ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1237

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY et al.,
Respondents.

On Petition for Review of an Order of the U.S. Environmental Protection Agency

PETITIONERS' REPLY BRIEF

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Andrew D. Koblenz
Douglas I. Greenhaus
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
(703) 821-7000

Of Counsel

Matthew G. Paulson
Brian J. Faulkner
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500
matthew.paulson@bakerbotts.com

Alexandra M. Walsh
Adam J. White
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 639-7700

Counsel for Petitioners Chamber of Commerce of the United States of America and National Automobile Dealers Association

Page-Proof Brief
October 15, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

FEDERAL LEGISLATIVE HISTORY

FEDERAL REGULATORY MATERIALS

STATE REGULATORY MATERIALS

OTHER AUTHORITIES

* *Asterisks denote those authorities on which Petitioners' Reply Brief chiefly relies.*

GLOSSARY

2008 Denial	EPA's 2008 decision to deny California's request to waive Clean Air Act preemption of standards adopted by California to limit GHG emissions for new motor vehicles beginning in MY 2009. 73 Fed. Reg. 12,156 (Mar. 6, 2008)
CARB	California Air Resources Board
CO	Carbon Monoxide
CO_2	Carbon Dioxide
EPA	United States Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
GHG	Greenhouse Gas
MY	Model Year
NO_x	Oxides of Nitrogen
Pet'r Stand. Add.	Petitioners' Standing Addendum, attached to Petitioners' Opening Brief
Section 177 States	Collectively, the thirteen states and the District of Columbia that have adopted California's GHG standards for motor vehicles pursuant to Section 177 of the Clean Air Act
Waiver Decision	EPA's 2009 decision to waive Clean Air Act preemption for standards adopted by California to limit GHG emissions for new motor vehicles beginning in MY 2009. 74 Fed. Reg. 32,744 (July 8, 2009)

SUMMARY OF ARGUMENT

Under EPA's view, so long as California has made some showing, at some point, that it has some need for a vehicle-emissions program "in some respect," then from that point forward California has *carte blanche* to adopt whatever additional standards it likes—without EPA giving those standards *any* scrutiny at all under Section 209(b)(1)(B). That interpretive position violates the statute's express terms and destroys the critical balance Congress struck when it granted California a limited exception to Clean Air Act preemption, *subject* to EPA review.

In this case, EPA relied on its unlawful interpretation of Section 209(b)(1)(B) to waive preemption of California's GHG standards—standards that do not relate to California-specific conditions, and will have no "identifiable effect" on California's pollution problems. Despite the unprecedented nature of California's GHG standards, EPA asserts that the waiver was justified based on an amalgamation of legislative history, this Court's prior decisions, and past agency practice. EPA and California are wrong. Contrary to the agency's arguments, California's GHG standards mark a radical departure from the vehicle-emissions program Congress had in mind when it authorized EPA to waive preemption for certain California-specific standards. That historical program had always been limited to addressing "peculiar local conditions" in California. With its new GHG standards, California sought, for the first time, to address what is a *global*

environmental phenomenon, one that cannot be attributed to California-specific conditions. Even if Section 209(b)(1)(B) could be read to permit EPA's "whole-program" approach under some circumstances, allowing California to take on an *international* environmental issue based on a generalized conclusion that the state has a continuing need to address *local* pollution problems was plainly unreasonable.

EPA claims that, regardless of whether the agency's "whole-program" approach was unlawful, the Petition should be denied because California's GHG standards satisfy Section 209(b)(1)(B)'s "need" criterion even if considered "in isolation." But EPA does not (and cannot) explain how California could "need" emissions standards that, by the state's own admission, will have no "identifiable" effect on temperature levels in the state, and therefore no ability to address the state's local air quality concerns (including ozone). Nor does EPA explain how it can square its "need" finding with the fact that, at the time of the waiver, EPA was developing its own federal GHG standards—standards California informed the agency it intended to adopt. Whatever "deference" California might be due under Section 209(b)(1)(B), there is no discernible rational basis for concluding that the state "needs" ineffectual standards that it is *not even planning to use*.

Finally, this Petition is plainly justiciable. Because the very purpose, and conceded effect, of California's standards is to limit the vehicles "delivered for

sale" in California and the Section 177 States, Petitioners' members—including thousands of businesses that *sell* vehicles in those jurisdictions—undoubtedly suffer a cognizable injury. That injury is not mooted by the promulgation of federal GHG standards, or by California's pledge to adopt those standards as its own. The only thing established by that turn of events is that California never "needed" state-specific GHG standards in the first place.[1]

ARGUMENT

I. PETITIONERS HAVE STANDING

California implemented its standards to reduce GHG emissions by restricting the vehicles "*delivered for sale*" in that state. Cal. Code Regs. tit. 13, § 1961.1(a)(1)(A)(i) (2010) (emphasis added). California acknowledged that the "industries and individuals *affected most* by the [standards] [include] those engaged in the . . . *sales* of light-duty passenger vehicles . . . ." J.A. __ (EPA Docket No. 0010.44 at 158) (emphasis added). Nonetheless, California and EPA claim that Petitioners' vehicle-dealer members lack injury sufficient for standing to challenge EPA's Waiver Decision, 74 Fed. Reg. 32,744 (July 8, 2009). They are incorrect.

