHARD F. OUTCAULT, JR.
LAWLER, FELIX & HALL
605 West Olympic Boulevard
Los Angeles, California 90015
Attorneys for Defendant General Motors Corporation

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INDEX

TABLE OF AUTHORITIES

Cases Page

Statutes

Federal

INDEX

TABLE OF AUTHORITIES

Cases Page

Statutes

Federal

State of California

Page

Page

Other

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INTRODUCTION AND SUMMARY

On August 5, 1970, fifteen States (subsequently joined by three additional States) moved this Court for leave to file an original action for injunctive relief against the four major motor vehicle manufacturers and the Automobile Manufacturers Association. The complaint is in three counts, one under the federal antitrust laws, one under the "common law" of conspiracy in restraint of trade, and one under the state laws of public nuisance. The main relief sought is mandatory installation of emission controls in new and used vehicles.

Defendants filed a brief in opposition to the motion on October 6, 1970. On February 12, 1971,

plaintiff States filed a supplemental memorandum in support of the motion. On August 31, 1971, an *amicus* brief was filed by the City of New York and sixteen additional states, of which none is a plaintiff here but fourteen are plaintiffs in parallel federal district court actions. This Court has set plaintiffs' motion down for oral argument. 402 U.S. 940.

Defendants are filing this supplemental memorandum primarily to discuss three developments that have occurred since defendants' brief in opposition was filed: (1) this Court's decision of March 23, 1971, in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493; (2) enactment on December 31, 1970, of the Clean Air Amendments of 1970 and the administrative actions recently taken under that law; and (3) the filing by many of the plaintiffs, in March of 1971, of identical or substantially similar complaints in the federal district courts. We also respond herein to several of the assertions contained in the *amicus* brief filed by the sixteen additional States and the City of New York.

In Part I of this Memorandum we show that the instant case fully satisfies the two *Wyandotte* tests for declining jurisdiction over an original action between a State and the citizens of other States. First, there are a number of other impartial forums available, in which any or all of plaintiffs' claims can be (and in fact are being) tried as fairly and expeditiously as they could be in this Court. Second, the ongoing regulation of the problem of vehicle emissions by federal and state legislative and administrative bodies is a cogent "reason of practical wisdom" for this Court to decline to assume the trial court role.

There are other cogent reasons as well. Trial of the equity claims in this Court, before the damage claims based on identical allegations by many of these same plaintiffs are tried by juries in the district courts, would conflict with this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). And resort to a Special Master to conduct the trial, as plaintiffs suggest to get around this Court's obvious inability to sit as a trier of testimonial fact, would violate the salutary principles of *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

As we show in Part II, the Clean Air Amendments of 1970 completed the structure, begun in 1965, of a comprehensive federal legislative program for reducing vehicle emissions to a minimal level by a time certain. Administrative action to execute this program is well under way. In *Wyandotte* the mere possibility of legislative and administrative relief was an important reason for this Court to decline jurisdiction. Here a comprehensive program of legislative and administrative relief is an ongoing fact.

Amici tacitly concede that this program parallels the plaintiffs' request that this Court order emission controls installed on new vehicles. But they contend that the prayer for mandatory "retrofit" of control devices on used cars is not affected. As we further show in part II, for the Federal Judiciary to impose a retrofit obligation is not only impracticable but is also likely to conflict with the program of vehicle emission control adopted by Congress. In the Clean Air Act and its subsequent amendments, Congress deliberately focused the federal effort exclusively on new vehicle controls and reserved all questions of

retrofitting controls on used vehicles to the judgment and regulatory power of each of the States.

In Part III we show that plaintiffs here, by filing actions in the district courts alleging that those courts have jurisdiction of counts identical with all the counts in the instant complaint, have demonstrated the lack of any need to impose the burden of trying these complex cases upon the tightly-rationed time of this Court.[1] Nor is there any merit in the suggestion of *amici* that this Court must nevertheless assume jurisdiction of the proposed complaint in order to give the plaintiff States the opportunity to proceed jointly in a single action. If plaintiffs in fact believed (as defendants do not) that a joint trial of all their claims is feasible, nothing prevented the entire group of plaintiffs and *amici* from seeking that result by filing a joint complaint in a single district court, as eight of them in fact did.

We also show in Part III that the complaints of *amici* over the progress of the ongoing district court litigation are unfounded, and that defendants are doing more to expedite the evidentiary phase of the pretrial proceedings than are the plaintiffs.

In sum, trial of this complex litigation as an original action in the Supreme Court would offer no advantages over trial in the lower federal courts and, if

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[1] All the plaintiffs and fourteen of the seventeen *amici* here are plaintiffs in lower court antitrust actions arising out of the same subject matter as the original action sought to be instituted in this Court. Some of these lower court antitrust actions also involve "common law conspiracy" and "nuisance" claims identical with those in the instant complaint.

need be for any state law claims, in the state courts.[2] Whatever relief plaintiffs can obtain in this Court they can obtain in those courts. Trial of the cases here could be a severe strain on the resources of this Court, with no assurance whatever that the proceedings could be completed more justly, efficiently or expeditiously than by trial in the courts created for trial purposes followed, if needed, by appeal in the ordinary course.

I. Following the principles of the recent *Wyandotte* decision, the Court should decline to assume original jurisdiction over the plaintiffs' proposed complaint.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (March 23, 1971), this Court declined to entertain Ohio's original action against American and Canadian chemical companies for pollution abatement.[3] The decision to decline jurisdiction was based on an analysis of the purpose of the Article III jurisdiction grant and on several practical considerations relating to the Court's paramount appellate role. The Court found that the policies underlying the grant of original jurisdiction were satisfied by the availability of an alternative and more desirable trial forum (401 U.S. at 500-01), and that substantial "reasons of practical wisdom" (*id.* at 499) for declining jurisdic-

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[2] Plaintiffs may have no need to resort to their state courts, since a number of them have alleged in their district court complaints that these courts have pendent jurisdiction over the state law claims. See pp. 7-8, *infra*.

[3] The complaint sought to stop the introduction of mercury into Lake Erie; to require the defendants to remove from the Lake mercury already introduced, or provide funds to the state for such removal; and to recover damages for the harm done to the Lake.

tion were furnished by the activities of federal and local legislative and administrative bodies, better suited than the Supreme Court to deal with the complex technical and political problems raised by the complaint. 401 U.S. at 502-03.

The principles adhered to by this Court in *Wyandotte* apply with even greater force to the present motion.

1. *The Availability of Other Forums*

The Court in *Wyandotte* noted that Article III granted original jurisdiction to the Supreme Court in order to afford an impartial forum to a State seeking redress against citizens of another State where the courts of that other State might be—or appear to be—partial to their own citizens, and no other impartial forum was available. 401 U.S. at 500. In *Wyandotte*, where the complaint was grounded on an alleged violation of the state law of Ohio, the Court found that this Constitutional policy was not "implicated" by Ohio's complaint because at least one suitable alternative forum was, in fact, available—namely, Ohio's own state courts.

The instant case, of course, presents both federal and state law claims. As to the former, since plaintiffs plead a *federal* cause of action (namely, a violation of the federal antitrust statutes), the district courts have explicit jurisdiction over the antitrust claim. 28 U.S.C. § 1337 (1964). Where they had valid claims, many States have sought and obtained effective antitrust relief in actions filed in the district courts,[4] and as we discuss further in Part III below,

[4] See cases cited in defendants' Br. in Opp. at 16, n.20. *Amici* repeatedly assert that a State unable to sue in its own courts (as on a federal antitrust claim) "should not be

the plaintiff States have now filed district court actions asserting the very same antitrust claim they present here. These suits, filed in the district courts of many plaintiff States by the States themselves, obviously do not subject the States to the risk of a forum biased in favor of the defendants.

