**ORAL ARGUMENT NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 09-1237**

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**CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,**

**Petitioners,**

**v.**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,**

**Respondents.**

---

**On Petition For Review of Final Action of the**
**United States Environmental Protection Agency**

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# BRIEF FOR RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

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**August 26, 2010**

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| | | |
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| CHAMBER OF COMMERCE OF THE UNITED STATES, et al., | ) | |
| Petitioners, | ) | |
| v. | ) | Docket No. 09-1237 |
| UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., | ) | |
| Respondents. | ) | |

**RESPONDENTS' CERTIFICATE OF COUNSEL**

Pursuant to Circuit Rule 27(a)(4), counsel for respondent United States Environmental Protection Agency ("EPA") submits this certificate as to parties, rulings, and related cases.

**(A) Parties and Amici**

**(i) Parties, Intervenors, and Amici Who Appeared in the District Court**

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

**(ii) Parties to These Cases**

1. Petitioners: Chamber of Commerce of the United States of America and National Automobile Dealers Association.

2. Respondents: United States Environmental Protection Agency ("EPA") and Lisa P. Jackson, EPA Administrator.

3. Intervenors:

a. The State of California;

b. South Coast Air Quality Management District;

c. The States of New York, Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the State of Florida Department of Environmental Protection, and the Commonwealth of Pennsylvania Department of Environmental Protection; and

d. Environmental Defense Fund, Natural Resources Defense Council, the Sierra Club, and Environment California.

4. Amici:

a. Pacific Legal Foundation;

b. William K. Reilly and Russell E. Train;

c. Charles E. Frank and Adam D. Lee;

d. Inez Fung, James Hansen, Mark Z. Jacobsen, Michael Kleeman, Benjamin Santer, Stephen H. Schneider, and James C. Zachos;

e. PG&E Corporation and Sempra Energy.

**(B) Rulings Under Review**

Petitioners seek review of the EPA action published at 74 Fed. Reg. 32,744 (July 8, 2009) granting a request by the State of California for a waiver of preemption of new motor vehicle emission standards pursuant to section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b).

**(C) Related Cases**

The case on review has not been previously before this Court or any other Court. EPA's prior action denying the same requested waiver was the subject of California v. EPA, No. 08-1178 and consolidated cases (D.C. Cir.). That action was dismissed September 3, 2009.

Respectfully submitted,

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August 26, 2010

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## GLOSSARY

| | |
|---|---|
| CAA | Clean Air Act, 42 U.S.C. §§ 7401-7671q |
| CARB | California Air Resources Board |
| Chamber | Petitioner Chamber of Commerce of the United States of America |
| CO | Carbon monoxide |
| EPA | United States Environmental Protection Agency |
| EPCA | Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) |
| NADA | Petitioner National Automobile Dealers Association |
| NOx | Oxides of nitrogen |

## JURISDICTION

The Court has jurisdiction pursuant to 42 U.S.C. § 7607(b)(1).

## STATUTES AND REGULATIONS

The pertinent statutory provision is quoted herein.

## STATEMENT OF ISSUES

1. Whether Petitioners have standing.

2. Whether the Environmental Protection Agency ("EPA") reasonably determined that the issue of whether California needed its own standards for control of motor vehicle emissions should be based on a consideration of California's program as a whole.

3. In the alternative, if California's need for its greenhouse gas standards must be considered in isolation from other aspects of its motor vehicle program, whether EPA reasonably determined that the opponents of the waiver had failed to demonstrate that California did not need the greenhouse gas standards to meet compelling and extraordinary conditions.

4. Whether EPA took any action regarding preemption under the Energy Policy and Conservation Act.

# STATEMENT OF THE CASE

## I. STATUTORY BACKGROUND

The Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality. The Act generally preserves considerable flexibility for States to meet their goals. However, with regard to new motor vehicles, EPA promulgates nationally applicable emission standards, and States are generally preempted from adopting their own standards. 42 U.S.C. § 7543(a). The Act contains a provision allowing the State of California to petition EPA for a waiver of that preemption. Id. § 7543(b).

Specifically, the Act provides:

> The Administrator shall, after notice and opportunity for public hearing, waive application of this section to [California] if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that –
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

Id. § 7543(b)(1). In keeping with the broad discretion that Congress intended to give California, EPA is required to grant the waiver unless it affirmatively makes at least one of these findings. Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1120-23 (D.C. Cir. 1979) ("MEMA"). Furthermore, "the burden of proof lies with the parties favoring denial of the waiver." Id. at 1121. Similarly, EPA is not required to affirmatively find that none of the conditions that would warrant denial affirmatively exist. Id. at 1120. Rather, the Administrator must examine the evidence submitted by those opposed to the waiver to determine if it is sufficient to overcome the presumption that the waiver should be granted. Id. at 1122. If EPA grants a waiver, other States may adopt the same standards if specified conditions are met. 42 U.S.C. § 7507.

Both the preemption provision in section 7543(a) and the waiver provision in 7543(b) were enacted in 1967. As the Senate Committee that developed these provisions stated: "Senator Murphy convinced the committee that California's unique problems and pioneering efforts justified a waiver of the preemption section to the State of California." S. Rep. No. 90-403 at 33 (1967). See MEMA, 627 F.2d at 1109. As explained by this Court:

> According to the Committee, the advantages of the California exception included the benefits for the Nation to be derived from permitting California to continue its experiments in the field of emissions control – benefits the Committee recognized might "require

> new control systems and design." [S. Rep. No. 90-403 at 33 (1967)] – and the benefits for the people of California to be derived from letting that State improve on "its already excellent *program*" of emission control, id. (emphasis added).

MEMA, 627 F.2d at 1109-10. Thus, as this Court has recognized, in enacting the waiver provision, Congress clearly expected that manufacturers would have to produce two fleets of vehicles: one for California and one for the rest of the nation.

The waiver provision was amended in 1977 to allow California to consider the protectiveness of its standards in the aggregate, rather than requiring that each such standard be at least as stringent as its federal counterpart. See MEMA, 627 F.2d at 1110-11. At the same time, Congress enacted section 7507, the previously-mentioned provision that allows other States to adopt California's standards. As this Court explained, "Congress had an opportunity to restrict the waiver provision in making the 1977 amendments, and it instead elected to expand California's flexibility to adopt a complete program of motor vehicle emissions control." MEMA, 627 F.2d at 1110. The Committee Report of the House committee in which the amendment originated states:

> The Committee amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of the provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.

H.R. Rep. No. 95-294 at 301-02 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1380-81 ("1977 Comm. Rpt."). This Court has summarized Congress' intent in section 7543(b) by stating:

> Since the inception of the federal government's emissions control program it has drawn heavily on the California experience to fashion and to improve the national efforts at emissions control. The history of congressional consideration of the California waiver provision from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation.

MEMA, 627 F.2d at 1110-11 (footnote omitted).