[1] Because EPA has clarified the scope of its decision and stipulated that it did not address the preemptive effect of the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 (1975), this Reply does not further address that issue. EPA's concession (Br. at 47–48), adopted by California (Br. at 47), removes the issue of EPCA preemption from this case.

1. EPA begins by asserting that, because Petitioners' members are not "the object of the government action or inaction [they] challenge[]," their ability to establish standing is compromised. *See* EPA Br. at 17–18. But standing is not foreclosed because a regulation does not operate *directly* against those bringing a challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). Rather, standing is present so long as there is a "substantial probability that [the challenged] action created a demonstrable risk . . . of injury to the particularized interests" of Petitioners' members. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) (internal quotation marks omitted). Here, where the purpose of the challenged standards is to limit the vehicles "delivered for *sale*" in California, a substantial probability of injury to Petitioners' vehicle-dealer members clearly exists.

EPA tries to avoid that conclusion by characterizing the risk of injury as "speculative," asserting that manufacturers have "a range of options for complying with the California requirements." EPA Br. at 21–22. But while manufacturers have some leeway in *how* to comply with California's GHG standards, they have no choice not to comply at all. And *all* compliance "options" risk injury to Petitioners' members by increasing the cost, or changing the type, design, performance, or number of new vehicles delivered to them for sale. *See* Pet'r Stand. Add. at 9–11, 13–14; 74 Fed. Reg. at 32,757.

"Courts routinely credit assertions founded on basic economic logic in upholding standing." *Shays v. FEC*, 414 F.3d 76, 90 (D.C. Cir. 2005) (internal quotation marks and citation omitted). Here, logic dictates that higher vehicle prices will cause some prospective customers to forgo purchases. Likewise, changes in the type, design, performance, or number of vehicles available for sale will cause some customers to make their purchases in other states. Either way, vehicle dealers are injured. *See* Pet'r Stand. Add. 10–11, 13–14.

The only compliance "option" that California contends would not result in increased prices or a shift in the "mix" of vehicles delivered for sale is the compliance-credit option. California asserts that "manufacturers will have earned credits during MY 2009 and 2010 that can be applied in 2011," thereby eliminating any need "to significantly alter the mix of vehicles" delivered for sale in that year. California Br. at 8. But the study California cites says only that General Motors and Chrysler "may" be able to meet the 2011 standards with "banked" credits. It says nothing about Ford, the manufacturer of the vehicles sold by Petitioners' declarants, or any other manufacturer. *See* Pet'r Stand. Add. 9, 13. Moreover, the study concedes that, even with credits, all three manufacturers may nonetheless need to undertake further compliance efforts in 2011. J.A. __ (EPA Docket No. 9019.15 at 7). (Notably, California does not even try to suggest that a compliance-credit option would prevent mix-shifting in the years following MY 2011.)

2. Ultimately, EPA acknowledges that California's GHG standards will affect the vehicles Petitioners' members can buy and sell, pointing out that the standards will result in the delivery of more "high-mileage" cars to California and the Section 177 states. EPA Br. at 19. EPA insists that standing is nonetheless lacking because the vehicle-dealer industry will benefit, not suffer, from the changed inventory given the "growing consumer preference" for such vehicles. *Id.* That argument is specious.

The notion that standing does not exist where a state *admits* its regulation will affect those who challenge it simply because the state *believes* the regulation might provide an "overall" net benefit to the impacted industry has no basis in law or common sense. Even if California's restrictive regulatory action were capable of satisfying customer demand in a way that unrestricted market forces cannot (a proposition Petitioners reject), that would not change the fact that at least *some* of Petitioners' members are injured because they are unable to sell the range of vehicles *their* customers prefer (and therefore will lose sales to dealers in other states). *See Nat'l Wildlife Fed. v. Burford*, 835 F.2d 305, 314 (D.C. Cir. 1987) (an association "need only demonstrate that 'one or more' of [its] members" is injured); Pet'r Stand. Add. 10–11, 13–14. The possibility that Petitioners' members might "ameliorate the injury by purchasing [and offering for sale] some

alternative product" cannot defeat standing. *Consumer Fed. of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) (citation omitted).

3. Finally, EPA and California argue that, even if Petitioners' members had standing at some point, their injury was mooted by the promulgation of federal GHG standards for MY 2012–2016, and by California's promise to deem compliance with those standards compliance with its own. EPA Br. at 20. But the only thing established by California's pledge to jettison its standards in favor of the pending federal rules is that California had no real need for its own state-specific GHG regulations; it did not affect the Court's jurisdiction.

First, the federal standards do not apply until MY *2012*; California's standards are in effect now. California, moreover, could withdraw its pledge to follow the federal standards whenever it likes and enforce its state-specific standards instead. In addition, while *California* has adopted a "deemed-compliance" policy for now, at least six of the Section 177 states have not.[2]

[2] California asserts that the Section 177 states are required to follow its lead in adopting its "deemed-compliance" policy. California Br. at 8. That is far from clear. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) (noting that Section 177's "'piggyback' provision requires states to adopt [California's] standards," but that its "identicality requirement" does not apply to "mechanism[s] employed to enforce those standards"). In any event, the Clean Air Act does not automatically invalidate GHG standards in states that fail to adopt California's amendment. As a result, the patchwork of state laws detailed by Petitioners is alive and well. Pet'r. Br. at 16.

Finally, the federal standards are subject to legal challenge and, as EPA itself acknowledges, could be invalidated. EPA Br. at 46 n.12.