As for the nuisance claim presented in the third count of the plaintiffs' complaint, it is obvious that a plethora of state court forums not partial to defendants is available. Plaintiffs' state law nuisance claim can clearly be filed in their own state courts. Plaintiff States have advanced no reason why they cannot, if they prefer, file this claim jointly in the state courts of a single plaintiff State.

Moreover, in the jurisdictional allegations of essentially identical district court complaints (treated more fully in Part III of this memorandum), a number of the plaintiffs here have pleaded that the same district courts hearing plaintiffs' antitrust claim have pendent jurisdiction to adjudicate the state nuisance law

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required to go anywhere else except this [Supreme] Court." Amici Br. at 9; also, at 6, 8. This is patently erroneous. It is well established that the availability of a federal district court affords a sufficient basis for this Court to decline to exercise its original jurisdiction. See *Massachusetts* v. *Missouri*, 308 U.S. 1, 19-20 (1930); *North Dakota* v. *Chicago & N.W. Ry.*, 257 U.S. 485 (1922). Cf. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 464-68 (1945). See also *Case* v. *Bowles*, 327 U.S. 92, 97 (1946); *United States* v. *California*, 297 U.S. 175, 187 (1936); *United States* v. *Louisiana*, 123 U.S. 32 (1887); and *Ames* v. *Kansas*, 111 U.S. 449 (1884) (U.S. Const. Art. III, § 2, gives Supreme Court original but not exclusive jurisdiction of cases in which a State is a party). A contrary rule could substantially increase this Court's docket.

claim pleaded in the third count of the instant complaint. *E.g.*, *Washington* v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.), Complaint, Count III, para. 1-2. As these allegations suggest, the federal district courts are also available to try plaintiffs' nuisance claim if it and the federal antitrust claim both derive "from a common nucleus of operative fact," *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). If not, the state courts remain available.[5]

In sum, the first of the *Wyandotte* tests—availability of alternative forums not partial to the defendants—is fully satisfied here.

2. *The Technical and Political Complexity of the Cause*

The second *Wyandotte* test for deciding whether to exercise jurisdiction is the existence of "reasons of practical wisdom" which make the Supreme Court an inappropriate forum for this kind of original action. The Court in *Wyandotte* began by noting that

> "the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth." 401 U.S. at 501.

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[5] If plaintiffs' second count, based on the "common law" of conspiracy, states a claim under federal law (as plaintiffs evidently believe, plaintiffs' Br. at 14-15), then the district courts obviously have jurisdiction under 28 U.S.C. § 1331 (as plaintiffs have pleaded below, *e.g.*, *Washington* v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.), Complaint, Count II, para. 1, 2). If, however, plaintiffs' second count is based on state law (see defendants' Br. in Opp. at 12), then under the *Gibbs* test there would appear to be pendent jurisdiction in the district courts. *Id.*

The Court referred to the "complex technical and political matters that inhere in all disputes of the kind at hand" (*id.* at 502). It observed that these difficulties were "severely compounded" by the fact that "a number of official bodies are already actively involved in regulating the conduct complained of . . . ." *Id.* Consequently, the Court concluded:

> "In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." 401 U.S. at 503.

Technical and political matters of even greater complexity inhere in the control of motor vehicle emissions. Although plaintiffs try to frame their case here in conventional antitrust terms, their principal effort is not to seek ordinary antitrust relief. Instead, what plaintiffs ask from this Court is a novel type of relief never before granted in an antitrust case. They seek a decree requiring defendants, *inter alia*, to (1) "adopt and pursue an accelerated program of spending, research and development" to produce "fully effective" emissions control devices or a "pollution free engine" (Complaint, Prayer, para. 2), and (2) install such control devices "as the Court deems reasonable and proper," at defendants' own expense, on all used cars built "during or following" the alleged conspiracy. *Id.*, para. 4.

As we demonstrate in Part II, any court attempting to grant and enforce such relief would thereby constitute itself as nothing less than a full-fledged regulatory agency, without the benefit of legislative standards or agency expertise. Leaving aside the

disputed question of the power of any court to grant such novel equitable relief, any such judicial intervention would be unnecessary and unwise in view of the ongoing efforts (described in Part II below) of the Legislative and Executive Branches of the Federal Government, along with the parallel efforts of the States, to grapple with the identical issues.

The factual and policy issues being resolved by these legislative and administrative bodies are substantially more "formidable" (401 U.S. at 503) than those from which the Court drew back in *Wyandotte*. Notwithstanding the efforts of *amici* here to suggest that vehicle emissions control (and especially "retrofitting") is a simple matter, the legislative and administrative bodies actually responsible for control programs have found the subject to be highly complex. The Environmental Protection Agency, for example, has stated in a recent report to Congress that "a major technological challenge" faces the motor vehicle industry in its efforts to meet the emissions standards for the coming years.[6]

Similarly, reports of the Department of Health, Education and Welfare have indicated the multitude of interacting technological considerations involved in vehicle emissions control,[7] and the experience of the

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[6] EPA, Annual Report to the Congress of the United States In Compliance With Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 1-9 (July 9, 1971). Extracts from this Report are reprinted for the convenience of the Court as Item 1 in the Separate Appendix to defendants' Supplemental Memorandum filed herewith.

[7] See, *e.g.*, HEW Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions from Mobile Sources, National Air Pollution Control Administration Publication No. AP-66 (1970). Extracts are printed as Item 2 of the Separate Appendix.

California legislature with retrofitting of crankcase emission controls is strong evidence of the complexity of the technical problems posed by vehicle emissions.[8]

Major antitrust cases usually require years of pretrial and trial proceedings, in which the documentary and testimonial strands of a decade or more of prior commercial and industrial activity are painstakingly unraveled. In the present cases, assuming plaintiffs have stated a claim upon which relief can be granted, this process will be complicated by the unusually complex and technical nature of the defendants' activities, involving a myriad of separate transactions relating to research, development and installation of many different kinds of emission control systems and devices. These cases deal not with traditional business practices of a settled industry, but with the frontiers of an arcane and still imperfectly understood technology, as they have advanced over a period of almost twenty years. Litigation of the present type presents great difficulties to *any* judicial tribunal. It is especially likely to overtax the resources

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[8] That experience, briefly stated, was that after the retrofit requirement was imposed, more than 20,000 complaints were received; that many vehicle owners reported "disastrous experiences" involving damage to their cars or exorbitant installation costs; and that the California legislature first suspended, and then sharply restricted, the retrofit requirement. See Transcript, Assembly [of the State of California] Interim Committee on Governmental Efficiency and Economy, August 7, 1964: Hearing on Motor Vehicle Repair and Smog Control Devices, at 1, 97; Assembly [of the State of California] Interim Committee Reports 1963-65, Vol. 8, No. 8, at 34; Cal. Stats., 1963, ch. 999, § 8, at 2267 (requiring retrofit); Cal. Stats., 1965, ch. 3, §§ 1, 2, at 872-73 (repealing requirement); Cal. Stats., 1965, ch. 2031, § 4, at 4609 (requiring retrofit only upon transfer of ownership). Relevant extracts from the foregoing materials are printed as Item 3 of the Separate Appendix.

of this Court, already strained by its increasing appellate responsibilities.

