**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' OPENING BRIEF

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**Page-Proof Brief**
June 25, 2010

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici

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

Respondents: United States Environmental Protection Agency and its Administrator, Lisa P. Jackson (collectively, "EPA" or the "agency").

Intervenors: The State of California; South Coast Air Quality Management District; 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 Environmental Defense Fund, Natural Resources Defense Council, the Sierra Club, and Environment California.

Amici: Pacific Legal Foundation; William K. Reilly and Russell E. Train; Charles E. Frank and Adam D. Lee; Inez Fung, James Hansen, Mark Z. Jacobsen, Michael Kleeman, Benjamin Santer, Stephen H. Schneider, and James C. Zachos; PG&E Corporation and Sempra Energy.

### B. Rulings Under Review

Petitioners seek review of EPA's decision, published on July 8, 2009, granting California's request for a waiver of Clean Air Act preemption to impose its own greenhouse gas emission standards for new motor vehicles beginning with model year 2009. *See* 74 Fed. Reg. 32,744 (July 8, 2009). This decision withdrew and replaced EPA's prior denial of California's waiver request for the same standards, published on March 6, 2008. *See* 73 Fed. Reg. 12,156 (Mar. 6, 2008).

### C. Related Cases

EPA's March 6, 2008 decision to deny California's waiver request was the subject of a petition for review in this Court in *California v. EPA*, Nos. 08-1178, 08-1179, 08-1180 (D.C. Cir. filed May 5, 2008 and dismissed Sept. 3, 2009). That proceeding was held in abeyance and ultimately dismissed before a decision on the merits following EPA's reconsideration of its original decision to deny California's waiver request.

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## CORPORATE DISCLOSURE STATEMENTS

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3,000,000 companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent company, and no publicly held company has a 10% or greater ownership interest in the Chamber.

The National Automobile Dealers Association ("NADA") is an Internal Revenue Code Section 501(c)(6) not-for-profit trade association that represents franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. NADA operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. NADA does not have publicly traded stock or corporate parents, subsidiaries, or affiliates. No publicly traded company has a 10% or greater ownership interest in NADA.

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* *Asterisks denote those authorities on which Petitioners' Opening 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 |
| Chamber | The Chamber of Commerce of the United States of America |
| $CO_2$ | Carbon Dioxide |
| EPA | United States Environmental Protection Agency |
| EPCA | Energy Policy and Conservation Act |
| GHG | Greenhouse Gas |
| Joint Notice | Notice of Intent to Conduct a Joint Rulemaking published by EPA and the United States Department of Transportation for the development of federal GHG emissions standards and fuel economy standards for MYs 2012 to 2016. 74 Fed. Reg. 24,007 (May 22, 2009) |
| MY | Model Year |
| NADA | National Automobile Dealers Association |
| NHTSA | National Highway Transportation Safety Administration |
| 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) |

## JURISDICTIONAL STATEMENT

On July 8, 2009, the United States Environmental Protection Agency ("EPA" or the "agency") published the decision under review. 74 Fed. Reg. 32,744 (July 8, 2009). That decision constituted EPA's final action. *See id.* at 32,784. On September 8, 2009, Petitioners timely petitioned this Court for review pursuant to Section 307(b) of the Clean Air Act (42 U.S.C. § 7607(b)) and Rule 26(a)(1)(C) of the Federal Rules of Appellate Procedure.

## STATEMENT OF THE ISSUES

1. EPA unlawfully concluded that it can waive Clean Air Act preemption without considering whether California needs the particular vehicle emissions standards under review to meet compelling and extraordinary conditions.

2. EPA unlawfully concluded that it can waive Clean Air Act preemption even if the vehicle emissions standards under review are not needed, or even intended, to address local or regional air pollution problems in California.

3. EPA's alternative conclusion that California's greenhouse gas ("GHG") vehicle emissions standards are needed to meet California-specific conditions was arbitrary and capricious.

4. EPA unlawfully authorized California to enforce its GHG vehicle emissions standards, despite the fact that those standards are preempted by the Energy Policy and Conservation Act, which EPA has no authority to waive.

## STATEMENT OF THE CASE

Section 209(a) of the Clean Air Act preempts state and local regulation of new motor vehicle emissions, leaving that regulatory issue to the federal government's control. Section 209(b)(1) of the Act provides a single exception to its preemptive effect: it authorizes EPA to waive preemption for certain emissions standards promulgated by California. EPA's waiver authority is not unlimited. Section 209(b)(1) identifies three specific circumstances under which EPA must deny a California-waiver request. Most relevant here, Section 209(b)(1)(B) requires EPA to deny a waiver where California's standards are not "need[ed] to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B).

This case arises from EPA's decision to waive Clean Air Act preemption for standards adopted by California to limit GHG emissions for new motor vehicles for Model Years ("MYs") 2009 to 2012. 74 Fed. Reg. 32,744 (July 8, 2009) (the "Waiver Decision"). EPA first considered—and denied—that request in 2008, finding that California's standards could not survive Section 209(b)(1)(B)'s "compelling and extraordinary conditions" review. 73 Fed. Reg. 12,156 (Mar. 6, 2008) (the "2008 Denial"). In January 2009, California asked EPA to reconsider

its 2008 Denial. 74 Fed. Reg. at 32,747. On February 12, 2009, EPA granted the request for reconsideration, *id.*, and on June 30, 2009, EPA reversed the 2008 Denial and authorized California to enforce its state-specific GHG standards. *Id.* at 32,783.

On September 8, 2009, the Chamber of Commerce of the United States (the "Chamber") and the National Automobile Dealers Association ("NADA") petitioned for judicial review of the Waiver Decision. Petitioners' membership includes businesses that California identified as "most affected" by its GHG standards. J.A. __ (CARB, Staff Report: Initial Statement of Reasons For Proposed Rulemaking, EPA-HQ-OAR-2006-0173-0010.44 at 158 (Aug. 6, 2004)) (hereinafter "CARB Staff Report").