Second, even if none of the foregoing were true, Petitioners' members still would suffer ongoing injury because EPA's Waiver Decision for California's MY 2012–2016 standards will make it easier for the state to avoid preemption for *future* GHG standards. Petitioners explained why this is so in their Opening Brief, *see* Pet'r. Br. at 26–27, and neither EPA nor California disputes it. The injury that results is hardly conjectural: California recently announced plans to pursue stricter GHG standards for MY 2017 and beyond.[3] Vacating EPA's Waiver Decision would remove a critical legal advantage California otherwise enjoys in avoiding preemption of those standards. That advantage, and the corresponding detriment to Petitioners, removes any doubt about the justiciability of this case. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 669 (1993) (mootness applies only if an event renders "it impossible for the court to grant 'any effectual relief'").

II. EPA CANNOT DEFEND ITS UNLAWFUL INTERPRETATION OF SECTION 209(b)(1)(B)

Section 209(b)(1)(B), 42 U.S.C. § 7543(b)(1)(B), makes clear that EPA must deny a waiver request if California proposes a "standard" that is not "need[ed]" to

[3] *Statement of the California Air Resources Board Regarding Future Passenger Vehicle Greenhouse Gas Emission Standards*, at 1 (May 21, 2010), *at* http://www.arb.ca.gov/newsrel/2010/VehState.pdf (last visited Oct. 15, 2010).

address "compelling and extraordinary conditions" in that state. *See* Pet'r Br. at 31–38. That unambiguous statutory mandate is confirmed by the statute's "legislative history [and] structure, as well as its purpose[.]" *Shays*, 414 F.3d at 105 (citation omitted).

Notwithstanding the clear import of the statute, EPA contends that it can deny a preemption waiver under Section 209(b)(1)(B) *only* if a waiver opponent proves that California's need for its vehicle-emission "program" "as a whole" has ceased. EPA Br. at 22–23. But if Congress intended to give California free rein to add to its program any standard it chooses, subject only to a general assessment of the state's continuing need for that "program," the statute would look radically different. Rather than requiring Section 209(b)(1)(B) review each time California adopts a new "standard," the statute would limit EPA's role to periodic reviews of California's "need" for a "program" "as a whole," with EPA issuing a categorical preemption waiver at the completion of each review. Likewise, if it were Congress's intent to permit California-specific standards that have nothing to do with California-specific "conditions," Congress would have omitted the requirement for "compelling and *extraordinary* conditions"—a term that plainly requires a comparison to conditions in other states or to the nation as a whole. Pet'r Br. at 31–32.

At bottom, EPA's interpretation cannot be squared with how Section 209(b)(1)(B) was written or the purpose it was intended to serve. Even if Section 209(b)(1)(B)'s text were at all ambiguous, the statute cannot reasonably be interpreted to permit EPA's "whole-program" approach. *See* Pet'r Br. at 46–49; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753–54 (D.C. Cir. 2000).

A. The Statute Contains No Textual Support For EPA's "Whole-Program" Approach

Section 209(b)(1)(B) is part of a statutory review mechanism triggered when California submits particular "*standards*" for waiver review. It makes no mention of California's "program" "as a whole."

1. Nonetheless, EPA claims that its "whole-program" approach is supported by text because Section 209(b)(1)(B) refers to "*such* State standards." According to EPA, this term "refers back [to the] 'State standards,'" referenced in Section 209(b)(1)—*i.e.*, the standards California "has determined will be, 'in the aggregate,' as protective as federal standards. In other words, it refers to California's *program as a whole*." EPA Br. at 23 (quoting 42 U.S.C. § 7543(b)(1)) (emphasis added). EPA's textual argument suffers from two fatal flaws.

First, there is no basis for concluding that Section 209(b)(1)'s use of "in the aggregate" calls for review of California's "program as a whole"—rather than

directing "aggregate" review of the "standards" California presents for review on that particular occasion. As EPA recognizes, Congress added "in the aggregate" to Section 209(b)(1) to "accommodate California's particular concern with oxides of nitrogen." *Motor and Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1110 n.32. (D.C. Cir. 1979) (hereinafter *MEMA*). The state "was eager to establish [NO_x] standards considerably higher than applicable federal standards," but was concerned that "emission control devices could not be constructed to meet [those high standards] *and* the high federal [CO] standard." *Id.* (emphasis added). Accordingly, Congress amended Section 209(b)(1) "to require only that the California standards *in the aggregate* were at least as protective . . . as applicable federal standards"—*i.e.*, it permitted California to consider the comparative protectiveness of the state's NO_x and CO standards "*in the aggregate*," rather than individually. *Id.* (emphasis added). Nowhere did Congress indicate that it intended California to aggregate the state's *entire* "program" in assessing protectiveness.

Even if "in the aggregate" could be interpreted as EPA urges with respect to Section 209(b)(1)'s "*protectiveness*" determination, that language *does not appear* in Section 209(b)(1)*(B)*, which governs the "need" inquiry. That omission is significant. By adding "in the aggregate" to Section 209(b)(1), but excluding it from the other waiver-criteria provisions, Congress signaled that "aggregate" review is applicable to California's protectiveness determination—*but not*

otherwise. *See* Pet'r. Br. at 44–45 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). Section 209(b)(1)(B)'s reference to "*such* State standards" no doubt refers back to the "State standards" identified in Section 209(b)(1)—*i.e.*, the standards proposed for a waiver. But that reference is no justification for incorporating Section 209(b)(1)'s "aggregate" review provision, *sub silentio*, into Section 209(b)(1)*(B)*.