Nor is the technique of employing a Special Master to resolve complex factual issues, as plaintiffs suggest, one which this Court should be tempted to embrace. This Court observed in *Wyandotte* that it is basically "ill-equipped for the task of fact-finding," since it must necessarily function "without actually presiding over the introduction of evidence." 401 U.S. at 498. That handicap is especially disabling in the context of the present litigation, where the nature of the plaintiffs' antitrust claims—portraying an alleged conspiracy to delay and deceive—will require the triers of fact to hear extensive oral testimony and to base their determinations in substantial part upon their assessments of the credibility of live witnesses.

This Court has held that it was an abuse of discretion for a judge, assigned a much simpler antitrust trial than this one, to refer it for trial to a "temporary substitute appointed on an *ad hoc* basis." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259 (1957). Litigants, especially in complex antitrust cases, as the Court emphasized, are entitled to a trial presided over by the judge responsible for deciding the basic issues in the cause. It would hardly comport with the salutary decision in *La Buy* for the Court to accept original jurisdiction of the present action only to turn over all of the crucial testimonial aspects to a master of its own.[9]

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[9] Nor would such a course relieve the Court of the considerable burden of supervising the proceeding before the Master or reviewing his findings. A Master's findings and rulings do not have the force of law, and are merely recommendations to the Court. 5 J. Moore, Federal Practice ¶ 53.06 (2d ed. 1969).

3. *Special Disadvantages of Trial by this Court*

Amici urge that *Wyandotte* does not control the present case because plaintiffs' complaint here presents issues of federal antitrust law rather than local law. Amici Br. at 10-12. But this difference does not help plaintiffs, since it means that, as noted above, numerous additional impartial forums are available, namely, the various federal district courts, thus lessening the need for the exercise of original jurisdiction. In addition, it provides two other reasons why the Court should decline jurisdiction here.

This Court has previously expressed its dissatisfaction with the "great burden" imposed upon it by direct appeals from trial court antitrust decisions which "deprive [this Court] of the valuable assistance of the Court of Appeals." *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175 n.1 (1963). In the instant case, not only would the Court be denied the benefit of an evaluation of the trial record and clarification of the issues by an intermediate appellate court, this Court would also be forced to make the trial court record itself, and to decide in the first instance the countless legal questions involved in the pretrial and trial phases of what the Judicial Panel on Multidistrict Litigation foresaw would become "the largest and most complicated" litigation ever to come before it.[10] The Congress has recognized that this role is inappropriate for the Supreme Court by creating a system of inferior federal courts and conferring upon them jurisdiction to try antitrust

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[10] *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349, 1350 (J.P.M.L. 1970); and see *Brown Shoe* v. *United States*, 370 U.S. 294, 364 (1961) (Harlan, J.).

cases (and, except in certain cases brought by the United States, to hear intermediate appeals). There is no reason to short-circuit this system here.

To the contrary, there is an important reason why short-circuiting this system would be particularly inappropriate. The antitrust count of the complaint, like the other two counts, seeks equitable relief only, and hence would be tried by the Court without a jury. This count, however, is also the basis for damage claims by these same plaintiffs (and others) in the actions which all of them have filed in the district courts. Under the doctrine of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), the claims for equitable relief which all these district court complaints also contain could not be tried separately to a judge before the damage claims are tried to juries, because to do so would prejudice defendants' Seventh Amendment right to jury trial of the damage claims.[11] For this Court to try the equitable claims presented in the first count of the instant complaint before the trial of the damage claims presented in the plaintiffs' district court complaints would be equally violative of defendants' rights.

Quite aside from the question of whether and to what extent this Court's findings and judgment in the instant action would be technically binding on the defendants in a later trial of the district court damage claims, they would, as a practical matter, have

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[11] See *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); 5 J. Moore, Federal Practice ¶ 38.19[2] at 170, ¶ 38.37[2] at 299 n.13 (text & supp.) (2d ed. 1969); 2 Barron & Holtzoff, Federal Practice and Procedure § 894, at 82-85 (Wright ed. 1961).

a powerful and perhaps controlling effect.[12] And if this Court may not properly try the equitable claims of the present action before the district court damage claims are tried, there is plainly no point to accepting original jurisdiction, particularly since, as noted above, the district court complaints also include prayers for equitable relief overlapping the relief sought in this original action.

In *Wyandotte* this Court held that only the "strictest necessity" (401 U.S. at 505) would justify the Court's assumption of original jurisdiction over an interstate pollution case. Given the availability of many alternative forums, the difficulties of trying the case as an original Supreme Court action, and the activity of other competent governmental authorities, the element of necessity was found "totally lacking" in *Wyandotte*. *Id.* at 505. For similar reasons, it is equally absent in the case at bar.

II. The relief sought by plaintiffs herein is unnecessary and undesirable in light of the comprehensive legislative and administrative program, decisively strengthened by the Clean Air Amendments of 1970, for reducing vehicle emissions to a minimal level by a time certain.

In our earlier brief, we described the comprehensive pattern of emerging federal and state regulation

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[12] See *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320-27, 329-30 (May 3, 1971). Not only the plaintiffs and *amici* States, but numerous other governmental bodies and classes of private citizens have filed identical damage complaints in the district courts, and defendants' right to jury trial of the antitrust issues in these damage cases might also be prejudiced if this Court decided the original action first.

of motor vehicle emissions. We discussed the difficulties in reconciling plaintiffs' prayers for mandatory injunctive relief in this action with the dictates of the legislative program for emission control. *See* Br. in Opp. at 2-6, 20-24. Since that brief was filed, the Congress has passed and the President has signed the Clean Air Amendments of 1970, imposing drastic new emission control standards. The Environmental Protection Agency has begun to implement these requirements in detailed regulations.[13] These measures express and execute the best judgment of the Legislative and Executive Branches as to the steps necessary at the federal level to serve the public interest in the control of automobile emissions.

In *Wyandotte*, the mere possibility of some legislative relief was an important element in the Court's decision to decline to exercise its original jurisdiction. 401 U.S. at 502-03. Here a far-reaching and definitive legislative program is an accomplished fact. The complex task of administering the program is well under way. There is no occasion for this Court to depart from the principles it so recently reaffirmed.

1. *The Clean Air Amendments of 1970*

For a full understanding, the Clean Air Amendments of 1970 must be placed in their proper historical framework.

> "When the first federal air pollution control legislation was passed in 1955 [authorizing funds for research and related activities by the Public Health Service], there were no viable ongoing State programs at all. There was little interest

[13] See, *e.g.*, 36 Fed. Reg. 12652 *et seq.*, 12657 *et seq.*, 16905-06, 19697 (1971).

> in the scientific community, and the public, by and large, equated air pollution with coal smoke and considered smog a problem unique to Los Angeles. It is no wonder that air pollution is regarded as a recently discovered phenomenon." Council on Environmental Quality, First Annual Report, *Environmental Quality* 62 (1970); see also, *id.* at 73-75.

In Los Angeles in 1953, after six years of regulating stationary sources, it was recognized that the automobile contributed significantly to the Los Angeles pollution problem.[14] That problem, termed "smog," was the result of a chemical reaction between unburned hydrocarbons—largely unburned gasoline—and nitrogen oxides, the latter being a chemical formed in every flame through the combination of the oxygen and the nitrogen in the air.