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY FRAMEWORK

Section 209(a) of the Clean Air Act provides that "[no] State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control or emission from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a).[1] Congress's purpose in enacting Section 209(a) was to "occupy the regulatory role over [vehicle] emissions control" at the national level.

[1] This provision, and other statutory and regulatory materials relevant to the petition, are reproduced in the Statutory and Regulatory Addendum ("Stat. Add.") attached to this brief.

*Motor Equip. Mfrs. Assn., Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (hereinafter "*MEMA*"); *see also Washington v. Gen. Motors Corp*., 406 U.S. 109, 114 (1972) (citing 42 U.S.C. § 1857f-6a(a), predecessor to Section 209(a)) (noting that Congress has "largely pre-empted the field with regard to 'emissions from new motor vehicles'").

Congress preempted state regulation of vehicle emissions to avoid "an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for [vehicle] manufacturers." *MEMA*, 627 F.2d at 1109. A House Report concerning the Clean Air Act explained, "[t]he establishment of Federal standards applicable to motor vehicle emissions is preferable to regulation by individual States. The high rate of mobility of automobiles suggests that anything short of nationwide control would scarcely be adequate to cope with the motor vehicle pollution problem." H.R. REP. NO. 89-899, at 5 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 3608, 3612. A 1967 Senate Report noted, "[t]he auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry." S. REP. NO. 90-403, at 33 (1967).

The Department of Health, Education, and Welfare, a predecessor agency to the EPA, raised similar concerns:

> [T]he problem [of vehicle emissions] is a national one and needs to be dealt with on a national basis. Unless the

> Congress acts in this field through appropriate regulatory legislation, the States and even the municipalities will, increasingly, be driven to act. Considering the fact that motor vehicles are mass produced, the numerous conflicting requirements that might thus ensue in the absence of uniform national regulation could have a chaotic effect.

H.R. REP. NO. 89-899, at 14.

Congress permitted a single exception to Section 209(a)'s preemptive effect: Section 209(b)(1) authorizes EPA to waive the Act's preemption of emissions standards promulgated by California if two specific findings are made.[2] First, California must find that its proposed "standards will be, in the aggregate, at least as protective of public health and welfare as the applicable Federal standards." 42 U.S.C. § 7543(b)(1). Second, EPA must find that none of the three circumstances mandating a waiver denial are present. Specifically, EPA must consider whether:

> (A) "the [protectiveness] determination of the State is arbitrary and capricious";
>
> (B) "[California] does not need such State standards to meet compelling and extraordinary conditions"; and
>
> (C) "such State standards and accompanying enforcement procedures are not consistent with [Section 202(a) of the Act]."

[2] While Section 209(b)(1) is not expressly California-specific, *id.* § 7543(b)(1), California is the only state that can satisfy its requirements for preemption-waiver. *See Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994).

*Id*. § 7543(b)(1). If EPA finds that any of these circumstances are present, it must deny a preemption-waiver request. If EPA waives preemption of a California-proposed standard, Section 177 of the Act allows other states to enforce the same standard as well. *See* 42 U.S.C. § 7507.

EPA has stated that Section 209(b)(1)'s waiver provision reflects Congress's understanding that California faces "unique [pollution] problems . . . . as a result of numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns." 49 Fed. Reg. 18,887, 18,890 (May 3, 1984) (citing 113 Cong. Reg. 30,948, (Nov. 2, 1967)). During Congressional debate on the Clean Air Act, these geographic and climatic factors were cited "time and time again" as "compelling and extraordinary factors" that could justify an exception to the federal preemption provision for California-specific emission standards. *Id*. EPA has previously taken the position that the "compelling and extraordinary conditions" necessary to permit a waiver under Section 209(b)(1)(B) refer to "geographical and climactic conditions" that are "unique" to California and are "primarily responsible for causing its air pollution problem." *Id*.

## II. FACTUAL BACKGROUND

### A. California Promulgates GHG Emissions Standards For Vehicles Sold In The State

In September 2004, the California Air Resources Board ("CARB") approved state-specific standards regulating the emissions of GHGs, including carbon

dioxide ("$CO_2$"), from new motor vehicles. 74 Fed. Reg. at 32,746. The standards do not mandate particular control technologies or require that individual vehicles meet certain emission levels. Rather, the standards require that vehicles "produced and delivered for sale" in California meet specific limitations for GHG emissions on a California *fleet-wide basis*. *See* CAL. CODE REGS. tit. 13, § 1961.1(a)(1)(A)(i) (2010). The standards apply to vehicles for MYs 2009 to 2016 and are increasingly stringent each year. *See id.*

Though California's standards expressly limit GHG emissions, they are the functional equivalent of fuel economy standards, because the amount of $CO_2$ a vehicle emits correlates directly to the amount of fuel the vehicle consumes. *See* 71 Fed. Reg. at 17,566, 17,659 (noting that "[f]uel consumption and $CO_2$ emissions from a vehicle are two 'indissociable' parameters" (footnote omitted)). With respect to actual climate change issues, California has acknowledged that "the reductions in climate change associated with individual policies or the actions of individual regions"—such as its own GHG standards—"will not be identifiable," except through computer modeling. J.A. __ (CARB, Final Statement of Reasons, Regulations to Control Greenhouse Gases from Motor Vehicles, EPA-HQ-OAR-

2006-0173-0010.116 at 376 (Aug. 4, 2005) (hereinafter "CARB Final Statement")).[3]

At the time California adopted its GHG standards, EPA had already received a petition-for-rulemaking asking the agency to regulate "[GHG] emissions from new motor vehicles . . . under Section 202(a)(1) of the Clean Air Act." 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003). Though EPA's denial of the petition was subject to litigation, *Massachusetts v. EPA*, 549 U.S. 497 (2007), the petition eventually resulted in federal GHG vehicle emissions standards virtually identical to those adopted by California. Those federal standards were under review at the time EPA was considering California's waiver request, and were finalized less than a year after the California waiver was granted. *See* pp. 13–14, *infra*.