2. EPA tries to avoid the plain meaning of Section 209(b)(1)(B) by insisting that "[i]t would be bizarre for Congress to give California such substantial discretion in determining the overall makeup of its emissions control program" for purposes of "protectiveness" review, yet "requir[e] the State to justify its need for each element of the program." EPA Br. at 30. California claims that Congress could not have intended to require the state to "demonstrate that it 'needed' a particular standard that was less stringent than a corresponding federal standard." California Br. at 21.

In fact, the line drawn by Congress is eminently sensible: Section 209(b)(1) gives California discretion to propose a portfolio of standards that collectively maximizes overall "protectiveness"—an aim that is entirely compatible with requiring EPA to confirm that each component of that portfolio is actually "needed." This gives California leeway in striking a balance for itself, yet ensures that EPA protects the national interest against California imposing regulations that

do not address California's "peculiar local conditions." *See* Pet'r Br. at 30, 46–47. As for whether California should have to demonstrate its need for "a particular standard that is less stringent than a corresponding federal standard," the answer is plainly "yes." The importance of demonstrating "need" with respect to *less* stringent standards is especially acute. California should not be permitted to deviate downward unless it is clear that the state "needs" a less stringent standard for one pollutant to facilitate the adoption of a more stringent standard for another pollutant, such that overall protectiveness is maximized. *See supra* at 11.

B. EPA's Interpretation Cannot Be Squared With The Statute's Purpose And History

The fundamental purpose of Section 209 is to ensure that *federal* regulation occupies the field in the area of vehicle-emissions control. Pet'r Br. at 32–33. Only by doing so could Congress avoid an "anarchic patchwork" of competing regulations, one that would unduly burden industry and undermine an effective national response to vehicle emissions. *Id.* at 32. While Congress did create a preemption exception for California, nothing in the history of the waiver provision suggests that Congress intended to give the state a license to impose any particular emissions standards that California "deems appropriate." EPA Br. at 30. Rather, legislative history confirms what the statutory text already makes plain: Congress recognized that California's "compelling and extraordinary circumstances" are "sufficiently different from the Nation as a whole to justify standards . . . [that]

may, from time to time, need to be more stringent than national standards." *See* S. Rep. No. 90-403, at 33 (1967). Accordingly, Congress permitted California to impose such standards—*subject* to EPA's review to ensure that those standards are "require[d]" to address California's "unique" pollution problems. *See* H.R. Rep. No. 90-728, at 18 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1958.

1. EPA and California insist that Congress intended otherwise, relying on a House Committee Report issued when Congress added the "in the aggregate" language to Section 209(b)(1). According to that Report, Congress intended "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 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1380. EPA claims that expression of intent is best accomplished through the agency's "whole-program" interpretation.

But the Report on which EPA relies relates to an amendment that had nothing to do with, and was enacted a decade *after*, Section 209(b)(1)(B). And the snippet of the Report EPA cites speaks of *California's* "select[ion]" of standards the state believes will maximize protectiveness, *not* of *EPA's* separate review of those standards under the "need" criterion.

Even if an isolated statement in the legislative history concerning a *different* part of the statute were relevant to the proper interpretation of Section 209(b)(1)(B), it would not justify EPA's complete abdication of its express

statutory mandate. If Congress intended to give California "discretion" to adopt whatever standards it likes, without EPA giving any consideration to whether those standards are "need[ed]," Congress would have omitted Section 209(b)(1)(B) altogether. But it did not. EPA should not be permitted to achieve that result through agency fiat, especially based on such a tenuous legislative-history reed. *Corely v. United States*, 129 S. Ct. 1558, 1566 (2009) (no statute should be read to render any part "inoperative or superfluous, void or insignificant") (citation omitted).

EPA's attempt to bolster its characterization of the legislative history by reference to *MEMA* fails. That case observed that the waiver provision was not "designed to permit California to adopt only a portion of [an emissions control] program." EPA Br. at 25 (quoting *MEMA*, 627 F.2d at 1110). But it made that observation in response to a claim that EPA's waiver authority does not apply to certain enforcement regulations. Nowhere did *MEMA* hold, or even suggest, that the waiver could be granted simply because California had a continuing need for its overall "program."

2. California and EPA also rely on legislative history "indicating" that Congress believed California would "act as a kind of laboratory for innovation." *MEMA*, 627 F.2d at 1111 (citing sources). But Congress's expression of an aspirational hope for the waiver provision is not a license for California to

"experiment[] in the field of emissions control" *however it chooses*. Congress may have believed that allowing California room to continue its history of developing *state-specific* standards to address *state-specific* problems might produce technological innovation that could benefit the nation as a whole. *See MEMA*, 627 F.2d at 1110–11. But California's insistence that it will serve as a better national "laboratory" if allowed to operate without supervision, *see* California Br. at 16–17, cannot trump Section 209(b)(1)(B)'s unambiguous command that EPA review those standards for "need."

3. Finally, EPA attempts to justify its "whole-program" approach by pointing out that so long as *any* California-specific standard is permitted, manufacturers will have to produce "two variations of each model sold": "one for California . . . and one for the rest of the nation." EPA Br. at 24. If a "two-car" system will exist in any event, why, California asks, should EPA bother to give any consideration to the state's "need" for additional standards imposed on the California fleet? California Br. at 27. The answer is because *that is what the statute requires*.