## II. FACTUAL BACKGROUND

The petition for review challenges EPA's grant of a waiver of Clean Air Act preemption for California regulations concerning emissions of greenhouse gases, including carbon dioxide, methane, nitrous oxides, and hydrofluorocarbons, from new motor vehicles. California submitted its initial request for a waiver to EPA by letter dated December 21, 2005. On April 30, 2007, EPA published a notice announcing an opportunity for hearing and comment on California's waiver request. 72 Fed. Reg. 21,260 (Apr. 30, 2007). Public hearings were held May 22 and May 30, 2007, and the public comment period closed on June 15, 2007.

EPA originally denied California's request in a Federal Register notice dated March 6, 2008. 73 Fed. Reg. 12,156. In reaching that decision, the then-Administrator departed significantly from the Agency's past practice of considering whether California needed its own motor vehicle program *as a whole* to address compelling and extraordinary conditions, and instead considered whether California needed its greenhouse gas regulations considered *by themselves*. Id. at 12,159-61.[1/] Based on that new approach, the Administrator stated that the greenhouse gas standards were designed to address a global air pollution problem and determined that California did not need its standards to meet compelling and extraordinary conditions, as required by section 7543(b)(1)(B). 73 Fed. Reg. at 12,159/1.

Petitions for review of that decision were filed in this Court and consolidated as California v. EPA, No. 08-1178. The parties filed their initial briefs in the case. The brief that was submitted on behalf of EPA argued that the Administrator's decision was a reasonable interpretation of the ambiguous provisions of section

---

[1/] This decision resulted in a bifurcated interpretation of the statute, where this new interpretation was applied to emissions standards for greenhouse gases, while the traditional interpretation continued to be applied to all other emissions standards. 74 Fed. Reg. 32,744, 32,759/3 (July 8, 2009). See 73 Fed. Reg. 12,156, 12,161 (March 6, 2008) ("EPA continues to believe that it is appropriate to apply its historical practice to air pollution problems that are local or regional in nature, and is not suggesting the need to change such interpretation.").

7543(b). The case was dismissed by Order dated September 3, 2009 on the basis of the parties' joint motion to dismiss.

On January 21, 2009, the California Air Resources Board ("CARB") submitted a request that EPA reconsider the waiver denial. See 74 Fed. Reg. at 32,747. On February 12, 2009, EPA published a notice in the Federal Register announcing that EPA would fully review and reconsider its March 6, 2008 Denial. 74 Fed. Reg. 7040 (Feb. 12, 2009). In that notice EPA sought comment on: any new or additional information regarding the three section 7543(b) waiver criteria; whether EPA's interpretation and application of section 7543(b)(1)(B) in the denial decision was appropriate; and the effect of the waiver denial on whether CARB's greenhouse gas standards were consistent with section 7521(a), including that section's lead time requirements. Id. EPA held a public hearing on the reconsideration on March 5, 2009.

EPA's decision on reconsideration granting California's waiver request was published in the Federal Register on July 8, 2009. 74 Fed. Reg. 32,744. The decision was based on the Administrator's finding that "the March 6, 2008 Denial was based on an inappropriate interpretation of the waiver provision." Id. at 32,746/1. Specifically, the Administrator rejected the interpretation of section 7521(b)(1)(B) relied on in the March 6, 2008 denial and returned to the Agency's

traditional interpretation of section 7543(b)(1)(B) – that this criterion is to be determined on the basis of its program *as a whole*, by considering whether California needs it own motor vehicle program to address extraordinary and compelling circumstances, rather than standard-by-standard. The Administrator stated:

> If California needs a separate motor vehicle program to address the kinds of compelling and extraordinary conditions discussed in the traditional interpretation, then Congress intended that California could have such a program. Congress also intentionally provided California the broadest possible discretion in adopting the kind of standards in its motor vehicle program that California determines are appropriate to address air pollution problems that exist in California, whether or not those problems are local or regional in nature, and to protect the health and welfare of its citizens. The better interpretation of the text and legislative history of this provision is that Congress did not intend this criterion to limit California's discretion to a certain category of air pollution problems, to the exclusion of others.

Id. at 32,762/1-2.

The Administrator further recognized that there is no sharp line between local and broader air pollution problems. Id. at 32,762/2 ("air pollution problems, including local or regional air pollution problems, do not occur in isolation"). For example, ozone and particulate matter air pollution, which have long been the target of California's motor vehicle standards, have both local, regional and long-range components. Id. The Administrator concluded:

> This context for air pollution problems supports the view that Congress did not draw such a line between the types of air pollution problems under this criterion, and that EPA should not implement this criterion in a narrow way restricting how California determines it should develop its motor vehicle program to protect the health and welfare of its citizens.

Id.

Considering California's motor vehicle program as a whole, the Administrator determined that she was "unable to identify any change in circumstances or any evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist." Id. at 32,763/1. Accordingly, the Administrator concluded that there was no basis to deny the requested waiver. Id. The Administrator determined that "whether or not local conditions are the primary cause of elevated concentrations of greenhouse gases," this approach is consistent with the clear deference that Congress intended to provide California on the mechanisms it chooses to address its air pollution problems. Id. at 32,763/2.

The Administrator also considered, in the alternative, whether the waiver should be granted even if the tests utilized in the waiver denial were applied. Id. at 32,763-67. To that end she considered whether the evidence in the record showed that California did not need its motor vehicle greenhouse gas standards if those standards were looked at separately, and concluded that the waiver could not be

denied based on such a finding. Id. The first alternative test from the denial decision considered by the Administrator was whether California's greenhouse gas standards, considered in isolation, were designed at least in part to address an air pollution problem that is local or regional in nature. Id. at 32,763. The Administrator rejected as "overly narrow" the approach taken in the waiver denial, which focused solely on the global effects of greenhouse gases. Id. Instead, the Administrator considered both the logical link between local ozone concentrations and climate change and the considerable discretion that Congress has given California in addressing its air pollution problems. Id. Applying this approach, the Administrator found that California had made the case that its ozone problems would be made worse by rising temperatures, which the greenhouse gas regulations are intended to ameliorate, and thus that California's greenhouse gas standards were intended at least in part to address a local or regional problem.

The Administrator also considered whether the waiver should be granted if the second alternative test from the denial was applied, i.e., she considered whether the impacts of global climate change on California were significant enough and different enough from the effects on the rest of the country to support the conclusion that California needs its greenhouse gas regulations to meet compelling and extraordinary circumstances. She determined, based on the evidence in the

record, that there would also be no basis to deny the waiver if that test were applied. Id. at 32,763-67. The Administrator found that California had identified a wide variety of impacts from climate change within California and that the opponents of the waiver had not demonstrated that any other State, group of States or area within the United States would face a similar or wider range of vulnerabilities and risks. Id. at 32,765/2. Thus, the waiver could not be denied even under the alternative tests.

The petition for review was filed September 8, 2009. EPA moved to dismiss the petition for lack of standing. By Order dated February 25, 2010, the Court referred the motion to dismiss to the merits panel and ordered the parties to address the issues raised in the motion in their briefs.