Commencing in 1953, the County of Los Angeles sought the assistance of the auto industry in an attempt to find a solution, and the industry responded by initiating the cooperative research and development program here under attack.[15] The first problem tackled was the development of measurement techniques and instrumentation. At the urging of

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[14] Report of the Subcommittee of the Assembly [of the State of California] Interim Committee on Governmental Efficiency and Economy, Study and Analysis of the Facts Pertaining to Air Pollution Control in Los Angeles County 14 (1953). Relevant excerpts from sources cited herein relating to the early history of vehicle emissions control in California are printed as Item 4 of the Separate Appendix.

[15] Report of the Assembly [of the State of California] Interim Committee on Transportation and Commerce, Motor Vehicle and Highway Problems 45 (Assembly Interim Committee Reports 1957-59, Vol. 3, No. 6, 1959).

the California authorities, the industry directed its efforts toward the development of "deceleration devices." When it was learned, however, that emissions during deceleration were a much smaller portion of total vehicle emissions than had been supposed, Los Angeles County declined to require installation of the devices.[16]

With the passage of time, the legislative emphasis shifted from the County to the State. Through the work of legislative committees, which sought and obtained the advice of industry committees, the necessity of defining the degree of control required was established. Standards were fixed, both for air quality and for auto exhaust emissions. This activity marked the start of regulation of automotive emissions.[17]

By 1965, interest in air pollution had become nationwide. Federal legislation relating, *inter alia*, to vehicle emissions was enacted in 1965, in 1967, and again in 1970.[18] Legislation prior to the 1970 Amendments is summarized in our earlier brief. In general, it directed the administrative establishment of "criteria" for air quality and the adoption of regu-

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[16] *Id.*; Transcript, Assembly [of the State of California] Interim Committee on Transportation and Commerce, December 1, 1958: Hearing on Automotive Smog Control, at 3-4.

[17] Cal. Stats. 1959, ch. 200, § 1, at 2091; Cal. Health & Safety Code, §§ 426.1, 426.5.

[18] Act of October 20, 1965, Pub. L. No. 89-272, 79 Stat. 992; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. These provisions are codified at 42 U.S.C. § 1857 *et seq.* (1970).

lations fixing permissible levels of automotive emissions.

The 1970 Clean Air Amendments go beyond preexisting law in one critical respect: they establish what their principal author described as a final "deadline for the cleanup of the internal combustion engine in the passenger automobile." [19] The effect of the 1970 Amendments is to prohibit the sale of 1975 or later model-year motor vehicles which fail to reduce emissions of carbon monoxide and hydrocarbons to a level 97-98% below the emissions from uncontrolled vehicles.[20] As to emissions of oxides of nitrogen, 1976 and later model year vehicles must meet a comparable standard.[21] The spelling out of the standards and supervision of the automotive industry's compliance are entrusted to the Administrator of the Environmental Protection Agency, who is required to report annually to the Congress and to make "any

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[19] See 116 Cong. Rec. S20599 (daily ed. Dec. 18, 1970) (remarks of Senator Muskie).

[20] The Amendments require that the 1975 model vehicles meet emission standards for hydrocarbons and carbon monoxide 90% more stringent than the standards in force for 1970 vehicles. 42 U.S.C. § 1857f-1(b)(1)(A) (1970). The 1970 standards reduced hydrocarbons by almost three-quarters and carbon monoxide by about two-thirds in relation to uncontrolled vehicles. EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 2-2 and 2-3 (July 9, 1971). Thus, the effect of the Amendments is to mandate reductions of approximately 98% for hydrocarbons and 97% for carbon monoxide. *Id.*, Fig. 1, at 6-2.

[21] 42 U.S.C. § 1857f-1(b)(1)(B) (1970).

recommendations for additional congressional action necessary to achieve the purposes of" the Act.[22]

As a practical matter, no decree that might be issued by this Court could reasonably be expected to replace, modify, or accelerate the imposition of the standards mandated by the Amended Act. We say this for three reasons. In the first place, the new standards are scheduled to be imposed within less than three years. Unless the law is amended, they *must* be imposed, assuming the longest extension permissible, within four.[23] It is highly unlikely that an original proceeding in this Court could result in a final decree by that time.[24]

In the second place, Congress acted with full awareness that the automotive industry did not possess the technology required to meet the new standards.[25] The 1970 Amendments were literally a demand that the industry "do the impossible" within a stated period (very much, as one Senator observed, in the manner of the Apollo program to put a man

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[22] 42 U.S.C. § 1857f-1(b)(4) (1970).

[23] The Administrator is statutorily prohibited from extending the effective date of the new standards for more than one year. 42 U.S.C. § 1857f-1(b)(5)(E) (1970).

[24] A useful chronology of original actions entertained by this Court appears in Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665, 701 *et seq.* (1959). A great number of them have required more than four years.

[25] See 116 Cong. Rec. S16093 (daily ed. Sept. 21, 1970) (remarks of Senator Muskie): "[I]f we thought the technology existed today [to meet the new standards] we would insist that it be incorporated in these cars today."

on the moon).[26] The 1970 Amendments were candidly designed to insure a maximum effort to solve the problem of vehicle pollution forthwith, regardless of the amounts of money and manpower required. It is difficult to see how the judiciary can be expected to order more.

Third, as noted above (pp. 9-11, *supra*), the establishment and enforcement of rules for the control of vehicle emissions are tasks far better suited to the legislative and administrative process than to "common law" case-by-case decisions of the judiciary. Effective vehicle emissions control requires the fact-gathering, policy-evaluation and rule-making capabilities of legislatures and administrative agencies. Courts are not equipped to make the policy trade-offs between, for example, more carbon monoxide emissions but less emissions of oxides of nitrogen.[27] Courts do not usually have before them all the parties interested in, and affected by, the solutions to a social problem of this type.[28] Where a comprehen-

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[26] See 116 Cong. Rec. S16258 (daily ed. Sept. 22, 1970) (remarks of Senator McIntyre).

[27] See EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 1-9 (July 9, 1971):

> "One of the unfortunate aspects of motor vehicle emission control is that reducing levels of hydrocarbons and carbon monoxide, which is done primarily through increasing the efficiency of combustion, tends to make more difficult the control of oxides of nitrogen, whose formation is largely a function of heat combustion."

See also p. 28 n.37, *infra*.

[28] For example, the statute contemplates that as a matter of competitive fairness, standards and the means for measur-

sive regulatory scheme for the control of vehicle emissions has already been established, there is no need to rely on the *ad hoc* equitable powers of this Court or any other court over the particular defendants before it.

Nevertheless, in an effort to induce this Court to substitute a judicial emissions control program for that adopted by Congress, *amici* carefully cultivate the widespread misimpression that the motor vehicle is almost entirely responsible for the damage to health and property caused by air pollution, and that alleged violations of the antitrust laws by the motor vehicle manufacturers are responsible for the fact that the problem of air pollution has not been solved. *Amici* Br. at 27-30. None of this is true.

While transportation of all types is currently estimated to be the source of 51% of U.S. air pollution *on a weight basis*,[29] transportation generally, and motor vehicles in particular, are responsible for a much smaller fraction of total air pollution *on an environmental effects basis*. Using California air quality standards as the basis for measuring the environmental impact of each of the major air pollu-

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ing compliance must be uniform for all manufacturers of like vehicles. Yet many of the world's largest vehicle manufacturers, occupying substantial positions in the United States market, are not defendants in the present actions.