Contrary to EPA's claims, EPA Br. at 4, the agency's approval of California's GHG standards, and their subsequent adoption by Section 177 states, require much more than adjustments to the existing California fleet. Rather, because those standards are enforced on a fleet-wide, state-by-state basis,

manufacturers must adjust the type and number of vehicles they deliver for sale in every participating state. Pet'r Br. at 14–17. They also must satisfy the reporting, compliance, and enforcement obligations imposed in each jurisdiction. All of this results in exactly the "patchwork" Congress intended to limit with Section 209—including by requiring EPA to consider *all* of California's newly proposed standards under Section 209(b)(1)(B).

C. Past Agency Practice Does Not Support EPA's Current Position

California argues that EPA's interpretation of Section 209(b)(1) is reasonable because it is longstanding. California Br. at 23–24, 28–35. But even where this Court has given nominal "weight" to an agency's consistent past practice, *see Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003), the final determination has turned on whether the agency's construction of a statute is "permissible," *not* whether it is persistent. *Chevron*, 467 U.S. at 843. "No matter how consistent its past practice, an agency must still explain why that practice comports with the governing statute and reasoned decisionmaking." *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009). Here, EPA has failed to do so. *See* pp. 10–13, *supra*.

Moreover, none of the "decades-long" list of agency decisions California cites presents anything like the situation here. In those prior decisions, California proposed regulations seeking to expand or refine its already existing program to

address local and regional pollution issues. *See, e.g.*, 40 Fed. Reg. 23,102, 23,105 (May 28, 1973) (granting waiver for CO and NO_x standards to mitigate "oxidant concentrations in the South Coast area"). Under that circumstance, it might be reasonable for EPA to ask whether California has a continuing need for its existing program—as a proxy, *not a replacement*, for asking whether it needs the standards themselves.

Here, by contrast, California took the unprecedented action of implementing standards "intended" to tackle what is a *global* environmental issue—one that cannot be attributed to California-specific conditions and one that is, at bottom, an obvious attempt to regulate fuel economy. *See* Pet'r Br. at 7. Far from "improv[ing] on 'its already excellent program' of emissions control"—one aimed at "meet[ing] peculiar local conditions," *MEMA*, 627 F.2d at 1109—California's GHG standards transformed the state's program into something radically different from what Congress had in mind when it allowed for the waiver. There is no indication Congress intended that waiver to extend to standards that are neither justified by, nor needed to address, California-specific conditions. Pet'r Br. at 34–38. Whether or not California is categorically "preclud[ed]" from regulating GHGs, *see* California Br. at 37–38, there is no basis for EPA shirking its statutory responsibility by waiving preemption for California's unprecedented standards

without giving any consideration to whether they serve any "need" under Section 209(b)(1)(B).[4]

III. CALIFORNIA'S GHG STANDARDS CANNOT SURVIVE REVIEW UNDER SECTION 209(b)(1)(B)

Considered independently (as the statute commands), California's GHG standards fall far short of satisfying Section 209(b)(1)(B). *See* Pet'r Br. at 34–38, 53–56. That is made plain, first and foremost, by California's admission that its GHG standards will have no "identifiable" effect on temperature levels in California (or elsewhere). J.A. __ (EPA Docket No. 0010.116 at 376). With no "identifiable" ability to affect temperature, the standards cannot redress California's local air quality issues, or any other environmental conditions in the state. The fact that California announced to EPA, before the Waiver Decision was issued, that it intended to allow manufacturers to "comply" with its state-specific standards by meeting federal GHG regulations instead confirms the no-need conclusion. Pet'r Br. at 56–58. There is "no discernible rational basis" for EPA's decision that California "need[ed]" standards that the state told EPA it did *not even plan to use* before the waiver was granted. *See MEMA*, 627 F.2d at 1105–06 (a

[4] Nothing about Petitioners' position "conflicts with" *Massachusetts v. EPA*'s holding that GHGs are "air pollutant[s]" under the Clean Air Act. 549 U.S. 497, 532 (2008). It is *California* that misreads that case as nullifying Section 209(b)(1)(B)'s "need" inquiry. California Br. at 36–37.

waiver cannot stand if "the record yields no discernible rational basis for [EPA's] action").[5]

A. California's Admission That Its GHG Standards Would Have No "Identifiable" Effect On Global Temperatures Precluded A Finding Of "Need"

Section 209(b)(1)(B) prohibits EPA from waiving preemption if the standards California proposes are not "needed." "Needed," in turn, describes a thing or action that is necessary to the achievement of an identified goal. *See, e.g.*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1512 (1993) (defining "need" as "to be needful" or "necessary," which in turn describes "anything required to fill a want or need"). Thus, in *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422-23 (D.C. Cir. 2000), the court held that "necessary" means "that which is required to achieve