To date, thirteen states and the District of Columbia (collectively, the "Section 177 States") have adopted California's GHG standards under Section 177 of the Act. *See* 74 Fed. Reg. at 32,754 n.59.

[3] California's rule-making does not indicate whether California itself has ever modeled the anticipated impacts of its GHG standards. EPA's rule-making noted the results of only one computer model, offered by the Alliance of Automobile Manufacturers, which indicated that, if California's GHG standards were adopted across the country, the temperature reduction by the year 2100 "would be about one-hundredth of a degree." J.A. __ (EPA Hearing Transcript, EPA-HQ-OAR-2009-0173-0421 at 71:8-17).

### B. EPA Denies California's Preemption-Waiver Request

In December 2005, California requested that EPA waive federal preemption of its GHG standards. After considering written comments and holding two public hearings, EPA determined that it was compelled to deny the waiver because California did not "need" its proposed GHG standards to "meet compelling and extraordinary conditions" in California, as required by Section 209(b)(1)(B). *See* 73 Fed. Reg. at 12,168.

In reaching this conclusion, EPA asked first "whether the emissions of California motor vehicles, as well as California's local climate and topography, are the fundamental causal factors for the air pollution problem of elevated concentrations of greenhouse gases." *Id.* at 12,162. It concluded that the answer was "no," observing, for example, that "[GHG] emissions of motor vehicles in California do not affect California's air pollution problem in any way different from emissions from vehicles and other pollution sources all around the world." *Id.* at 12,160.

EPA next considered whether "the effect in California of this global air pollution problem amounts to compelling and extraordinary conditions." *Id.* at 12,162. It considered each of the ways in which California contended that elevated GHGs affected the state, and examined projections for temperatures, precipitation, and sea level rise in California as compared to the nation as a whole. *See id.* at

12,165–68. Based on that analysis, EPA concluded that the impacts of climate change in California were not "sufficiently different" from those elsewhere in the country to qualify as "compelling and extraordinary conditions." *Id.* at 12,168.

The 2008 Denial acknowledged that in prior waiver decisions EPA had declined to consider whether California "needed" the specific standards proposed by the state to "meet compelling and extraordinary conditions." *Id.* at 12,159. Instead, EPA had asked only whether California had a continuing need for its program "as a whole" to address California-specific conditions contributing to local and regional air pollution in that state; if so, preemption for the particular standard under review was waived. *Id.* According to EPA, the agency had concluded that, where California promulgated standards aimed at addressing its state-specific conditions, it was appropriate to forego a standard-by-standard review and waive preemption as long as those conditions—and California's need for a state-specific emissions program—remained present. *See id.* at 12,160.

However, EPA explained, California's GHG standards presented a much different case: here, for the first time, California had adopted standards that related to a national environmental phenomenon, one that was not attributable to "conditions" in California. *See id.* Given that fact, EPA determined that it was appropriate to evaluate California's GHG standards on a stand-alone basis to determine if they independently satisfied the "compelling and extraordinary

conditions" criterion. *Id.* at 12,161–62. Because EPA determined that the standards could not meet that test, it denied the waiver.

California, several other states, and several environmental groups petitioned this Court for judicial review of the 2008 Denial. *See California v. EPA*, Nos. 08-1178, 08-1179, 08-1180 (D.C. Cir. filed May 8, 2008). That proceeding was held in abeyance and dismissed after EPA issued the Waiver Decision reversing the denial.

### C. EPA Reconsiders And Reverses Its Waiver Denial

On January 21, 2009, one day after the inauguration of President Obama, California sought reconsideration of EPA's 2008 Denial. *See* 74 Fed. Reg. at 32,747. Five days later, the President reiterated that request. 74 Fed. Reg. 4905 (Jan. 28, 2009). Shortly thereafter, EPA announced that it would "fully review and reconsider" the prior denial. 74 Fed. Reg. 7040 (Feb. 12, 2009).

On July 8, 2009, EPA issued a decision reversing the 2008 Denial and "granting California's request to enforce its motor vehicle GHG emission regulations." 74 Fed. Reg. at 32,783. The agency announced that it was "returning to [its] traditional interpretation" of Section 209(b)(1)(B), under which a waiver would be granted so long as California "need[ed]" its entire emissions program "as a whole" to meet "compelling and extraordinary conditions." *Id*. at 32,745, 32,762. EPA noted that no opponent of the waiver "suggest[ed] that California no

longer needs a separate motor vehicle emissions program to address the various conditions that lead to serious and unique air pollution problems in [that state]." *Id*. at 32,763. Therefore, EPA concluded, it had no basis for denying California's waiver request. *Id*.

EPA concluded, in the alternative, that even if it reviewed the GHG standards "separately" under Section 209(b)(1)(B), a waiver still would be warranted. EPA acknowledged that "elevated concentrations of greenhouse gases" is "a global air pollution problem" that is not caused by California-specific conditions. *Id.* Nonetheless, it concluded that "California ha[d] made a case that its [GHG] standards are linked" to California's local problem of ozone. *Id.* Though EPA had rejected an identical argument in its 2008 Denial, 73 Fed. Reg. at 12,163, this time the agency found this "link" sufficient to satisfy Section 209(b)(1)(B) review.

EPA also rejected its 2008 determination that the "impacts" of GHGs and climate change in California were not "significant enough and different enough from the rest of the country such that California could be considered to need its greenhouse gas standards to meet compelling and extraordinary conditions." 74 Fed. Reg. at 32,763. It noted that California had "identified a wide variety of impacts and potential impacts" of climate change in its state, and that the waiver opponents 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.