[29] Council on Environmental Quality, Second Annual Report, *Environmental Quality* 212 (1971). The contribution of automotive vehicles (cars, trucks, buses) is estimated, as of 1968, at 38.8%. See HEW, Nationwide Inventory of Air Pollutant Emissions, 1968, National Air Pollution Control Administration Publication No. AP-73 (1970) (computed from Tables 2, 4, 7, 9 and 11).

tants, two University of California researchers have placed the contribution of motor vehicles to total U.S. air pollution at only 12%.[30] While motor vehicles are a major source of pollution even on an environmental effects-basis in Los Angeles and some other cities where hot, dry, stagnant air and sun-

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[30] See Letter from Robert F. Sawyer and Lawrence S. Caretto (Dept. of Mechanical Engineering, University of California at Berkeley), "Air pollution sources reevaluated," 4 Environmental Science & Technology 453 (1970). The other contributors to air pollution are, on an environmental effects basis, industry—37%; power plants—36%; space-heating—10%; and refuse disposal—5%. Another academic study, using air quality criteria (the "pindex" method) and the earlier high tonnage figure for transportation, found transportation responsible for 19% of U.S. emissions, behind the industrial and electric power generation categories. *Babcock, A Combined Pollution Index For Measurement of Total Air Pollution,* 20 J. of Air Pollut. Control Ass'n 653 (1970).

The difference in the weight vs. effects measurements of vehicle emissions is primarily due to the automobile's relatively high emission of carbon monoxide, which is the least noxious of air pollutants on a mass-for-mass basis, and its minimal emission of sulfur oxides, a pollutant more than one hundred times as noxious as carbon monoxide. Eisenbud, *Environmental Protection in the City of New York,* 170 Science 706, 707 (1970); Sawyer & Caretto, *supra.*

The Council on Environmental Quality has recognized the misleading character of weight measurements of air pollutants and the importance of considering the effects of particular pollutants and their geographical distribution. See Council on Environmental Quality, Second Annual Report, *Environmental Quality* 213 (1971).

shine are common, most cities do not have this problem.[31]

Moreover, the national failure to appreciate the environmental implications of vehicle and other emissions at an early date cannot fairly be ascribed to the vehicle manufacturers alone. As the Council on Environmental Quality has explained, the failure is plainly a social and political one, growing out of the national commitment to economic growth and the public preferences for the increasing urbanization, industrialization and personal mobility that technology can provide.[32] Effective remedies for vehicle emissions have at all times depended upon a public decision to require development of emissions controls and, most importantly, to accept the very real economic and social costs of such a program. That decision has now been made and is in process of implementation by the regulatory agencies that Congress and the States have entrusted with the job.

Whether this essentially political decision could have been made earlier, and whether the technological obstacles to developing effective vehicle emissions

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[31] Eisenbud, *supra;* Sawyer & Caretto, *supra.* The principal ingredients of photochemical ("Los Angeles type") smog are hydrocarbons, oxides of nitrogen and sunlight, while "London type" smog is principally composed of the sulfur dioxide and particulates found in smoke and fumes from burning coal and oil. Chicago, for example, has London-type smog about one-third of the days of the year, and photochemical smog less than one per cent of the time. It is, of course, local differences of this kind which caused Congress to leave the control of used car emissions to the States.

[32] See Council on Environmental Quality, First Annual Report, *Environmental Quality* 12-16 (1970). Excerpts from this report are reprinted as Item 5 of the Separate Appendix.

control systems could have been surmounted more rapidly, are necessarily matters of conjecture which no court can possibly resolve. It is clear, however, that the alleged actions and omissions of the vehicle manufacturers—even if they had occurred—could have been no more than one contributing factor among many that were far more significant.[33]

2. *The Impropriety of a Federal Judicial "Retrofit" Program*

Amici strenuously urge that nothing in the emissions control program established by the Clean Air Act bars "retrofitting" (installing emissions control systems on used cars), and that retrofitting, at least, is a form of relief that the Court could and should order. Amici Br. *passim*, esp. at 21-26. In *amici's*

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[33] For example, the one specific allegation of delay in the complaint herein charges the defendants with having agreed to delay the installation of a crankcase ventilation valve on some new 1962 model year vehicles (and to delay an improvement thereon "in late 1962 and extending into 1963"). Complaint, para. 17(c)(1), (2). But the entire motor vehicle population accounts for less than half of the total annual hydrocarbon emissions in the U.S.; the crankcase accounts for only one-fifth of the automotive hydrocarbons emissions from an uncontrolled vehicle (and essentially no carbon monoxide or oxides of nitrogen); and the number of vehicles produced in any one model year is only about one-tenth of the total number of cars on the road. So the alleged delay could have affected no more than one one-hundredth of the total annual U. S. hydrocarbon emissions—or between one and two one-thousandths of total annual emissions of all known types of pollutants (since hydrocarbons represent only 15% by weight of total emissions). See HEW, Nationwide Inventory of Air Pollutant Emissions, 1968, National Air Pollution Control Administration Publication No. AP-73, at 3, 13 (1970); HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emis-

view, because "there is no federal regulation covering emissions on used cars or retrofitting," therefore "retrofit is solely a matter of judicial concern." *Id.* at 15. Several important omissions and over-simplifications render the argument wholly untenable.

In the first place, *amici* fail to note that in the Clean Air Act the Congress advertently left the problem of used car emission controls to the judgment and powers of the several States. In considering the Clean Air Amendments of 1970, Congress explicitly considered and rejected the proposal, reintroduced by plaintiffs here, for a federally-imposed retrofit program:

> "In considering alternative means of controlling emissions of air pollution agents from *used* vehicles, the Committee was unable to develop a feasible national system. The Committee rejected ideas ranging from the *imposition of a retroactive installation obligation on automobile manufacturers* to a Federal subsidy program." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 13 (1970) (emphasis added).

The Senate Committee went on to state:

> "The Committee believes at this time that regulations relative to the retroactive application of emission control devices and methods is *manageable only at the State and regional level* and expects and hopes that the regions and States

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sions From Mobile Sources, National Air Pollution Control Administration Publication No. AP-66 (1970), at 2-12; Automobile Manufacturers Association, 1971 Automobile Facts and Figures, at 22. This small fraction would be even smaller on an environmental-effects basis. See pp. 22-23 & n.30, *supra.*

will be innovative in this area." *Id.*, at 13-14 (emphasis added).

For this Court to attempt to establish a particular retrofit program by federal judicial fiat would be fundamentally inconsistent with the Congressional scheme, and in disregard of the legislative findings as to the inadvisability of federal action in this area.

The Clean Air Act makes the States responsible for adopting and enforcing implementation plans to bring local air into compliance with the regional air quality standards.[34] As one part of this regulatory scheme, the power to regulate used car emissions is reserved to the States.[35] And the various kinds of requirements relating to used car emissions that different States may find feasible, appropriate and acceptable to their citizens may diverge radically from the used vehicle control requirements that plaintiffs would have this Court impose.[36] For example, because of the fact that measures reducing hydrocarbon emissions from used cars may increase emissions of nitrogen oxides, and *vice versa*, two different States may choose two entirely different kinds of used car control programs (or none at all), depending on local

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[34] 42 U.S.C. §§ 1857c-2, -5 (1970).

[35] 42 U.S.C. § 1857f-6a(c) (1970); S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967).