## STANDARD OF REVIEW

The Court's review of EPA's decision to deny California's request for a waiver is governed by section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d at 1105. Thus, the Agency's decision must be upheld unless it is "arbitrary, capricious, . . . or otherwise not in accordance with law," or if it fails to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2). See also American Trucking Ass'ns, Inc. v. EPA, 600 F.3d 624, 627 (D.C. Cir. 2010).

The "arbitrary or capricious" standard presumes the validity of agency actions, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 519-21 (D.C. Cir. 1983); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court must "presume that the Administrator acted lawfully and so conclude unless [the Court's] thorough inspection of the record yields no discernible rational basis for his action." MEMA, 627 F.2d at 1105. Furthermore, the same standard applies to judicial review of an agency's decision, whether review is of the agency's initial decision on a matter or is of the agency's revision or reversal of a previous decision. F.C.C. v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810-11 (2009). In either case, the Agency is required only to provide a "reasoned explanation" for its decision. Id.

With regard to questions of statutory interpretation, as the agency to which Congress expressly delegated implementation authority, EPA's interpretation of the Clean Air Act "governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed

*most* reasonable by the courts." Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct. 1498, 1505 (2009) (emphasis in original) (citing Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-44 (1984)). It is not necessary that the reviewing court first and independently consider the Chevron step 1 question of "'whether Congress has directly spoken to the precise question at issue' . . . [because] surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." Riverkeeper, 129 S. Ct. at 1505 n.4 (internal citations omitted).

## SUMMARY OF THE ARGUMENT

Petitioners lack standing, and the petition must therefore be dismissed. The Chamber of Commerce of the United States ("Chamber") has failed to identify a single individual member that it asserts has suffered harm as a result of the waiver decision, and thus has not even made the minimum threshold showing necessary to demonstrate standing. While the National Automobile Dealers Association ("NADA") has presented declarations identifying specific members, those declarations do not establish that NADA's members will suffer any concrete harm as a result of the grant of the waiver. While the declarants assert *without support* that they will lose sales as a result of the waiver, evidence in the record demonstrates the opposite – that the availability of more fuel-efficient vehicles as a

result of the waiver decision will actually *increase* sales. Furthermore, declarants' claims that they will lose sales to dealers in other States has been mooted by the recent adoption of federal standards for model years 2012 to 2016 that are essentially equivalent to the California standard for which the waiver was granted.

Even if Petitioners had standing, the petition should be denied because EPA reasonably concluded that California's need for its own emission standards should be determined based on consideration of California's need for its program *as a whole*. EPA reasonably interprets the criterion set forth in section 7543(b)(1)(B) – whether California needs "*such* State standards" to meet compelling and extraordinary conditions – as referring back to the introductory language of section 7543(b)(1), which requires California to determine whether *its standards "in the aggregate"* are at least as protective as applicable Federal standards, which refers to California's program as a whole. Furthermore, Congress' 1977 amendment of the statute to allow the protectiveness determination to be made "in the aggregate" supports EPA's reading of the statute because it would be anomalous for Congress to permit California to have a program in which some standards were less stringent than federal standards, so long as the whole is more protective, and yet simultaneously require California to justify its need for those standards individually.

EPA's reading of the statute is also consistent with congressional purpose. Once EPA grants California a waiver with regard to any of its regulations, manufacturers will need to meet two different sets of regulations for the nation without regard to the exact nature of California's program; thus, EPA's reading of the statute as allowing California's need for its own standards to be assessed based on the California program as a whole does not implicate Congress' desire to avoid a "patchwork" of regulation. Furthermore, one of the central purposes of Congress' decision allowing California to obtain waivers of preemption was to allow that State to continue to act as a laboratory for innovation in developing new pollution control technologies and techniques. To that end, Congress intended to grant the State the "broadest possible discretion." MEMA, 627 F.2d at 1110-11; Ford Motor Co. v. EPA, 606 F.2d 1293, 1296-97 (D.C. Cir. 1979). Considering California's need for its program as a whole is consistent with this congressional intent to allow California the broadest possible discretion to innovate, whereas requiring considering each element of the program in isolation is not.

Even if California's need for the greenhouse gas regulations is considered in isolation from other aspects of California's regulatory program, EPA's determination that there was no basis to deny the waiver is reasonable and supported by evidence in the record, including evidence submitted during the

reconsideration process. First, California's greenhouse gas regulations are part of California's program to address the local and regional problem of air pollution. California has considerable discretion in fashioning its program of vehicle standards. Because California indisputably may promulgate its own program to address its long-recognized and undisputed ozone problem, it has discretion to include the greenhouse gas standards for purposes of that program, and there was no basis to deny the waiver. Second, EPA reasonably determined that the waiver should be granted because opponents of a waiver had not demonstrated that the effects of climate change on California do not constitute compelling and extraordinary conditions.

Finally, EPA made no determination as to whether enforcement of California's greenhouse gas regulations would be preempted by the Energy Policy and Conservation Act. Rather, EPA simply granted a waiver from the prohibition in section 7543(a) on adoption or enforcement of motor vehicle standards by a State. Thus, that issue is not before this Court.

## ARGUMENT

### I. PETITIONERS LACK STANDING

Petitioners do not claim standing based on an injury to themselves, but rather associational standing based on alleged injuries to their members. Pet'r Br. at 22.

To establish associational standing, Petitioners must demonstrate that: (1) at least one identified member would have standing to sue in its own right; (2) the interests they seek to protect are germane to the organizations' purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. American Chemistry Council v. Dep't of Transp., 468 F.3d 810, 815 (D.C. Cir. 2006).

To establish that an identified member would have standing, the Petitioners must demonstrate that (1) the member has suffered an injury-in-fact that is both concrete and particularized and actual or imminent rather than conjectural or hypothetical; (2) there is a causal connection between the claimed injury and the challenged action and that the injury is not the result of the independent action of some third party; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id.

The California regulations for which the waiver was granted directly regulate only vehicle manufacturers,[2/] who have not challenged the grant of the waiver. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially

[2/] See Cal. Code Regs. tit. 13 § 1961.1 (2010) (compliance with California's greenhouse gas emission standards are based on manufacturer compliance with fleet average requirements).

more difficult' to establish." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (citation omitted); Sierra Club v. EPA, 292 F.3d 895, 899-900 (D.C. Cir. 2002). Because Petitioners are not themselves the subject of the agency action being challenged, they must come forward with specific facts to demonstrate that they have an identifiable member who has suffered a redressable injury from the waiver grant.

The Chamber has not identified a single specific member that it alleges has been injured, and thus has not even made the threshold showing necessary to establish standing. While the Chamber asserts that it has members who are automobile dealers or other entities who are affected by the grant of the waiver, it has not identified them, and thus cannot establish the particularized injury necessary for standing. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1150-51 (2009) (to have standing organization must identify specific member with a specific concrete injury).

While NADA has identified specific members, it has not established that those members will suffer a concrete injury. The sole evidence of injury presented by NADA are declarations by two dealers who speculate that they may be harmed if they are unable to obtain certain vehicle models allegedly desired by customers

or are forced to accept more fuel-efficient vehicles that are allegedly less popular with consumers. Pet'r Stand. Add. at 8-14.