Finally, EPA found that neither of the other statutory bases for waiver denial were present. *See* 74 Fed. Reg. at 32,759, 32,777; 42 U.S.C. § 7543(b)(1)(A), (C).

### D. EPA Promulgates Federal GHG Vehicle Emissions Standards

On May 22, 2009, two months prior to the California Waiver Decision, EPA and the National Highway Transportation Safety Administration ("NHTSA") announced the federal government's intent to issue its own GHG vehicle emissions standards under the Clean Air Act (along with fuel economy standards under the Energy Policy and Conservation Act). *See* 74 Fed. Reg. 24,007, 24,008 (May 22, 2009) ("Joint Notice"). Those standards were issued on April 1, 2010, and require manufacturers to meet GHG emissions standards on a national fleet-wide basis in MYs 2012 to 2016. *See* 75 Fed. Reg. 25,324, 25,331 (May 7, 2010). Unlike the California standards, the federal standards do not apply to MYs 2009 to 2011. *See id.*

In the Waiver Decision, EPA concluded that its GHG rulemaking had no bearing on whether California should receive a waiver for its state-specific standards. 74 Fed. Reg. at 32,752. EPA noted, however, that it could withdraw the waiver for California's standards "if circumstances occur in the future that make this appropriate," including if the promulgation of federal GHG standards

"bring [its waiver] determination into question." *Id*. To date, EPA has not withdrawn the California waiver.

### E. California And The Section 177 States React To EPA's GHG Rulemaking

Two months prior to the Waiver Decision authorizing enforcement of its GHG standards, California announced, in a letter to EPA and NHTSA, that it "fully supports . . . a National Program" to address GHGs and "welcomes this opportunity to be a partner in helping to advance [this Program]." *See* Stand. Add. 1 (Letter from Mary D. Nichols, CARB Chairwoman, to Adm'r Lisa P. Jackson, U.S. EPA, and Sec'y Ray LaHood, U.S. Dept. of Transp. (May 18, 2009)) (the "Nichols Letter").[4] California stated that it intended to "revise its [GHG] standards . . . for MYs 2012 through 2016, such that compliance with [EPA's] standards . . . shall be deemed compliance with the California GHG emissions standards." *Id*. at 2 (Nichols Letter at 2). California also explained that, to "promote the adoption of the National Program," the state would "revise its [GHG] standards . . . for model-years [] 2009 through 2011 such that . . . compliance with the standards can be demonstrated" based on a combined emissions average for vehicle fleets sold in California and the Section 177 States. *Id.* at 1 (Nichols Letter at 1).

[4] This document, and other documents submitted to this Court by the parties in connection with Respondents' motion to dismiss for lack of standing, are compiled in the Standing Addendum ("Stand. Add.") found at the end of this brief.

California made clear that its "commitment to take [the foregoing] actions" "contemplate[d]" that EPA would adopt federal GHG standards "substantially the same as those" proposed in the 2009 Joint Notice, without making any substantive amendments. *Id.* at 2 (Nichols Letter at 2). It further "contemplate[d]" that EPA would grant a preemption waiver for California's state-specific GHG standards, and that vehicle manufacturers would "not contest" a favorable waiver decision by EPA. *Id.* The automobile industry issued its own "commitment" letters supporting this arrangement. *See, e.g.*, Letter from Dave McCurdy, President & CEO, Alliance of Auto. Mfrs. to Sec'y Ray LaHood, U.S. Dep't of Transp. and Admin'r Lisa Jackson, U.S. EPA at 1–2 (May 18, 2010); Letter from Frederick A. Henderson, CEO, Gen. Motors Corp. to Sec'y Raymond LaHood, U.S. Dep't of Transp., and Adm'r Lisa Jackson, U.S. EPA at 1–2 (May 17, 2010).[5]

As noted above, federal GHG standards for MYs 2012 to 2016 were issued on April 1, 2010. Since then, and consistent with its "commitment" to a "national" GHG program, California has announced that compliance with the federal standards for MYs 2012 to 2016 will be deemed compliance with its state standards. *See* CAL. CODE REGS. tit. 13, § 1961.1(a)(1)(A)(ii) (2010). Until 2012, manufacturers are bound to comply with California-specific standards in that state.

[5] These letters are available at http://www.epa.gov/OMS/climate/regulations.htm (last visited June 25, 2010).

To date, six states have failed to follow California's lead on this issue; in those states, the EPA-approved California standards remain in place through MY 2016. *See* CONN. AGENCIES REGS. § 22a-174-36b, Table 36B1 (2010); MD. CODE REGS. 26.11.34.02 (2010); N.M. CODE R. § 20.2.88.102(b) (Wiel 2010); OR. ADMIN. R. 340-257-0050 (2010); VT. AIR. POLLUTION CONTROL. REGS. § 5-1102, (2010); WASH. ADMIN. CODE § 173-423-070, Table 070(1) (2010).

California has also kept its "commitment" to a "national" approach by adopting "pooling rules" that allow manufacturers to achieve compliance for MYs 2009 to 2011 based on the "pooled" average for fleets sold in California and the Section 177 States. *See* CAL. CODE REGS. tit. 13 § 1961.1(a)(1)(A)(i) (2010); Stand. Add. 2 (Nichols Letter at 2). Again, six Section 177 States have not followed suit. The vehicles delivered for sale in those states must continue to meet fleet-wide averages on a state-by-state basis. *See*, *e.g.*, WASH. ADMIN. CODE § 173-423-090(2) (2010) (compliance with fleet-wide average based on vehicles "produced and delivered for sale in the state of Washington").