[36] For example, in 1963 California required that crankcase emission controls be installed within ten months beginning January 1, 1965, on used as well as new cars, but the requirement for used cars was first suspended, and then sharply restricted, before 1965 was over because it had "caused great concern and confusion throughout the state." Cal. Stats., 1965, ch. 3, § 3, at 873. See p. 11 & n.8, *supra*.

air conditions, population density, and other variables.[37]

Secondly, in their enthusiasm for a nationwide, judicially-imposed retrofit obligation, *amici* do not discuss the extent to which the imposition of this obligation on the manufacturers as to used cars would

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[37] For example, the California Air Resources Board reported to the State legislature in July of this year that it would not recommend establishment of a system of mandatory inspection and maintenance of used vehicles, in part because while such a system would reduce hydrocarbon emissions, it would increase oxides of nitrogen. See California Air Resources Board, A Report to the Legislature on Vehicle Emission Inspection (July 1, 1971). While rejecting inspection to control hydrocarbons, California has adopted a retrofit law designed to reduce oxides of nitrogen. See Los Angeles Times, Nov. 16, 1971, Pt. II, at 6, reporting enactment of S.B. 578. In contrast, the City of Chicago has adopted mandatory inspection aimed only at hydrocarbons and carbon monoxide. Chicago, Ill., Amendment to Chapter 17 of the Municipal Code, Art. IIA, Nov. 29, 1971. The State of New Jersey is evidently adopting a similar inspection program, also not involving nitrogen oxides standards. See New Jersey State Department of Environmental Protection, Notice of Public Hearing on Air Pollution Control Code, Proposed Chapter 15 (May 27, 1971). Excerpts from the foregoing materials are reprinted as Item 6 in the Separate Appendix.

For further elucidation of the conflict between controlling hydrocarbon emissions and controlling nitrogen oxide emissions, see HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions from Mobile Sources, National Air Pollution Control Administration Publication No. AP-66 (1970), extracts from which are contained in Item 2 of the Separate Appendix, and Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, *Air Pollution—1967* (*Automotive Air Pollution*), 90th Cong., 1st Sess. Pt. 1, at 238-41, 326 *et seq.*, 470 (1967).

actually conflict with the Congressionally-imposed obligation to create essentially pollution-free new automobiles by 1975. Senator Muskie, the principal architect of the Clean Air Amendments, explained the Congressional treatment of the new car-used car problem as follows:

> "There is a tendency to focus upon the new car provisions in the bill, and understandably so. Nevertheless, *what really moved the committee, the Senate, and the conferees to go in the direction of a tough deadline for new cars is the fact that there are used cars*, and the used car population creates a problem." 116 Cong. Rec. S20602 (daily ed., Dec. 18, 1970) (emphasis added).

Stating that these used cars are "beyond the reach, really, of any effective technological control development," the Senator went on to say that "to deal with the used car problem, we need a new car deadline in order to begin the process of cleaning up new used cars" that come onto the streets each year. *Id.* at S20602-03.

Rather than invoke federal power to require partially effective retrofit devices, Congress opted for fully effective new car controls. Before any court were to order the defendants to divert their resources and energies into a massive retrofit program, it would certainly have to consider the effect of such an order on the ability of each one of the several vehicle manufacturers to meet the new car deadlines that Congress preferred as the federally-imposed solution of the problem. At present, the Environmental Protection Agency is "moderately optimistic" that the vehicle manufacturers can overcome the "major technological challenge" facing them and meet the 1975

standards on schedule.[38] A massive judicial retrofit program could substantially and adversely affect the basis for this moderate optimism.

Any court contemplating such a departure from the Congressional choice would also have to consider whether independent automobile dealers and gas station operators have the necessary trained manpower and skills to install and maintain the particular kinds of retrofit devices involved, whether the necessary degree of public cooperation with the retrofit program could be obtained, and whether the time required for manufacture and installation of the devices would in any event take so many years that the beneficial effect on overall emission levels would be minimal.[39]

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[38] EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 1-9, 1-10, and 5-17 (July 9, 1971).

[39] Additionally, before ordering retrofit at defendants' expense, the court would have to consider that even if plaintiffs' theory were correct and that, absent the alleged violation, some of the defendants would have introduced some control devices earlier, the cost of these devices would have been reflected in the prices defendants charged for their vehicles. Some of the defendant companies have in fact developed and test-marketed certain types of retrofit devices at moderate prices, but with total lack of market success. The reason, undoubtedly, is that to the average automobile owner, an emissions control device is, in economic terms, an "externality" that he does not perceive as worth the price in benefits to him, and that, if given a market choice, he will not purchase. See, *e.g.*, P. Samuelson, Economics 791-92 (8th ed. 1970); Gerhardt, *Incentives to Air Pollution Control*, 33 Law & Contemp. Prob. 358 (1968); Report of the Panel on Electrically Powered Vehicles to the Commerce Technical Advisory Board, *The Automobile and*

Obviously, all these issues call for essentially legislative, not judicial, choices.

Thirdly, given the constantly shrinking number of uncontrolled used vehicles on the road and the increasing stringency of the standards applicable to new models, it is obvious that plaintiffs' proposed retrofit remedy, in addition to its other defects, can be of little practical significance in reducing overall levels of air pollution. By the time this Court or any court could responsibly render a judgment granting the extraordinary retrofit relief plaintiffs seek, and by the time a retrofit program (with the necessary inspection and maintenance that would have to accompany it[40]) could be established, the overwhelming proportion of the used cars on the road would be the federally-controlled vehicles of the 1968 and subsequent model years.[41] At that point in time, the need or effectiveness of any judicial retrofit relief whatever would be, at best, open to serious question,

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Air Pollution: A Program for Progress, Pt. 1, at 36 (Dept. of Commerce Print, 1967); Ruff, *The Economic Common Sense of Pollution,* 19 The Public Interest 69 (1970); Posner, *Antitrust Policy and the Consumer Movement,* 15 Antitrust Bull. 361 (1970).

[40] See California Air Resources Board, A Report to the Legislature on Vehicle Emission Inspection (July 1, 1971), excerpts from which are reprinted in Item 6 of the Separate Appendix.

[41] The Automobile Manufacturers Association estimates that by July 1975, 77 million of the 100 million passenger cars then on the road will be 1968 or later models. (In 1970, 78% of the vehicles on the road were less than eight years old. See Automobile Manufacturers Association, 1971 Automobile Facts and Figures, at 22.)

even assuming the States had not acted on their own in the interim.[42]

Finally, even if retrofit were ultimately found after trial to be an appropriate and useful federal judicial remedy in this case, both the trial and the remedy, as we show in the next section of this Memorandum, could be more efficiently provided in the cases plaintiffs have filed against defendants in the federal district courts, with such appellate review as this Court deems appropriate when and if the occasion should arise. There is nothing so simple or magical in the proposed retrofit remedy, or in the imagined power of this Court to provide that remedy more quickly, that would justify trying one of the most complicated fact cases in modern times before a court so admittedly "ill-equipped for the task of fact-finding" and so heavily burdened with other responsibilities. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. at 498.[43]

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[42] The States' implementation plans for attaining the national ambient air standards within their boundaries by 1975 are to be submitted to the Environmental Protection Agency by January 30, 1972. EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 4-4 (July 9, 1971). These plans are "expected to include a variety of abatement strategies and contribute greatly to our understanding of the significance of motor vehicle emissions control." *Id.*

[43] Defendants feel constrained to comment on the grossly misleading assertion by *amici* that used cars now on the road can be retrofitted with exhaust controls which are "precisely" the same ones that "the manufacturers conspired to block" and that California would have ordered installed on 1966 models, "had not the auto manufacturers blocked this advance by hurriedly proposing engine modifications." *Amici*

III. Plaintiffs' complaints in the district courts, and the proceedings currently in progress under the direction of Multidistrict Litigation Panel, demonstrate that there is no necessity for this Court to exercise original jurisdiction over plaintiffs' proposed complaint herein.