The evidence in the record, however, shows that automobile sales are predicted to *increase* in California as a result of its greenhouse gas standards because of growing consumer preference for high-mileage vehicles. Analysis by CARB demonstrates that implementation of the California standards will result in an overall increase in vehicle sales, at least through the 2013 model year, because of the increased availability of fuel-efficient vehicles. CARB, Addendum to Initial Statement of Reasons, EPA-HQ-OAR-2006-0173-0010.132, at 34 Table 12.1-7; see also id. at 38 Table 12.6-4 (showing no jobs lost at automobile dealers as a consequence of implementation of the California standards) (JA XXXX, XXXX). This conclusion is supported by other analyses as well as the recent experience of at least one automobile manufacturer. Testimony of Dr. Walter McManus, University of Michigan Transportation Research Institute, EPA-HQ-OAR-2006-0173-7176, at 175-82 (JA XXXX-XX); Citigroup Global Market Reports, October 13, 2009 (Attachment 1); Ford Motor Company news release November 3, 2009 (Attachment 2) ("Consumer demand for our new high-quality, fuel-efficient products is driving Ford's market share gains.").

Furthermore, federal greenhouse gas standards have been promulgated for model years 2012 to 2016, and California has taken action to accept compliance with the federal standards as an alternative means of compliance with the State's standards.[3/] As a result of EPA's promulgation of these federal standards, automobile manufacturers selling vehicles in States neighboring California will now be subject to the same greenhouse standards as manufacturers selling vehicles in California and manufacturers will be able to deliver the same fleet for sale in each State. Therefore, there will be no incentive for consumers to leave the State to purchase vehicles, eliminating one of the major alleged sources of harm identified by NADA's declarants. While the vehicle manufacturers will have to comply with the California standards for the 2009-2011 model years, there is no evidence whatsoever that compliance with the standards for those years will impose actual or imminent injury on dealers or other third parties. The combined car and truck federal fuel economy standards for the 2009-2010 model years are comparable to California's standards for those model years. See Environmental Analysis, Inc., "Auto-Manufacturers' Ability to Comply with California GAG

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[3/] As Petitioners note, the federal regulations were not final at the time the petition was filed, and standing is determined as of the date of filing. Pet'r Br. at 25. However, if the Court were to find that there was injury at the time of filing that has been eliminated by the subsequent promulgation of federal regulations, the petition would still have to be dismissed because it would be moot.

Standards through 2012," EPA Docket No. EPA-HQ-OAR-2006-0173-9019.15[1] (JA XXXX). Furthermore, manufacturers can utilize credits generated by exceeding the applicable standards in 2009 or 2010 to assist in compliance with the 2011 standards. Evidence presented to EPA during the reconsideration process indicates that vehicle manufacturers will be able to comply with the 2009-2011 California requirements with little or no change to their intended model lines. 74 Fed. Reg. at 32,770-76. Specifically, that evidence demonstrates that the manufacturers complied with the 2009 standards with the generation of credits, that manufacturers will comply with the 2010 standards, and that manufacturers will be able to comply with the 2011 standards with, in some cases, the use of credits from previous years. Id.

Furthermore, any alleged injury to dealers or other third parties, whether in the 2009-11 model years or beyond, is entirely speculative because it is dependent on the voluntary actions of third parties, specifically the vehicle manufacturers. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (no standing where claimed injury "results from the independent action of some third party not before the court."); Gettman v. Drug Enforcement Admin., 290 F.3d 430, 435 (D.C. Cir. 2002) ("speculative claims dependent upon the actions of third parties do not create standing"). Manufacturers have a range of options for complying

with the California requirements, and any alleged harm would have to be based on speculation that manufacturers would choose a particular option. For the same reason, any claim by Petitioners that their alleged injury can be redressed by the Court would also be based on speculation. For example, manufacturers could *choose* to manufacture fleets compliant with the California standards regardless whether the Court upholds or vacates the waiver decision.

Because Petitioners have not met their burden to establish standing, the petition should be dismissed.

## II. EPA REASONABLY ASSESSED WHETHER CALIFORNIA NEEDS ITS PROGRAM TO MEET COMPELLING AND EXTRAORDINARY CONDITIONS BY CONSIDERING THE PROGRAM AS A WHOLE

CAA section 209(b)(1)(B) states that EPA may not grant California a waiver of preemption if the Administrator finds that California "does not need such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). In granting the waiver for California's greenhouse gas regulations, EPA considered whether California needed its automobile emission standards as a whole, a practice that has been followed in every decision it has made under this section for over 40 years, except for the initial March 6, 2008 denial of this waiver petition. EPA's current interpretation is consistent with the

statutory language, congressional intent as demonstrated by the legislative history, and prior decisions by this Court.

Nothing in section 7543(b) requires that EPA consider whether California has a need for any *particular* aspect of its automotive standards program, rather than assessing whether California has a need for its program *as a whole*. The statute provides in relevant part:

> The Administrator shall, after notice and opportunity for public hearing, waive application of this section to [California] . . . if the State determines that *the State standards will be*, *in the aggregate*, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that . . . (B) such State does not need *such State standards* to meet compelling and extraordinary conditions . . . .

42 U.S.C. § 7543(b)(1) (emphasis added). The most natural reading of the statutory language is that the italicized phrase "such State standards" in subsection (b)(1)(B) refers back to the italicized word "standards" in section 7543(b)(1) – that is, the "State standards" that the State has determined will be, "in the aggregate," as protective as federal standards. In other words, that it refers to California's program as a whole. Thus, even if the statutory language does not compel the reading EPA gives to section 7543(b)(1), EPA's interpretation is a reasonable one that must be upheld.

Furthermore, EPA's interpretation is clearly reasonable in light of the purpose of the statute and its legislative history. As this Court has recognized, the waiver provision in section 7543 was a compromise between allowing any State to independently regulate automobile emissions and complete preemption in favor of a single federal standard. MEMA, 627 F.2d at 1109. Under the provision as enacted, and as amended in 1977, manufacturers desiring to sell cars in California would potentially have to produce two variations of each model sold – one complying with national standards and one complying with California's standards. EPA's interpretation of the statute, to consider California's need for a separate motor vehicle program as a whole, is consistent with this congressional compromise. Regardless of the individual elements of California's program, there are still only two required variations – one for California (and States that adopt California's program) and one for the rest of the nation.

Furthermore, the congressional rationale for adopting the statutory provision allowing California to adopt its own standards was not only that California has unique air pollution problems, but also that the provision would allow California to continue to be a leader in experimenting with techniques for control of air pollution from automobiles. The report of the Senate committee that created the waiver provision stated, "Senator Murphy convinced the committee that California's

unique problems *and pioneering efforts* justified a waiver of the preemption section to the State of California." S. Rep. No. 90-403 at 33 (1967) (emphasis added). This Court has summarized the compromise reached by the Committee in this manner:

> According to the Committee, the advantages of the California exception included the benefits for the Nation to be derived from permitting California to continue its experiments in the field of emissions control – benefits the Committee recognized might "require new control systems and design." [S. Rep. No. 90-403 at 33 (1967)] – and the benefits for the people of California to be derived from letting that State improve on "its already excellent *program*" of emission control, id. (emphasis added). There is no intimation in the Senate Committee report that the waiver provision was designed to permit California to adopt only a portion of such a program.