In comments to EPA, manufacturers predicted that achieving compliance with California's EPA-approved standards would require them to alter the type and number of vehicles they would otherwise deliver for sale in the states where the standards apply. 74 Fed. Reg. at 32,774; *see, e.g.*, J.A. __ (Comments of the Alliance of Automobile Manufacturers at 26, EPA-HQ-OAR-2006-0173-8994.2

(Apr. 6, 2009)). Manufacturers also explained that, because of the state-specific fleet-wide averaging approach, compliance would require that the mix of vehicles delivered for sale be adjusted on a state-by-state basis. *See* 74 Fed. Reg. at 32,783; *see also* J.A. __ (Comments of the Association of International Automobile Manufacturers at 25, EPA-HQ-OAR-2006-0173-9005.2 (April 6, 2009) (explaining that manufacturers will have to "balance" each state's fleet for "purpose of fuel economy and [GHG] emissions").

## SUMMARY OF ARGUMENT

In its passage of the Clean Air Act, Congress made a deliberate and plainly expressed choice: to make new vehicle emissions the subject of *federal*, not state, regulation. Congress recognized that only by preempting state law on this issue could it protect the businesses involved in the production and sale of new vehicles from a disparate "patchwork" of competing regulations—a patchwork that would create a nightmare of regulatory complexity, and constrain the free and efficient flow of commerce by requiring manufacturers to alter the vehicles or mix of vehicles they would otherwise offer for sale in particular states.

The decision under review creates exactly the patchwork Congress sought to avoid. As a result of EPA's decision to waive Clean Air Act preemption of California's GHG standards, California and the fourteen Section 177 States are now enforcing state-specific GHG emissions standards. Those standards do not

apply in the rest of the country, and they create disparate compliance burdens among the various states where they *do* apply because they are enforced on a state-by-state basis. While California has "committed" to use the federal GHG standards when they eventually go into effect, several Section 177 States have not done likewise. Moreover, California is free to retract its "commitment," and revert to state-specific standards at any time. Finally, with this EPA waiver in hand, it will be that much easier under existing EPA policy for California to avoid preemption of future, state-specific GHG standards, should it decide that the ongoing national efforts to address this problem fall short.

In sum, unless EPA's Waiver Decision is vacated, the ability of California and the Section 177 States to enforce their own state-specific GHG regulatory regimes will destroy the standardization and certainty that Clean Air Act preemption was meant to secure.

As noted above, the Clean Air Act does authorize EPA to waive federal preemption for certain emissions standards promulgated by California. But the text, purpose, and history of the Act make clear that EPA can lift preemption only for standards "needed" by California to address local or regional pollution problems that are caused by "compelling and extraordinary conditions" in that state. California's GHG standards do not come close to meeting that standard. Climate change is not a *local* or *regional* pollution problem caused by California-

specific conditions; it is a *global* environmental phenomenon caused by GHG emissions from a multitude of sources all over the world. Nor is there any plausible basis for concluding that climate change has more serious effects in California than it does anywhere else in the country. Even if some differential impact were present, California has acknowledged that its state-specific standards will have no "identifiable" effect on climate change. The notion that California could "need" a regulation that has no "identifiable" effect on the problem it claims to address is nonsensical.

EPA recognized all this in its original 2008 Denial. The agency's reversal of that decision, little more than a year later, constitutes unlawful agency action and an abdication of EPA's statutory responsibility under the Clean Air Act. That is true for at least three reasons.

*First*, EPA erroneously concluded that it was authorized—indeed, compelled—to waive preemption of California's GHG standards simply because no opponent of the waiver had offered evidence that California no longer needed its state-specific vehicle emissions program "*as a whole*." That conclusion directly contravenes Section 209(b)(1) of the Act, which unambiguously requires EPA to consider whether the *specific* "standards" presented for waiver are "need[ed]" to meet "compelling and extraordinary conditions" *in California*. Even if there were any ambiguity concerning that statutory mandate (and there is not), EPA's

conclusion that it was compelled to waive preemption for standards related to a *global* environmental problem based on California's continuing need to address *state*-specific pollution conditions is patently unreasonable.

*Second*, EPA's alternative conclusion that California's GHG standards are waiver-eligible even under a proper interpretation of Section 209(b)(1) is arbitrary and capricious and otherwise contrary to law. EPA's primary rationale for this finding was that there is a "logical link" between California's local problem of ozone and the global issue of climate change—namely, that ozone issues are "exacerbated" by higher temperatures from global warming. But that rationale cannot withstand scrutiny given California's acknowledgment that its state-specific GHG standards *will have no identifiable effect* on increased global temperatures. Much as California might like, its proposed regulations cannot be passed off as ozone reduction standards; they are GHG standards. And their inability to have any meaningful impact on ozone, or any other environmental issue in California, means that they cannot pass muster under Section 209(b)(1)(B).

EPA also concluded that a waiver is warranted because of comparatively severe impacts of climate change in California. But EPA's conclusory analysis of that issue was unsupported by record evidence and disregarded—without explanation—the agency's own, prior determination (based on extensive factual findings) that any effects of climate change in California are not sufficiently

different from those experienced elsewhere in the country to justify California-specific regulations.

Finally, EPA's new Waiver Decision is contrary to law because it failed to consider the agency's own pending GHG standards, and California's commitment to jettison its state-specific approach in favor of a national response. California's advance notice that it did not intend to *enforce* its state standards disproved any claim that it "need[ed]" those standards, as required by Section 209(b)(1)(B). 42 U.S.C. § 7543(b)(1)(B). To the contrary, California's "commit[ment]" to EPA, Stand. Add. 2 (Nichols Letter at 2), suggests that the state's true motivation in seeking a waiver was to exercise influence over the national program for GHG regulation—a position it achieved as a result of EPA's unlawful decision.

*Third*, even if the Clean Air Act did not bar EPA's action here, the agency cannot lawfully confer upon California authority to "enforce" its GHG standards while another federal statute, the Energy Policy and Conservation Act ("EPCA"), expressly preempts states from adopting or enforcing any law or regulation related to vehicle-fuel economy. That prohibition plainly applies to California's GHG regulations, which are the functional equivalent of fuel economy standards (as NHTSA has repeatedly recognized). Because EPA has no authority to waive EPCA-preemption, it likewise had no authority to authorize enforcement of California's GHG standards.