All of the eighteen plaintiffs in the instant case have now filed actions identical or substantially sim-

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Br. 24-25. The true facts, as contained in official reports, are quite different.

Four exhaust control devices, produced by manufacturers other than defendants here, were certified by the California Motor Vehicle Pollution Control Board in 1964; but three of the devices were approved only for installation on *new* 1966 model cars, not for retrofit on used cars. Calif. Motor Vehicle Pollution Control Board, Resolutions 64-12, 64-13, 64-14 and 64-15 (June 17, 1964). (The one device certified for installation on used cars as well could not be produced by its manufacturer for sale at a price within the $65 limit set by California law. See Transcript, Assembly [of the State of California] Committee on Transportation and Commerce, March 8, 1966: Hearing on Air Pollution Control, at 4; Calif. Motor Vehicle Pollution Control Board, Summary of Report on Exhaust Control Devices of American Machine & Foundry Company—Chromalloy Corporation, June 10, 1964, at 3-4.) The defendants made their proposals for exhaust emission control (which were made possible by the cooperative industry effort here under attack) *in order to meet* the new California emissions standards for 1966 cars that became operative upon the certification of these four devices, *not* to block implementation of the standards. Defendants' various proposals for their 1966 model cars were approved by the Control Board, with an exemption for that small part of their 1966 model production that they could not engineer into conformity. California Motor Vehicle Pollution Control Board, Resolution 64-36 (November 18, 1964); California Motor Vehicle Pollution Control Board, Resolution 65-2 (January 20, 1965); California Motor Vehicle Pollution Control Board, Resolutions 65-17, 65-18, 65-19, 65-20 and 65-21 (July 14, 1965).

The Board in fact congratulated General Motors, Ford, Chrysler, and American Motors on their "significant contribution" and urged them to continue their "outstanding developmental efforts." California Motor Vehicle Pollution Con-

ilar to this one in various federal district courts.[44] Plaintiffs allege in their complaints below that the federal district courts have jurisdiction to try all of the counts in all of their cases, and to grant all the relief—including the "retrofit" relief—they seek from this Court. Neither in their communications to this Court, nor elsewhere, have plaintiffs disavowed

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trol Board, Resolutions 64-18, 64-19, 64-20, and 64-21 (August 12, 1964). By contrast, the Board later effectively decertified the four devices of the other manufacturers because they required regular maintenance, and the State legislature, in response to public protest, had refused to give the Board authority to impose on vehicle owners the compulsory maintenance requirements upon which the certification of the devices was predicated. California Motor Vehicle Pollution Control Board, Resolution 65-26 (September 15, 1965). See also IV [California] Motor Vehicle Pollution Control Board Bulletin 1, 2 (September 1965).

Excerpts from the items cited above are reprinted as Item 7 of the Separate Appendix.

[44] The district court proceedings initiated by the eighteen plaintiffs herein are listed in Appendix A of this Memorandum. (The total of eighteen includes two States whose pending motions for leave to join in the complaint as parties plaintiff have not yet been acted on by the Court.) All of these district court complaints contain one or more federal antitrust counts containing the same allegations as the complaints sought to be filed herein, and all of them pray for damages as well as injunctive relief. Two of the complaints, brought by eight of the plaintiffs here plus one State not a plaintiff in this Court (Nevada), also contain counts identical with the second and third counts of the instant complaint. *Washington* v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.); *Kansas* v. *General Motors Corp.*, Civil No. T-4896 (D. Kan.). As previously noted, *supra*, pp. 7-8, these complaints allege that the district courts have federal question jurisdiction over the second count and pendent jurisdiction over the third count.

these allegations.[45] The filing of these district court complaints, and the resulting proceedings currently in progress under the direction of the Multidistrict Litigation Panel, provide conclusive proof (not present in *Wyandotte*) that there is no need to impose the responsibility for conducting the trial of this complex litigation upon the tightly-rationed time of the Supreme Court.

Faced with the reality of these ongoing proceedings below, *amici* seek refuge in the argument that this Court must nevertheless assume original jurisdiction over plaintiffs' claims in order to enable plaintiffs to proceed jointly in a single action and thereby avoid "the necessity of time-consuming and duplicative litigation in numerous district courts and courts of appeal." *Amici* Br. at 9. But the decision whether to file separately or jointly, in several districts or in one district, was wholly within plaintiffs' control. While eleven plaintiff States filed separately in district courts located in their own States, seven plaintiff States as widely separated as Hawaii and Maine joined with one *amicus* State (Nevada) in filing a single complaint in the Central District of California. In defendants' view, there are many practical reasons why a single consolidated trial of the claims of all the plaintiff States is not feasible in this or any other court. But if plaintiffs genuinely held the contrary view, they obviously were free to

[45] By letter dated April 7, 1971, addressed to the Clerk of the Court, defendants informed the Court of these filings. Plaintiffs responded by telegram dated April 15, 1971, with the assertion that the district court actions had been filed merely as a "standby" to avoid the possible effect of the statute of limitations upon district court claims should this Court deny the motion for leave to file.

seek a single trial by filing a joint complaint in one of the district courts. They cannot contend that an original action in this Court was the only way to pursue that objective.

On the other hand, if it is consolidated pretrial proceedings that plaintiffs seek, again they need not come here for relief. Plaintiff States—and *amici* States as well—are parties to the consolidated pretrial proceedings presently taking place in the Central District of California, which also include complaints filed by other governmental bodies and private citizens.[46] Nevertheless, in a further effort to avoid the obvious fact that those consolidated proceedings contradict the asserted need to proceed in an original action in this Court, *amici* complain, albeit in a rather tentative way, about the rate of progress below. *Amici* Br. at 26-30. They urge that this Court should attempt to expedite the litigation by assuming original jurisdiction over plaintiffs' complaint, in which event *amici* "will seek leave to join as plaintiffs here." *Amici* Br. at 1.

Amici do not explain, however, what they would do with their pending district court cases and the damage claims those cases contain, nor do they suggest what would happen to the district court cases filed by the ten other plaintiffs who are not *amici* here and who, since they are not States, cannot file

[46] The district court actions that have been filed by fourteen of the seventeen *amici* and a number of other parties, arising out of the same subject matter as the original action sought to be commenced here, are listed in Appendix B. All cases, including the district court cases recently filed by plaintiffs herein, have been transferred to the Central District of California for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

original actions in this Court.[47] In any event, without repeating the previous discussion of the difficulties which this Court would have in superseding the trial of some but not all of the previously filed complaints in the district courts, several points need to be made about the allegedly slow pace of the actions below.

Amici appear to be chiefly disturbed by the fact that the District Court has certified for interlocutory review, and the Court of Appeals for the Ninth Circuit has accepted, appeals from the District Court's orders denying defendants' motions to dismiss which were filed in all but two of the consolidated actions and rejecting, in part, defendants' challenges to certain of the class actions and *parens patriae* claims.[48] All briefs in those appeals have been filed, defendants did not object to plaintiffs' request that oral argument be expedited, and the Court of Appeals has scheduled that argument for January 13, 1972.