MEMA, 627 F.2d at 1109-10.

Considering California's program as a whole is consistent with Congress' intent that California be allowed to continue its role to experiment with new methods for emissions control and to spur the development of new pollution control technologies and techniques. The current waiver is a good example of the benefits of this approach. California developed and implemented standards for the control of greenhouse gases when there was no regulation of these pollutants at the

federal level, and California's innovative efforts ultimately facilitated the development of federal standards to address the same problem.[4/]

The conclusion that Congress intended to give California broad flexibility in determining for itself the scope of its emissions control program is reinforced by the 1977 amendment to the waiver provision, in which Congress provided that California could receive a waiver if it determined that its program "in the aggregate" is at least as protective as the federal program, rather than requiring that each component of the program be at least as protective as the corresponding federal requirement. As this Court explained, "Congress had an opportunity to restrict the waiver provision in making the 1977 amendments, and it instead elected to expand California's flexibility to adopt a complete program of motor vehicle emissions control." MEMA, 627 F.2d at 1110. The Committee Report of the House committee where the amendment originated says:

> The Committee amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that

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[4/] It is worth noting that the Alliance of Automobile Manufacturers, a trade association of 11 car and light truck manufacturers including BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota and Volkswagen Group of America, has moved to intervene *in support* of EPA's federal greenhouse gas standards for new light duty motor vehicles in Southeastern Legal Found. v. EPA (D.C. Cir.), No. 10-1094, which involves direct challenges to those federal standards.

> provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.

1977 Comm. Rpt. at 1380.

Interpreting section 7543(b) to allow California to determine the exact nature of its air quality problem and to subsequently design the parameters of its overall program for control of automobile emissions, once the threshold determination is made that California needs its own program, is clearly consistent with the congressional intent that California be provided "the broadest possible discretion" to adopt a "complete program" to protect the health and welfare of its citizens. Nothing in the statute indicates that Congress intended this broad discretion to apply to some air pollution problems but not to others.

California has determined that control of greenhouse gases is a desirable part of its program for control of emissions from vehicles. Because California undisputably has a need for its own program of emission controls to address its serious air pollution problems, such as ozone, the addition of greenhouse gas controls to its program does not increase the number of different vehicles that manufacturers must create nationwide, and thus does not implicate the multiple-fleet concerns that caused Congress to enact the section 7543 preemption provisions in the first place. Accordingly, EPA's determination that it need only

consider California's need for its program as a whole in finding that the State is entitled to a waiver for its program including the greenhouse gas controls, is consistent with the statutory language, purpose, and existing case law. EPA's reading of the statute thus must be upheld as a reasonable interpretation of the statute under the precepts of Riverkeeper and Chevron. See American Trucking Ass'ns, Inc. v. EPA, 600 F.3d at 627 (holding that similar language in CAA section 209(e)(2)(A)(ii), 42 U.S.C. § 7543(e)(2)(A)(ii), "gives California (and in turn EPA) a good deal of flexibility in assessing California's regulatory needs.")[5/]

Petitioners' claims to the contrary are without merit. Petitioners' textual argument, Pet'r Br. 31-32, 39-42, simply assumes that the word "standards" in section 7543(b)(1)(B) refers to the particular standards that California wants to add to its program or modify at a given time, rather than to the program as a whole. However, there is nothing in the statutory text that specifies that EPA must consider *only* California's need for the *particular* changes being made at one time.

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[5/] In the waiver decision at issue in the American Trucking case, EPA interpreted the similar language in Clean Air Act section 209(e), 42 U.S.C. § 7543(e), concerning "compelling and extraordinary circumstances" as requiring a review of California's need for the program as a whole. Although the issue was not explicitly addressed by the Court in its opinion, petitioners did challenge EPA's interpretation of this statutory language. See American Trucking Ass'ns, Inc. v. EPA, No. 09-1090 (D.C. Cir.), Brief of Respondent United States Environmental Protection Agency (August 31, 2009) at 23-30.

As discussed above, the introductory text of section 7543(b)(1) uses the word "standards" to refer to California's program as a whole because it permits California to obtain a waiver if the State determines that its "*standards* will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1) (emphasis added). It is clearly a reasonable interpretation of the statute that the later reference to "such standards" in subsection B of the same section *also* refers to California's program as a whole.

Petitioners' argument that the fact that Congress did not include the phrase "in the aggregate" in section 7543(b)(1)(B) means that Congress did not intend for the protectiveness determination to be made with regard to the program as a whole, Pet'r Br. at 44-46, is meritless. First, the language "such standards" in section 7543(b)(1)(B) refers back to the "State standards" for which the protectiveness determination is made "in the aggregate," thus indicating the program as a whole. Second, the "in the aggregate" language was added to the statute to address a specific issue that arose in the context of the protectiveness determination, i.e., the problem of control measures for one pollutant potentially exacerbating emissions of another (in particular, the possibility that control measures for oxides of nitrogen ("NOx") would increase emissions of carbon monoxide ("CO")). Congress amended the statute to give California the discretion to determine whether the

benefits of increased NOx control (to address the problem of ozone pollution) outweigh the increased emissions of CO.

It would be bizarre for Congress to give California such substantial discretion in determining the overall makeup of its emissions control program, while at the same time requiring the State to justify its need for each element of the program. For example, it is difficult to envision how California could possibly justify its need for a CO standard that is less stringent than federal standards if the CO standard had to be considered on its own. The interpretation of the statute most consistent with Congress' grant of "the broadest possible discretion" to California to develop its own program is that if California needs its own emissions control program in some respect, it is allowed to fashion whatever set of controls it deems appropriate, as long as it finds that the controls in the aggregate are at least as protective as the federal program and as long as the program is consistent with Clean Air Act section 7521(a). The alternative interpretation espoused by Petitioners would effectively undermine what Congress intended to achieve through the 1977 Amendments by requiring California to make a protectiveness determination for each element of its program under the guise of demonstrating the State's need for that element.

Petitioners' claim that the use of the phrase "such standards" in section 7543(b)(1)(C) is inconsistent with EPA's interpretation, Pet'r Br. at 43-44, is similarly meritless. California's *entire* program must be consistent with section 7521(a), including the requirement of adequate lead time. As a practical matter, when California seeks to add or modify a portion of its program, the only issue before the Agency will generally be whether the new or modified portion of the regulations meets the consistency requirement because EPA will have already made that determination with regard to the pre-existing elements of the program.[6/] Because vehicles sold in California must meet *all* the applicable California requirements, the program would not meet the 7543(b)(1)(C) requirement if such vehicles could not be constructed in compliance with the lead time requirements. Petitioners' assertion that EPA took a different view in this waiver decision is simply erroneous.