[5] Those two facts starkly distinguish this case from *American Trucking Associations v. EPA*, 600 F.3d 624 (D.C. Cir. 2010) (hereinafter "*ATA*"), which involved no such concessions. *See* EPA Br. at 28 n.5; California Br. at 17, 40. To the contrary, in *ATA* the petitioners *acknowledged* that the challenged rules would reduce diesel particulate matter emissions in California, and argued only that the state had "more efficient and equally effective" options for achieving that result. *See* Br. of Am. Trucking Ass'ns at 63, *Am. Trucking Ass'ns v. EPA*, No. 09-1090 (D.C. Cir. filed Aug. 31, 2009). Those emissions reductions, moreover, were part of a state plan to reduce "associated cancer risks in California by 75% by 2010." 600 F.3d at 626. Here, by contrast, the record evidence shows that California's GHG standards will result in *at most* a "0.01 °C effect on temperature *by 2100*"—and that assumes the standards are adopted by all fifty states. *See infra* at 22. Where (as in *ATA*) a regulation has some ability to address a local pollution issue—such as diesel-particulate pollution effects—it may be reasonable for the agency to find "need" on the ground that "California continues to suffer from 'some of the worst air quality in the nation.'" *ATA*, 600 F.3d at 628. As noted above, that approach is plainly unreasonable as applied to the GHG standards at issue here. *See* pp. 10–13, *supra*.

a desired goal," and struck down as unreasonable an agency order interpreting "necessary" to mean merely "useful," stressing that "*Chevron* deference does not bow to such unbridled action." Here, not only are California's GHG standards unnecessary, but, by California's own admission, they are not even *useful* in attaining their stated objective.[6]

1. EPA's and California's primary basis for claiming Section 209(b)(1)(B) was satisfied is that "California's [GHG] regulations were intended in part to address California's chronic problems with ozone pollution." EPA Br. at 35; California Br. at 42–43. According to EPA, California's regulations "are *intended* to help slow the current rise in temperatures that exacerbates California's ozone problem." EPA Br. at 35 (emphasis added).

Even if reducing GHG levels could lower temperatures, and even if lower temperatures could affect ozone issues, that would be insufficient to demonstrate "need" under Section 209(b)(1)(B). Whatever California "intended," the state has acknowledged that its GHG standards will have no "identifiable" effect on temperatures. J.A. ___ (EPA Docket No. 0010.116 at 376). Likewise, it noted in the proceeding below that the state "cannot accurately determine a temperature

[6] Consistent with that ordinary and fair meaning of "need," this Court has indicated that Section 209(b)(1)(B)'s requirement can be met if the proposed standards "directly address[] air quality" and "protect the public health." *MEMA*, 627 F.2d at 1113, 1117. California's GHG standards do not.

impact in California from these regulations." J.A. __ (EPA Docket No. 1686 at 10). In other words, California's GHG standards have no ability to "directly affect" temperature "conditions in the environment," *MEMA*, 627 F.2d at 1113; nor are they "required" *or even "useful"* in achieving California's goal of mitigating local ozone problems. *See GTE*, 205 F.3d at 423.

The citations on which EPA and California rely to try to demonstrate otherwise relate solely to the proposition that there is a link between temperature and ozone formation. EPA Br. at 38, 40 (citing record); California Br. at 42–43 (citing record). That may be correct—but it is also irrelevant. What matters under Section 209(b)(1)(B) is whether California's GHG standards are required or will even do anything to lower the temperatures that purportedly contribute to ozone formation. The answer is "no."

Indeed, the *only* evidence cited by EPA regarding any connection between the GHG standards and temperature is a computer model that actually disproves EPA's argument. *See* EPA Br. at 37. That model predicts that *if* the "entire country" eventually adopts California's standards, and *if* vehicle purchasing patterns will not otherwise change, *then* California's standards would "have only a 0.01 °C effect on temperature" in *ninety years*. J.A. __ (EPA Docket No. 8995.1 at 14–15, cited in EPA Br. at 37). EPA cites no record evidence indicating that *either*, let alone *both*, of those conditions precedent will ever be satisfied.

California was even more pessimistic than the cited model, stating that it would require "the accumulation of *several countries'* worth of . . . emissions reductions [from standards like California's] to demonstrate a change in temperature." *See* J.A. at __ (EPA Docket No. 1686 at 10).[7]

2. Nor can California's GHG standards be justified on the ground that they are "needed" to address any other "extraordinary" effects of climate change in California. For one thing, there is no plausible basis for concluding that any increase in global temperatures has disproportionate effects in California. EPA recognized as much in 2008. *See* 73 Fed. Reg. 12,156, 12,168 (Mar. 6, 2008) (original waiver denial). The agency rationalizes its about-face, just sixteen months later, by claiming that "new facts" were presented "during the reconsideration process," "show[ing] that the impacts of climate change are more severe on California than believed during the initial proceedings." EPA Br. at 44–45 (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009)). It appears that the only "additional information" considered on this point, EPA Br.

[7] California asserts that Petitioners have "taken out of context" the state's acknowledgement of no "identifiable" reductions in climate change, asserting that that statement "was meant to convey that a reduction in climate change associated with an individual regulatory action could not be *measured*." California Br. at 44 (emphasis added). But the fact that any temperature reduction that might occur as a result of California's standards defies "measurement" only further confirms that the record lacked evidence of any actual "need" and that EPA's decision was therefore arbitrary.

at 44, were three "new studies . . . submitted to EPA," addressing issues such as sea level rise and ozone pollution considered by EPA in 2008, 74 Fed. Reg. at 32,764 n.117.