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[47] Similarly, *amici* do not attempt to show any basis for this Court's original jurisdiction over an action by the one of their number which is not a State, namely, City of New York.

[48] In the District Court proceedings defendants moved to dismiss, primarily on the ground that plaintiffs had no relationship, direct or indirect, to the line of commerce allegedly restrained. See *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). In addition, defendants challenged the authority of the governmental unit plaintiffs to sue *parens patriae* and challenged the propriety of the class actions, which had been filed on behalf of classes as broad as every resident of the United States. The District Court denied the motion to dismiss, and granted in part and denied in part defendants' objections to the *parens patriae* claims and the class actions. The District Court thereafter certified these issues to the Court of Appeals as appropriate for interlocutory review under 28 U.S.C. § 1292(b).

More importantly, no stay of discovery or other pretrial proceedings has been sought by defendants pending this interlocutory appeal. By agreement, the mass of documents compiled by the government in connection with its earlier investigation of the defendants' cooperative research and development program was made available to plaintiffs, and it has evidently taken plaintiffs considerable time to examine, classify and analyze these papers. Beyond this, however, it has been *defendants* who initiated pretrial evidentiary proceedings by seeking and obtaining, without plaintiffs' support, a district court order dated September 8, 1971, commencing a deposition program—now under way—to take the testimony of certain retired employees. It ill behooves *amici*, who are plaintiffs below, to charge defendants with attempting to delay the lower court proceedings.[49]

Finally, defendants are puzzled by *amici's* evident concern that the congressional emission control program, together with the manufacturers' efforts to meet the stringent legislative goals, may solve the entire vehicle emissions problem before the massive litigation launched by plaintiffs and others can be brought to a definitive conclusion. If this is so, it merely bears witness to the superiority of legislative and administrative action to resolve the problem of vehicle pollution, as compared to the type of judicial relief sought by plaintiffs. It affords no reason for

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[49] Cf. Transcript of Proceedings, November 22, 1971, at 49, *In Re Multidistrict Vehicle Air Pollution*, M.D.L. Docket No. 31 (C.D. Cal.) (remarks of Judge Manuel L. Real): ". . . the delays in this [initial] deposition [of a retired General Motors employee] have been the delays of the plaintiff and not the defendant."

this Court to seek to compete either in speed or in substance with the legislative and administrative processes, or for this Court to take over, so far as plainly judicial responsibilities are concerned, the duties currently being discharged in this and related litigation by the federal trial and intermediate appellate courts.

The Chief Justice, in a recent review of the Court's work, reiterated the concern expressed in *Wyandotte* over the need to safeguard the Supreme Court's "paramount role as the supreme federal appellate court" (401 U.S. at 505):

> "[W]e cannot keep up with the volume of work and maintain a quality historically expected from the Supreme Court . . . .
>
> "Either the quantity or quality of the work of the Court must soon yield to the realities." [50]

Plaintiff States are presently pursuing their claims in other forums better suited than this Court to sort out the factual and legal complexities of the cases they plead, and with as much power as this Court to grant the relief they seek. Yet in disregard of this Court's other manifold responsibilities, they ask it to assume the heavy burden of a proceeding duplicative of the district court proceedings and, in its basic thrust, either duplicative of or potentially in conflict with legislative and administrative efforts at the federal and state levels to resolve the same problems.

Over the next several years, this Court may well find it necessary to function as the appellate court

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[50] Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855 (1971).

of last resort to review some of the more important legislative, administrative and judicial decisions that will emerge from these ongoing activities. This task alone may require a substantial commitment of the Court's resources. No justification has been shown for asking the Court to assume the added burden of acting as the trial court of first resort for this one set of exceedingly complex and time-consuming cases.

CONCLUSION

Accordingly, leave to file the complaint herein should be denied.

Respectfully submitted,

WALTER J. WILLIAMS
14250 Plymouth Road
Detroit, Michigan 48232
FORREST A. HAINLINE, JR.
CROSS, WROCK, MILLER & VIESON
Penobscot Building
Detroit, Michigan 48226
Attorneys for Defendant American Motors Corporation

LLOYD N. CUTLER
LOUIS F. OBERDORFER
JAMES S. CAMPBELL
ROBERT A. GERARD
WILMER, CUTLER & PICKERING
900 - 17th Street, N.W.
Washington, D.C. 20006
JULIAN O. VON KALINOWSKI
PAUL G. BOWER
GIBSON, DUNN & CRUTCHER
634 South Spring Street
Los Angeles, California 90014
Attorneys for Defendant Automobile Manufacturers Association, Inc.

TOM KILLEFER
PAUL A. HEINEN
WILLIAM E. HUTH
Chrysler Corporation
340 Massachusetts Ave.
Detroit, Michigan 48231
G. WILLIAM SHEA
PHILIP K. VERLEGER
MCCUTCHEN, BLACK, VERLEGER & SHEA
30th Floor
3435 Wilshire Blvd.
Los Angeles, California 90010
Attorneys for Defendant Chrysler Corporation

WRIGHT TISDALE
Ford Motor Company
The American Road
Dearborn, Michigan 48121
ROBERT L. STERN
ROGER W. BARRETT
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
CARL J. SCHUCK
ERNEST E. JOHNSON
OVERTON, LYMAN & PRINCE
550 South Flower Street
Los Angeles, California 90017
Attorneys for Defendant Ford Motor Company

ROSS L. MALONE
ROBERT A. NITSCHKE
General Motors Building
Detroit, Michigan 48202
HAMMOND E. CHAFFETZ
JOSEPH DUCOEUR
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
Prudential Plaza
Chicago, Illinois 60601
MARCUS MATTSON
RICHARD F. OUTCAULT, JR.
LAWLER, FELIX & HALL
605 West Olympic Boulevard
Los Angeles, California 90015
Attorneys for Defendant General Motors Corporation

APPENDIX A

Plaintiffs

Arizona v. *Automobile Mfrs. Ass'n*, Civil No. 71-174 PHX-WPC (D. Ariz.).

Illinois v. *Automobile Mfrs. Ass'n*, Civil No. 69 C 2194 (N.D. Ill.).

Iowa v. *Automobile Mfrs. Ass'n*, Civil No. 10-231-C-2 (S.D. Iowa).

Kansas v. *General Motors Corp.*, Civil No. T-4896 (D. Kan.).

Massachusetts v. *Automobile Mfrs. Ass'n*, Civil No. 71-622-M (D. Mass.).

Minnesota v. *Automobile Mfrs. Ass'n*, Civil No. 3-70-205 (D. Minn.).

Missouri v. *Automobile Mfrs. Ass'n*, Civil No. 19192-2 (W.D. Mo.).

Ohio v. *Automobile Mfrs. Ass'n*, Civil No. 71-51 (S.D. Ohio).

Rhode Island v. *Automobile Mfrs. Ass'n*, Civil No. 4552 (D. R.I.).

Vermont v. *Automobile Mfrs. Ass'n*, Civil No. 6232 (D. Vt.).

Virginia v. *Automobile Mfrs. Ass'n*, Civil No. 190-71-R (E.D. Va.).

Wahington, et al. (Wash., Colo., Hawaii, Idaho, Maine, W. Va., N.D.) v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.).