## STANDING

The central purpose and effect of California's GHG standards is to modify the supply of new vehicles that can be purchased and sold by automobile dealers. Given that fact, there can be no question that both NADA and the Chamber have standing to challenge EPA's approval of those GHG standards on behalf of their vehicle-dealer members (and, in the case of the Chamber, other members as well). EPA's Waiver Decision, which authorizes enforcement of California's standards, caused injury-in-fact to NADA's and the Chamber's members—an injury that can be redressed by this Court's nullification of EPA's waiver. The interests NADA and the Chamber seek to protect through nullification of the waiver are germane to their organizational purposes. And neither their claims nor the relief they request requires the participation of their individual members. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005).

### I. NADA HAS STANDING

NADA represents nearly 17,000 vehicle dealers that engage in the sale of new vehicles throughout the country, including in California and the Section 177 States. Stand. Add. 5 (Regan Decl. at ¶ 2). The central purpose of California's EPA-approved standards is to limit GHG emissions by restricting the vehicles that can be delivered for sale in that state. Without EPA's waiver, California's standards would be unenforceable. *See* 42 U.S.C. § 7543(a)–(b). With EPA's

Waiver Decision, California's standards have now gone into effect. Because NADA's vehicle-dealer members are the direct objects of California's EPA-approved standards, their standing is self-evident. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)).

The injury suffered by NADA's members is confirmed by the administrative record. That record shows that California promulgated its GHG standards fully aware that the "industries and individuals *affected most* by the [standards] are those engaged in the production, distribution, *sales*, service, and use of light-duty passenger vehicles . . . ." J.A. __ (CARB Staff Report at 158) (emphasis added). *See also id.* at __ (CARB Staff Report at 159) ("California businesses impacted by this regulation tend to be affiliated businesses such as . . . automobile dealers"). EPA recognized that California's standards "will result in an increase in new vehicle prices of approximately $1,000 per vehicle." 74 Fed. Reg. at 32,757. And California acknowledged that the standards may prove so onerous as to force at least one manufacturer to "restrict sales of certain vehicle models in California and other states adopting the California standards, out of necessity." *Id.* at 32,773. The upshot of these anticipated effects is that NADA's members may be forced to pay more for certain vehicles, and may be unable to purchase other vehicles at all.

One of NADA's member dealers, Steve Pleau, has submitted a declaration to the Court embodying those very concerns. He is a dealer in California and explains that if, as anticipated, California's GHG standards force Ford Motor Company to adjust what vehicles it makes available for sale, the standards "may limit my ability to obtain and keep in stock a sufficient quantity of the vehicles that my customers want or need to buy, particularly those with the most powerful engines available for a given model." Stand. Add. 10 (Pleau Decl. ¶¶ 8–9). In a separate declaration, Mr. Vincent Trasatti, a dealer in Maryland (a Section 177 State), voices similar concerns: he explains that if the new standards force Ford to "alter[] the mix of vehicles that it delivers to Maryland dealers, I anticipate that it will be more difficult to stock the mix of vehicles that my customers expect to be able to purchase from my dealership." Stand. Add. 13 (Trasatti Decl. ¶ 8).

The bottom line is that dealers, like all intermediaries in the automobile supply chain, wear two hats: before they can sell cars, they must buy cars. As would-be *purchasers* of cars, dealers are injured by EPA's approval of the standards that prevent or limit their purchase of certain vehicles, or that cause them to pay higher prices. *See, e.g., Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 112 (D.C. Cir. 1990) (finding standing because petitioners sought "the opportunity to buy larger passenger vehicles" but were "hindered in their ability to do so"); *see also Consumer Fed. of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) ("[T]he

inability of consumers to buy a desired product may constitute injury-in-fact even if they could ameliorate the injury by purchasing some alternative product." (quotation marks omitted)). As *sellers*, dealers are injured by their inability to offer certain vehicles for sale and by their need to charge higher prices—or settle for a lower profit margin. *See, e.g., Sabre, Inc. v. DOT*, 429 F.3d 1113, 1119 (D.C. Cir. 2005) (finding standing because "[i]t is reasonably certain that [petitioner's] business decisions will be affected" by agency's rulemaking).

The injury to NADA's members persists notwithstanding EPA's promulgation of its own federal GHG standards after this petition was filed, and California's agreement to accept compliance with those standards as compliance with its own. "[S]tanding is assessed as of the time a suit commences." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009). Here, the federal standards are not applicable until *MY 2012*, meaning that at this time California's state-specific standards—with their various injurious effects—remain in effect in California and the fourteen Section 177 States. Even after 2012, the existence of separate regulatory regimes, one federal and one in California, will give rise to separate reporting, enforcement, and compliance obligations. The resulting costs are certain to affect the vehicle prices that must be paid by NADA's members.

Moreover, while California has indicated that it will follow the federal GHG standards beginning in MY 2012, at least six Section 177 States have not done so. The resulting patchwork of disparate emissions standards will continue to affect the vehicles that NADA's members may purchase and offer for sale in those states through 2016 and beyond. It is also worth noting that California itself could withdraw its "commitment" to the "national program" at any time and enforce its state-specific, EPA-approved standards instead. That threat, and the exacerbating effect it would have on the "patchwork," further injures NADA's members.