As EPA acknowledges, where an "agency's change in position is based on changed facts, the agency must address [those facts]." EPA Br. at 44. That principle is particularly applicable where the change in position contradicts prior factual findings *from the very same proceeding only sixteen months earlier*. Here, EPA's new Waiver Decision barely mentions the "new facts" that purportedly changed its view, much less explains why they mattered. Indeed, there is no indication that those facts, rather than other intervening events, precipitated EPA's reversal. Even if EPA's disparate-impact reversal were not arbitrary, the fact remains that California's GHG standards will have no "identifiable" effect on temperature—which again raises the question how California could "need" those standards at all.[8]

[8] EPA and California contend that *Massachusetts*, 549 U.S. at 523–26, demonstrates the state's "need" for its GHG standards. EPA Br. at 37; California Br. at 46. But the holding in that case was that EPA's inaction threatened an injury to states sufficient for standing purposes, citing "uncontested affidavits" that nationwide regulation of GHGs would "reduce[] . . . to some extent" the risk posed by GHGs. 549 U.S. at 526. That conclusion has no bearing on whether California "needs" its state-specific GHG standards as required by Section 209(b)(1)(B)—especially given California's admission that those standards will have no "identifiable" effect on climate change issues.

EPA tries to compensate for the inefficacy of California's GHG standards by hypothesizing that "*other* States may adopt [those] standards, multiplying their effect." EPA Br. at 39 (emphasis added). That argument is surprising given the agency's insistence, six pages earlier, that the Court must *ignore* the effect of the standards in the Section 177 states in assessing the *harm* done to Petitioners. *Id.* at 33. In any event, as noted, the only record evidence suggesting a correlation between California's standards and temperature indicates that even if the standards were adopted *by all fifty states*, their effect would be *de minimis*. *See* pp. 22–23, *supra*.

B. California's Agreement To Adopt EPA's Pending GHG Rules As Its Own Confirmed The State's Lack Of Need

If California's admission that its GHG standards would have no "identifiable effect" were insufficient to prove lack of "need," the state's announcement that it would discard those standards in favor of pending federal GHG standards surely sufficed. The notion that California could "need" standards it was not even planning to use makes no sense. *See* Pet'r Br. at 56–58.

EPA responds by noting that Section 209(b) permits California to have emissions regulations that overlap with federal requirements, and that California's standards were "not identical to the EPA regulations" at the time of the waiver decision. EPA Br. at 46. Both points are true but irrelevant, given California's commitment to *replace* its state-specific standards with upcoming federal

regulations. Nor does it matter that the federal rules had not been promulgated when the waiver was granted. *See id.* What matters is that when the waiver was granted, California had evidenced its plain lack of need for a state-specific GHG response, and in fact demonstrated a *preference* for a comprehensive federal approach. Pet'r Br. at 7–8, 56–58.

California reiterates that preference in its brief, asserting that "remediat[ion of] global warming will require significant concerted action." California Br. at 45. California's belief that GHG issues call for a coordinated, national regulatory response, and that its state-specific standards could not address the perceived problem, was all the more reason to leave preemption in place and allow the federal government to try to fashion a nationwide rulemaking that would appropriately address the issue. Instead, EPA granted the waiver, thereby creating exactly the kind of burdensome regulatory overlay Section 209(b) was meant to limit. Pet'r Br. at 58.

C. EPA Cannot Justify Its Waiver Decision By Claiming It Was Affording Proper Deference To California, Or That Opponents Of The Waiver Failed To Carry Their Burden Of Proof

Notwithstanding California's lack of "need" for its GHG standards, EPA and the state claim that the waiver was justified because Congress intended to afford California "substantial deference," EPA Br. at 38, and because the waiver opponents failed to carry their burden of proof under Section 209(b)(1)(B).

1. Section 209(b)(1)(B) does not afford California the "substantial deference" EPA and California claim. Indeed, the text and structure of Section 209(b) compel a contrary conclusion. To overcome Section 209(a)'s preemptive effect, Section 209(b) requires, first, that California make its protectiveness determination and, then, for *EPA* to consider whether California's protectiveness determination was "arbitrary and capricious" and (even if the protectiveness determination was sound) whether California "need[s] such State standards to meet compelling and extraordinary conditions." The deferential "arbitrary and capricious" language expressly applies to EPA's review of California's protectiveness determination, but *not* to the agency's independent consideration of "need." That omission itself is strong evidence that deference applies to the protectiveness review only. *See* pp. 11–13, *supra*.

Nor does EPA's "substantial-deference" approach find support in the statute's purpose or history. The primary source EPA cites in favor of deference is an amendment to Section 209(b). *See* EPA Br. at 26–27 (citing 1977 U.S.C.C.A.N. at 1380). But, as noted above (*supra* at 14), that amendment left untouched EPA's assessment of need under Section 209(b)(1)*(B)*; it modified only California's "protectiveness" determination. *See* 1977 U.S.C.C.A.N. at 1380–81. Moreover, while it makes sense that Congress would want EPA to defer to California regarding a determination the state itself makes, it would be illogical to

require deference to *California* with respect to a consideration that is *EPA's* responsibility.

Even if some measure of deference were due, what happened in this case went far beyond deference and amounted to a complete abdication of EPA's mandate, with the agency disclaiming *any* responsibility to consider whether California "need[s]" its GHG standards. *See* EPA Br. at 35–41; *see also* 74 Fed. Reg. at 32,766. EPA tries to defend its abdication by noting that, in *MEMA*, the court upheld a waiver even though California "conceded that it could not precisely identify the emissions-related benefits to be derived from the regulations alone." EPA Br. at 36–37 (quoting *MEMA*, 627 F. 2d at 1124–25). Aside from the fact that *MEMA* had nothing to do with the proper application of Section 209(b)(1)(B) (as the court took pains to make clear, 627 F.2d at 1124; *supra* at 15), an inability to "precisely identify . . . the benefits" of a regulation is a far cry from California's admission that its proposed GHG standards will have no "identifiable" effect on the problem they are meant to address.