There is similarly no basis to Petitioners' assertion that EPA's interpretation of the statute renders section 7543(b)(1)(B) a nullity, Pet'r Br. at 46-49. California still must be denied a waiver if it does not need its own program to control vehicle

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[6/] One circumstance in which EPA might have to consider California's program as a whole to determine if a modification of the program meets the requirement of section 7543(b)(1)(C) would be if an opponent of the waiver alleges that the new standard, while feasible by itself, is infeasible to meet in combination with other aspects of California's standards.

emissions to meet compelling and extraordinary conditions.[7/] Thus, section 7543(b)(1)(B) continues to establish a substantive criterion that requires denial of a waiver if it is met. However, once that substantive requirement has been met, Congress and this Court have made clear that California is to be given the broadest possible discretion in designing that program. MEMA, 627 F.2d at 1110. Petitioners do not contest that California still needs its own program for controlling vehicle emissions to address its problems with ozone and other pollutants. Given that California still needs its own program, section 7543(b)(1)(B) provides no basis for EPA to deny the waiver.

Petitioners' assertion that EPA's interpretation is inconsistent with the statutory purpose is similarly erroneous. While Petitioners focus on Congress' intent in passing the preemption provision of section 7543(*a*) to avoid a nationwide "patchwork" of regulations, Petitioners ignore the fact that in section 7543(*b*) Congress expressly allowed *California* to seek a waiver of preemption, thus practically guaranteeing that manufacturers would have to produce two fleets if

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[7/] California must also meet the other requirements of section 7543(b), including demonstrating that its standards in the aggregate are at least as protective as federal standards and are technically feasible. Thus, EPA's interpretation does not give California "unlimited discretion," as asserted by Petitioners. Pet'r Br. at 42. It does, however, give California the "broadest possible discretion," as intended by Congress.

they intended to sell into the California market. Congress thereafter expanded the applicability of California's regulatory program by amending the statute in 1977 expressly to allow other States to adopt them. Changing the specific parameters of California's program does not alter the fact that there are still two, and only two, fleets and thus does not implicate the congressional concern of avoiding a "patchwork" of regulation.[8/]

Petitioners' argument ignores the fact that an equally important reason for inclusion of the waiver provision in the statute was to allow California to continue to drive the development of new techniques and technologies for emissions control. Petitioners similarly ignore the clear legislative history showing that Congress intended to give California the "broadest possible discretion" to determine the parameters of its program. EPA's interpretation of the statute is consistent with this congressional intent, while Petitioners' more narrow interpretation requiring EPA to consider each part of California's program in isolation is not.

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[8/] Petitioners' assertion that the adoption of the California standards by other States will create a "patchwork" of regulations because of state-specific enforcement, Pet'r Br. at 17-18, has no relevance to whether *California* needs its standards to address compelling and extraordinary circumstances. Any claims that a particular State's adoption of the California standards is inconsistent with Clean Air Act requirements can be addressed through a challenge to that State's standards. See, e.g., Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. N.Y. State Dept. of Envtl Conservation, 17 F.3d 521 (2d Cir. 1994).

## III. EVEN IF THE GREENHOUSE GAS STANDARDS ARE CONSIDERED IN ISOLATION, THE WAIVER WAS PROPERLY GRANTED

As discussed above, EPA believes that interpreting section 7543(b)(1)(B) to require analysis of whether California needs its own program as a whole is more consistent with the statutory language and congressional intent than Petitioners's interpretation that EPA is required to analyze each element of the program in isolation. However, EPA also examined whether the waiver must be denied if California's greenhouse gas standards are examined on their own. EPA determined that those opposing the waiver had not met their burden, and this decision is fully supported by the record.

EPA evaluated this question under two alternative approaches, i.e., EPA considered: (1) whether California's greenhouse gas standards address an air pollution problem that is local or regional in nature; and (2) whether the impacts of climate change in California constituted compelling and extraordinary circumstances. 74 Fed. Reg. at 32,763-67. EPA determined that under either of these alternative analyses those opposing the waiver had not met their burden to prove that the waiver should not be granted. This determination is fully supported by the record.

### A. The Greenhouse Gas Standards Are Part Of California's Program To Address Ozone Pollution, A Local Or Regional Problem.

With regard to the first approach, EPA determined that California's greenhouse gas regulations were intended in part to address California's chronic problems with ozone pollution, an undisputable local problem. California contains the only region in the United States classified as an "extreme" ozone nonattainment area, and California's climate, geography, and number of vehicles have made the problem of achieving the ozone standard particularly intractable in California. The production of ozone in the atmosphere, and thus ambient concentrations, is dependent on temperature. Lower temperatures result in lower ambient ozone concentrations; higher temperatures, conversely, lead to higher ozone concentrations. California's greenhouse gas regulations are intended to help slow the current rise in temperatures, which exacerbates California's ozone problem. 74 Fed. Reg. at 32,763 & n.112. California also noted that its greenhouse gas standards will lead to some limited local reductions in the traditional pollutants that cause ozone. 74 Fed. Reg. at 32,763 & n.114; CARB 2009 Comments, EPA-HQ-OAR-2006-0173-9006, at 10 (JA XXXX) Thus, whether or not local conditions are the primary cause of elevated concentrations of greenhouse gases, California's greenhouse gas regulations are designed to address, inter alia, a local

or regional problem relating to the formation of ozone within the State. 74 Fed. Reg. at 32,763.

Petitioners do not dispute that California needs its own vehicle emissions program to address its ozone problem. As discussed above, Congress has given California broad discretion in deciding how to structure its program to address the identified needs. Because the greenhouse gas regulations are a part of California's program to address its persistent ozone pollution problem, a program that California indisputably needs, there is no basis for EPA to deny the requested waiver pursuant to section 7543(b)(1)(B). 74 Fed. Reg. at 32,763.

Petitioners' first argument in response to this alternative approach is to assert that the projected decrease in temperature from implementation of the greenhouse gas regulations is too small for EPA to conclude that California needs the greenhouse gas regulations to address its ozone problem. Pet'r Br. at 49-50; Br. of Amicus Curiae Pacific Legal Foundation. This Court rejected a similar argument in MEMA. The petitioners there argued that California did not need the challenged regulations because the State had not demonstrated that the regulations would enhance air quality. 627 F.2d at 1124-25. Although the Court acknowledged that "the CARB staff conceded that it could not precisely identify the emissions-related

benefits to be derived from the regulations alone," id., the Court upheld the Administrator's grant of the waiver. Id. at 1125.

The Supreme Court also rejected a similar argument in Massachusetts v. EPA, 549 U.S. 497 (2007). Specifically, the Court rejected the argument that because the motor vehicle regulations sought by Massachusetts and other petitioners would not completely address the injuries caused by global climate change, they lacked standing. Id. at 523-26. The Court held that EPA's failure to take an interim step that could slow or reduce the effects of climate change was a sufficient cause of petitioners' injuries to give them standing. Id. at 525-26. Similarly here, that California's greenhouse gas standards will make only an incremental contribution to resolving California's ozone and climate change problems does not satisfy Petitioners' burden to establish that California does not need the standards.