EPA's Waiver Decision imposes an additional injury on NADA's members separate and apart from the effects of the specific GHG standards at issue. According to EPA, if a California emissions standard has already received a Clean Air Act waiver, then the agency is not required to subject *amendments* to that standard to "full waiver analysis," so long as the amendments are "within-the-scope" of a previously granted waiver. *See* 75 Fed. Reg. 11,878, 11,879 (Mar. 12, 2010). In other words, under EPA policy, approval of a waiver request eases the standards under which certain, future waiver requests are likely to be considered. EPA does not, for example, apply Section 209(b)(1)(B)'s "compelling and extraordinary conditions" standard to amendments within the scope of previous waivers. *See id*. Given this policy, the current Waiver Decision may make it easier for California to obtain waivers for future GHG standards and regulations—

and concomitantly more *difficult* for NADA's members to challenge those waiver requests. By modifying the applicable legal regime, the Waiver Decision imposes an injury to NADA's members that is in no way affected by the subsequent promulgation of federal standards. *See Bennett v. Spear*, 520 U.S. 154, 168–70 (1997).

In addition to demonstrating injury-in-fact, causation, and redressability with respect to its members, NADA also satisfies the remaining requirements of associational standing. *See Am. Library Ass'n*, 406 F.3d at 696. First, the interests to be protected by NADA's petition are germane to NADA's purpose: this petition's attempt to protect vehicle dealers from burdensome regulation limiting their commercial discretion is at the heart of NADA's associational purpose, which is to defend the commercial interests of its members. Stand. Add. 5 (Regan Decl. ¶ 3). Second, neither NADA's claim nor its requested relief requires the participation of individual members, because this petition asks only that this Court apply the law to the administrative record, and vacate the Waiver Decision.

## II. THE CHAMBER HAS STANDING

NADA's standing independently suffices to support this Court's jurisdiction. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004). But the Chamber also has standing to bring this suit, for the same reasons as NADA. The Chamber directly represents 300,000 members and indirectly represents more than

3,000,000 businesses and professional organizations. Stand. Add. 16 (Engstrom Decl. ¶ 3). Among its members are more than 1000 vehicle dealers, including dealers in California, *id*. (Engstrom Decl. ¶ 4), who face the substantial likelihood of EPA-caused injury for precisely the same reason NADA's members do.

Many of the Chamber's non-vehicle-dealer members are also injured by EPA's approval of the California GHG standards. The Chamber's membership includes gasoline service stations, automobile repair shops, and companies that purchase and use vehicles on a fleet-wide basis. *Id*. (Engstrom Decl. ¶ 5). Each of these segments of the Chamber's membership is identified by California as among the "industries . . . affected most by" the EPA-approved standards. J.A. __ (CARB Staff Report at 158); *see also id.* at __ (CARB Staff Report at 159). Thus, as with NADA's members, the Chamber's members suffer an injury that is caused by EPA's Waiver Decision and would be redressed by this Court's nullification of that agency action.

Like NADA, the Chamber also satisfies the remaining requirements of associational standing. First, the interests that the Chamber seeks to protect are germane to its organizational purpose: "to advocate . . . on behalf of its members before Congress, the White House, regulatory agencies, and the courts" in defense of its members' business and financial interests. Stand. Add. 16 (Engstrom Decl.

¶ 6). Second, neither the Chamber's claim nor its requested relief requires the participation of individual members.

## ARGUMENT

Section 209(b)(1) of the Clean Air Act authorizes EPA to waive federal preemption where California proposes vehicle emissions standards that seek to address *local* or *regional* pollution problems caused by conditions peculiar to California. In this case, California requested a waiver for GHG standards that purport to address the *global* environmental issue of climate change, an issue that *cannot* be attributed to California-specific conditions. EPA was required, under the plain terms of the waiver provision, to reject that request—as the agency properly recognized in its original, 2008 Denial. EPA's decision to reverse the 2008 Denial, and permit California to impose its own preferred response to the issue of GHG vehicle emissions, was an unlawful abdication of its statutory responsibility under the Clean Air Act. EPA's decision also exceeds EPA's statutory authority by purporting to authorize California to "enforce" the state's GHG standards despite the preemptive effect of an altogether separate federal law, the Energy Policy and Conservation Act, which EPA has no authority to waive.

Standard of Review. Because the Waiver Decision constitutes EPA's informal adjudication, *see* 74 Fed. Reg. at 32,781, it is reviewed under the Administrative Procedure Act's familiar standards of review, *see MEMA*, 627 F.2d

at 1105–06. The Court is required to vacate the Waiver Decision if EPA's determinations are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). EPA's interpretation of the Clean Air Act's requirements is reviewed under *Chevron*'s two-part test. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 465 (D.C. Cir. 1998) (citing *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842–43 (1984)). EPA's factual findings are arbitrary and capricious if they are not supported by substantial evidence in the agency's administrative record. *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). The Court is required to vacate EPA's decision if it determines that the agency acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

## I. THE CLEAN AIR ACT REQUIRED EPA TO DENY CALIFORNIA'S PREEMPTION-WAIVER REQUEST

As this Court recognized three decades ago, the Clean Air Act's waiver provision strikes a "compromise" between two competing considerations: the automobile industry's need for "a single national standard in order to eliminate undue economic strain on the industry" on the one hand, and California's desire to set its own, state-specific standards "to meet peculiar local conditions," on the other. *MEMA*, 627 F.2d at 1109 (quoting S. REP. NO. 90-403, at 33). That compromise was not a capitulation to California. Rather, as made clear in Section 209(b)(1)(B), EPA is required to deny California's waiver requests if the standards

proposed for EPA review are not "need[ed]" to meet "compelling and extraordinary conditions" in that state. 42 U.S.C. § 7543(b)(1)(B). Applying that standard here, it is self-evident that California's GHG standards—which relate to a *global* environmental issue that is not caused by *California-specific* conditions—are not waiver-eligible.

### A. Section 209(b)(1)(B) Requires EPA To Deny A Preemption Waiver Where The Standards Presented For Review Are Not Needed To Address California-Specific Conditions

EPA's statutory mandate under Section 209(b)(1)(B) is unambiguous: It requires EPA to deny a waiver request if the standards California presents for review are not needed to address pollution problems that California experiences as a result of its state-specific conditions.