Also misplaced is California's reliance on past EPA decisions not to deny a waiver under Section 209(b)(1)(B). California Br. at 31–34. Declining to delve into whether a standard provides sufficient "marginal improvements in air quality," *see* California Br. at 31–32 (quoting EPA waiver decisions), is entirely different

from capitulating to a waiver request where the state *admits* the standards will have no "identifiable" effect.

Section 209(b)(1)(B) is a critical opportunity for EPA to weigh in on California's state-specific emissions regulations. *See* pp. 12-13, *supra*. By watering down Section 209(b)(1)(B) to a point where it is meaningless, EPA gave California a blank check to impose additional regulatory burdens—not just in its state but nationwide—without independent consideration of whether those regulations make any contributions to their stated goal. If Congress intended that result, it would have omitted Section 209(b)(1)(B) entirely.

2. EPA and California also try to defend the agency's waiver by claiming that the burden to prove the GHG standards were not needed was on the waiver's opponents, and that they failed to carry it. EPA Br. at 41; California Br. at 41. Whether the burden properly lies with a waiver's opponents on reconsideration is not at all clear, given that *California* sought the order reversing EPA's original denial. *See generally*, *MEMA*, 627 F.2d at 1122 n.51. But whatever burden Petitioners may have borne was easily met. It was met by California's forthright admission (echoed in its comments in this proceeding) that those standards would have no "identifiable" effect on the environmental conditions they were "intended" to address. *See* pp. 22-23, *supra*. And it was confirmed by California's announcement (before EPA even granted the waiver)

that it would allow manufacturers to comply with California's standards by meeting federal GHG regulations instead. Pet'r Br. at 56–58. If uncontroverted evidence that California's standards would be ineffectual—and that California would forgo their enforcement in favor of federal rules—do not demonstrate that California's standards were not "needed," it is difficult to see what would suffice.

CONCLUSION

For the reasons set forth above and in their Opening Brief, Petitioners respectfully request that the Court grant this Petition and vacate EPA's Waiver Decision.

Respectfully submitted,

/s/ Matthew G. Paulson

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Andrew D. Koblenz
Douglas I. Greenhaus
NATIONAL AUTOMOBILE
DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
(703) 821-7000

Of Counsel

Dated: October 15, 2010

Matthew G. Paulson
Brian J. Faulkner
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500
matthew.paulson@bakerbotts.com

Alexandra M. Walsh
Adam J. White
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 639-7700

Counsel for Petitioners Chamber of Commerce of the United States of America and National Automobile Dealers Association

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

/s/ Matthew G. Paulson
Matthew G. Paulson
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500
matthew.paulson@bakerbotts.com

Counsel for Petitioners

Dated: October 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, I filed and served the foregoing Petitioners' Reply Brief by electronic service through the CM/ECF system to the following counsel, who are registered CM/ECF users:

Kevin P. Auerbacher
Frederick Don Augenstern I
Barbara Beth Baird
John W. Busterud
Barney James Chisolm Jr.
Beverly Marie Conerton
Sean H. Donahue
David D. Doniger
Stephen Robert Farris
Kristen Campfield Furlan
Douglas Irwin Greenhaus
Stephen Farwell Hinchman
Roberta Rose James
Helen Kang
Robb William Kapla
Gerald T. Karr
Kathleen A. Kenealy
Paul Sandberg Logan
Marc Nathaniel Melnick
Michael J. Myers
Vickie Lynn Patton
Matthew F. Pawa
Norman Louis Rave Jr.
Damien Michael Schiff
Leslie Riley Seffern
David Robert Sheridan
Deborah A. Sivas
Terence J. Tierney
Kurt R. Wiese

In addition, I hereby certify that the foregoing Petitioners' Reply Brief has been served by United States first-class mail this 15th day of October, 2010 upon each of the following participants in the case who are not registered CM/ECF users:

Kimberly P. Massicotte
Office of the Attorney General
55 Elm Street
Hartford, CT 06106

Mark D. Patrizio
Pacific Gas & Electric Company
PO Box 7442
San Francisco, CA 94120-7442

Valerie Melissa Satterfield
Office of the Attorney General
102 West Water Street, Third Floor
Dover, DE 19904-0000

William H. Sorrell
Office of the Attorney General,
State of Vermont
109 State Street
Montpelier, VT 05609-1001

David G. Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002-0000

Gerald D. Reid
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

John Charles Cruden
U.S. Department of Justice
Environment & Natural Resources Division
PO Box 23986
L'Enfant Plaza Station
Washington, DC 20026-3986

Joseph P. Mikitish
Office of the Attorney General
1275 West Washington Street
Phoenix, AZ 85007-2926

In addition, pursuant to D.C. Circuit Rule 31(b), I have caused to be hand-delivered at the Court, this 15th day of October, 2010, five paper copies of this brief.

/s/ Matthew G. Paulson
Matthew G. Paulson
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500
matthew.paulson@bakerbotts.com

Counsel for Petitioners

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Petitioners' Opening Brief.