Petitioners do not contest that California's greenhouse gas standards will result in some reduction in greenhouse gas emissions or that a reduction in greenhouse gas emissions will result in reduction in global temperatures. See Comments of Chamber of Commerce of the United States, EPA-HQ-OAR-2006-0173-8995.1, at 14-15 (JA XXXX-XX). Such a reduction will have an effect on temperatures in California, and lower temperatures will

result in less ozone formation.[9/] 74 Fed. Reg. at 32,763 & n.112; CARB 2009 comments, EPA-HQ-OAR-2006-0173-9006.1, at 7-10 (JA XXXX-XX); CARB Hearing Presentation, EPA-HQ-OAR-2006-0173-7177, at 8-12 (JA XXXX-XX); Jacobson Testimony, EPA-HQ-OAR-2006-0173-7177.1 (JA XXXX-XX); Environmental Defense Comments (June 15, 2007), EPA-HQ-OAR-2006-0173-1459, at 1-2 (JA XXXX-XX); Comments of Jacobson, et al., EPA-HQ-OAR-2006-0173-8993.1, at 6-8 (JA XXXX-XX); May 30, 2007 Public Hearing Tr., EPA-HQ-OAR-2006-0173-0421, at 71 (testimony of Andrew Clubock, Alliance of Automobile Manufacturers) (JA XXXX).

Petitioners argue that the waiver is inappropriate because the impacts of climate change on California ozone levels are not entirely the result of local emissions of greenhouse gases. Pet'r Br. at 36-37, 50-51. Petitioners' argument ignores the substantial deference that Congress intended to provide California on the mechanisms it chooses to use to address its air pollution problems. The greenhouse gas program is part of a set of standards that California needs to

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[9/] Petitioners' attempt to distinguish the "logical link" EPA found between climate change and California's standards and causality, Pet'r Br. at 49-50, is specious. At a minimum, California's standards will reduce global concentrations of greenhouse gases, which will reduce global temperatures, including temperatures in California. Thus, there is a causal link between California's greenhouse gas standards and temperatures in California.

address the local or regional problem of ozone pollution. While the greenhouse gas regulations may make only a small contribution to solving that problem, Congress specifically left to California the determination of whether that contribution is worth the cost of the controls. As this Court has explained, "Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight." Ford Motor Co. v. EPA, 606 F.2d at 1297. "Congress has decided to grant California the broadest possible discretion in adopting and enforcing standards for the control of emissions from new motor vehicles." MEMA, 627 F.2d at 1128; see also Massachusetts v. EPA, 549 U.S. at 525-26.

Moreover, California can reasonably expect greater reductions in greenhouse gas emissions from its regulations than simply those resulting from application of the regulations in California. First, under section 7507, other States may adopt California's standards, multiplying their effect. In fact, 13 States and the District of Columbia, representing (with California) over half of the new motor vehicle market in the United States, have adopted California's greenhouse gas standards. California could also expect that the technologies developed in response to its regulations (which reduce fuel consumption as well as reducing the amount of greenhouse gases emitted) would be more widely adopted. This has also proven to

be the case, as demonstrated by the adoption of similar federal standards.[10/] The comments of the Chamber of Commerce and of the Alliance of Motor Vehicle Manufacturers demonstrate that a small but measurable decrease in temperature would result from nationwide adoption of the California standards. JA XXXX-XX, XXXX.

Finally, evidence presented during the reconsideration proceeding confirms the strong correlation between climate change and ozone levels in California. 74 Fed. Reg. at 32,763 & n.112; CARB 2009 comments, EPA-HQ-OAR-2006-0173-9006.1, at 7-10 (JA XXXX-XX); CARB Hearing Presentation, EPA-HQ-OAR-2006-0173-7177, at 8-12 (JA XXXX-XX); Jacobson Testimony, EPA-HQ-OAR-2006-0173-7177.1, (JA XXXX-XX). The record also contains evidence that local emissions of greenhouse gases can contribute to localized higher temperatures, and thus increased levels of ozone, and that the greenhouse gas emission standards will reduce total emissions of pollutants that are

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[10/] Petitioners' claim that California was inappropriately attempting to influence federal standards, Pet'r Br. at 50, is misplaced. First, one of the very purposes of the statutory waiver, expressly acknowledged by Congress, is to allow California to be a laboratory for innovation, i.e., to develop measures that may ultimately be adopted as federal standards. Thus the progression from California to federal standards is specifically intended by the statute. Second, California submitted its petition for a waiver in 2005, well before development of the federal standards.

ozone precursors. See 74 Fed. Reg. at 32,763; 2009 CARB Comments, EPA-HQ-OAR-2006-0173-9006.1, at 7-10 (JA XXXX-XX).

Accordingly, even if EPA were required to determine whether California's greenhouse gas standards are needed to address a local or regional problem, the waiver should still be granted because opponents of the waiver have not met their burden of proof to demonstrate that the greenhouse gas regulations are not part of a program of standards designed by California to address California's ozone problem.

### B. The Effects Of Climate Change In California Constitute Compelling And Extraordinary Conditions.

EPA also determined that, if it were necessary to consider whether California needs its greenhouse gas standards to address extraordinary and compelling conditions caused by climate change, there would again be no basis to deny the waiver. 74 Fed. Reg. at 32,763-67. This determination is based both on a re-analysis of the evidence in the record from the original waiver proceeding, as well as new evidence presented during the reconsideration proceeding.

EPA found that, while other States will suffer many of the same impacts from climate change as California, "[o]pponents have not demonstrated that any other state, group of states, or area within the United States would face a similar or

wider range of vulnerabilities and risks." Id. at 32,765. Among the impacts identified in California are:

> exacerbation of tropospheric ozone, heat waves, sea level rise and salt water intrusion, an intensification of wildfires, disruption of water resources by, among other things, decreased snowpack levels, harm to high value agricultural production, harm to livestock production, and additional stresses to sensitive and endangered species and ecosytems.

Id.

Factors that make these problems particularly acute for California include:

- California has the largest agricultural based economy of any State;
- California agriculture is heavily dependent on irrigation;
- California has the largest state coastal population, representing 25 percent of the United States oceanic coastal population;
- California has a recalcitrant ozone problem, which higher temperatures will exacerbate;
- California's water supply is already stressed and over-allocated;
- California has the greatest variety of ecosystems in the United States and the most threatened and endangered animal species.

Id. at 32,764. That global climate change will have effects on these concerns in California is supported by numerous documents in the record. 74 Fed. Reg. at

32,764-65; CARB 2007 Comments, EPA-HQ-OAR-2006-0173-1686, at 7-9 (JA XXXX-XX).

Petitioners' claim that these circumstances do not constitute extraordinary and compelling conditions, Pet'r Br. at 53-55, is without merit. Petitioners' assertion that EPA may only consider whether the *causes* of pollution constitute extraordinary and compelling conditions has no basis in the statute. Section 7543(b)(1)(B) does not specify how EPA is to determine what constitutes extraordinary and compelling conditions, and thus leaves to EPA's discretion whether to consider causes, effects, or both. Furthermore, the legislative history makes clear that one of the rationales for the waiver provision was concern over the effects of pollution in California, such as California's particularly severe ozone problems. S. Rep. No. 90-403 at 33 (1967) (citing "California's unique problems" as one basis for the waiver provision). Thus, even assuming it were necessary to consider California's greenhouse gas standards by themselves, examining whether California needs separate emission standards because the effects of the air pollution in California are extraordinary and compelling is a reasonable interpretation of the statute entitled to deference under Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

Petitioners' assertion that EPA has not sufficiently explained why its current conclusion differs from the one it reached in denying the waiver in 2008, Pet'r Br. at 56, is also without merit. First, Petitioners erroneously assert that the decisions are based on the same factual record. However, additional information was presented during the reconsideration process that demonstrates that the impact of climate change on California is more severe than in other States. See, e.g., 74 Fed. Reg. at 32,764 n.117.

Second, the determination of whether the impact of climate change on California compared to other States rises to the level of "compelling and extraordinary conditions" is a matter of judgement, rather than a purely factual determination. Contrary to Petitioners' assertions, Pet'r Br. at 56, the Supreme Court has made clear that there is no higher standard an agency must meet in changing a previous policy than that which applies when the agency develops a policy as an initial matter. F.C.C. v. Fox, 129 S. Ct. at 1810-11. If the agency's change in position is based on changed facts, the agency must address them, but there is no higher standard of review for its new policy. Id.

In this case, EPA adequately explained why it reached a different conclusion on reconsideration than it reached initially. To the extent the decision relies on new facts, those facts were presented to EPA during the reconsideration process

and show that the impacts of climate change on California are more severe than believed during the initial proceedings. 74 Fed. Reg. at 32,764 n.117. In the notice granting the waiver on reconsideration, the Administrator acknowledged the prior contrary determination, and explained why she has concluded that the prior determination was in error. Id. at 32,765. California has demonstrated that it will suffer from a lengthy series of consequences as a result of global climate change. Id. The opponents of the waiver have the burden of proof to demonstrate that California does not need its own standards, and the Administrator found that they have not presented any evidence to demonstrate that the range of effects from climate change expected in California are matched by other States or regions of the United States. Id. Accordingly, the Administrator concluded that the opponents of the waiver have not carried their burden of proof, and there is no basis to deny the requested waiver.

### C. The Federal Standards Provide No Basis For Denying The Waiver

Petitioners' claim that California does not need its greenhouse gas standards because of regulations subsequently issued by EPA and the National Highway Traffic Safety Administration, Pet'r Br. at 56-58, is meritless. First, section 7543(b) specifically provides that California can have its own standards if they are "*at least* as protective of public health and welfare as applicable Federal

standards." 42 U.S.C. § 7543(b)(1) (emphasis added).[11/] Thus, the statute clearly contemplates that California may have standards that are separate from EPA regulations but equally effective. Thus, the existence of federal standards with similar aims does not establish that California does not need its own standards.

Second, California's standards are not identical to the EPA regulations. The most obvious difference is that the California standards apply to model years 2009 through 2011, which are not addressed at all in the EPA standards. Thus, the EPA standards cannot obviate California's need for its greenhouse gas standards to cover those model years.

Third, at the time EPA made its waiver decision the federal regulations had not even been proposed, let alone promulgated. *Potential* regulations provide no basis for EPA to have found that the federal regulations obviated California's need for its own greenhouse gas regulations.[12/]

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[11/] EPA has interpreted the term "Federal standards" in section 7543(b) to refer only to standards promulgated by EPA. 74 Fed. Reg. at 32,750-54. Petitioners have not challenged that interpretation.

[12/] Furthermore, Petitioners (among other parties) have sought review in this Court of the federal regulations and of the endangerment finding that is a prerequisite to EPA's greenhouse gas regulations. Coalition for Responsible Regulation v. EPA, No. 09-1322 and consolidated cases (endangerment finding); Coalition for Responsible Regulation v. EPA, No. 10-1092 and consolidated cases (federal motor vehicle greenhouse gas standards). Thus Petitioners are seeking to have

(continued...)

Thus, the federal regulations promulgated subsequent to EPA's waiver decision have no bearing on the validity of that decision.

## IV. EPA HAS NOT ADDRESSED THE QUESTION OF WHETHER CALIFORNIA'S GREENHOUSE GAS STANDARDS ARE PREEMPTED BY THE ENERGY POLICY AND CONSERVATION ACT

The last argument in Petitioners' Brief, Pet'r Br. at 58-62, is meritless because it posits a determination that EPA has not made. Petitioners assert that by stating that California may enforce its greenhouse gas regulations, EPA has made a determination that those regulations are not preempted by the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 (1975). However, as Petitioners themselves note, EPA has not addressed that issue. Pet'r Br. at 61.

Rather, in the challenged statement EPA was simply stating the effect of its waiver decision. Section 7543(a) states that "[n]o State or any political subdivision thereof shall adopt *or attempt to enforce* any standard relating to the control of emissions from new motor vehicles . . . ." 42 U.S.C. § 7543(a) (emphasis added). Section 7543(b) allows EPA to waive "application of this section" to California. Waiving application of section 7543(a) includes waiving the Clean Air Act's

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[12/](...continued)
reversed the federal rules that Petitioners assert undermine California's need for its own standards.

prohibition on adoption and *enforcement* of standards. Thus, when EPA grants California a waiver of preemption, California is authorized, at least under the Clean Air Act, to adopt and enforce its own standards.

Whether California's enforcement of its standards is limited by some other provision of law, such as EPCA, is outside the scope of EPA's waiver decision and thus outside the scope of this case. In Massachusetts, the Court rejected an argument that EPA cannot regulate greenhouse gases for motor vehicles because the establishment of fuel economy standards was delegated to the Department of Transportation under EPCA. 549 U.S. at 531-32. The Court held: "EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency." Id. at 532. Consistent with that holding, EPA's analysis of California's request for a waiver is limited to the factors specified in the Clean Air Act and specifically does not include any consideration of EPCA. 74 Fed. Reg. at 32,783. Because EPA's statement that California may enforce its greenhouse gas standards simply states that the prohibition on enforcement in section 7543(a) is waived, there is nothing in that statement for the Court to review.

## CONCLUSION

As demonstrated above, the petition for review should be dismissed for lack of standing or denied for lack of merit. Petitioners have failed to establish a concrete, specific injury to their members and thus lack standing. Even if Petitioners had standing, EPA properly determined that California's need for its own motor vehicle emission standards should be determined on the basis of the program as a whole. Because it is undisputed that California still requires its own motor vehicle standards to meet its unique pollution problems, there is no basis to deny the requested waiver. Even if EPA is required to consider California's greenhouse gas standards in isolation, the record fully supports EPA's determination that opponents of the waiver have not met their burden of showing that California does not need its own greenhouse gas standards to meet compelling and extraordinary conditions.

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## CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Brief of Respondent EPA contains 10,996 words as counted by the Word Perfect 12 word processing system.

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