1. EPA's mandate is made clear, first and foremost, by the text of Section 209(b)(1)(B), which directs EPA to assess whether the "State *standards*" for which waiver is sought are "need[ed]" by California "to meet compelling and *extraordinary* conditions." 42 U.S.C. § 7543(b)(1)(B) (emphasis added). That statutory language, taken in context, requires EPA to review the specific "standards" California has presented for review, and to determine whether those standards are "needed" by California in light of pollution-causing "conditions" "extraordinary" or unique to that state. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 807 (1993) (defining "extraordinary" to mean "going beyond what is

usual, regular, common, or customary"). Where California-specific "compelling and extraordinary conditions" are present, a waiver can be approved. Where such conditions are lacking, "[n]o . . . waiver shall be granted." 42 U.S.C. § 7543(b)(1)(B).

2. Section 209's purpose and history confirm what its text makes clear, thereby eliminating any possible ambiguity regarding EPA's mandate. *See Catawba County, N.C. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (explaining that legislative history, like other tools of statutory interpretation, may bear on the statute's meaning for purposes of *Chevron*'s Step One); *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (same).

In passing the Clean Air Act, Congress determined that it was critical to "occupy the regulatory role over [vehicle] emissions control" at the national level. *MEMA*, 627 F.2d at 1109. Only by preempting state-regulation of vehicle emissions could Congress prevent "an anarchic patchwork of federal and state regulatory programs"—a patchwork that would create an undue drain on the economy and undermine an effective national response to the issue of new vehicle emissions. *Id.*; *see also, e.g.*, H.R. REP. NO. 89-899, at 5 ("The high rate of mobility of automobiles suggests that anything short of nationwide control would scarcely be adequate to cope with the motor vehicle pollution problem."). As EPA's predecessor agency explained, "the numerous conflicting [regulatory]

requirements that might ensue in the absence of uniform national regulation could have a chaotic effect." H.R. REP. NO. 89-899, at 14.

Given the need for uniformity, Congress decided that federal preemption of new vehicle emissions standards could yield *only* for California and *only* where California promulgated standards necessary to address "the unique problems facing [the state] as a result of its climate and topography." H.R. REP. NO. 90-728, at 22; *see* S. REP. NO. 90-403, at 33. ("California's unique problems and pioneering efforts justified a waiver of the preemption section"). In considering whether any preemption exception should be permitted, Congress noted that "*only* the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards." S. REP. NO. 90-403, at 33 (emphasis added). It follows that Congress intended to permit a preemption waiver for California—but *only* where California actually experiences "compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify" state-specific standards. That limitation on the preemption exception is embodied in Section 209(b)(1)(B), which prohibits EPA from granting a waiver where those California-specific "compelling and extraordinary circumstances" are absent. 42 U.S.C. § 7543(b)(1)(B).

3. EPA itself has long recognized (at least until issuance of this Waiver Decision) that the phrase "compelling and extraordinary conditions" refers to those "general circumstances, unique to California, [that are] primarily responsible for causing its air pollution problem." 49 Fed. Reg. 18,887, 18,890 (May 3, 1984). The agency has explained that "'compelling and extraordinary conditions' does *not* refer to levels of pollution directly, but primarily to the factors that tend to produce them: geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems." *Id.* (emphasis added); *see also* 73 Fed. Reg. at 12,163 ("[I]n specifying the need for standards to meet compelling and extraordinary conditions Congress had in mind the causal factors of local or regional air pollution problems, not the level of air pollution per se.").

EPA reiterated its longstanding policy as recently as the 2008 Denial, when it explained that Section 209(b)(1)(B) "allow[s] waivers of preemption for California motor vehicle standards based on the particular effects of local conditions in California on the air pollution problems in California." 73 Fed. Reg. at 12,161.

### B. Section 209(b)(1)(B) Precluded A Clean Air Act Waiver For California's GHG Standards

Properly interpreted and applied, Section 209(b)(1)(B) required a waiver denial in this case. When promulgating its GHG standards, California recognized

that "human-induced climate change is truly a *global* problem—one that will eventually require actions by all countries." J.A. __ (CARB Final Statement at 375). EPA acknowledged the same in the proceedings below, noting that California's GHG standards are "designed to address *global* air pollution problems," not any "local or regional" condition. 74 Fed. Reg. at 32,761 (emphasis added); *see id.* at 32,763 (describing "elevated concentrations of greenhouse gases [as] a *global* air pollution problem" (emphasis added)). That acknowledgement should have ended the inquiry.

A closer examination of the issues confirms that conclusion. It is undisputed that elevated GHG levels and climate change are not *caused* by California-specific conditions. As EPA noted in its 2008 Denial, "the local climate and topography in California have no significant impact on the long-term atmospheric concentrations of [GHGs] in California." 73 Fed. Reg. at 12,162. Nor can California's local or regional air pollution problems be attributed to GHG emissions that occur in that state, as opposed to the world as a whole. Again, as EPA recognized in 2008, GHGs from California cars and trucks "do not affect California's air pollution problems in any way different from emissions from vehicles and other pollution sources all around the world." 73 Fed. Reg. at 12,160; *see also id.* at 12,163 ("GHG emissions from California cars are not a causal factor for local ozone levels any more than GHG emissions from any other source of GHG emissions in the

world."); *id.* at 12,162 ("Emissions from other parts of the world affect the global concentrations of GHGs, and therefore concentrations in California, in exactly the same manner as emissions from California's motor vehicles"). Neither EPA, nor any proponent of the waiver, questioned those indisputable principles in the Waiver Decision proceedings.

There is also no reasonable basis to conclude that the impacts of GHGs and climate change are more severe or significant in California than they are anywhere else in this country. To the contrary, EPA determined in 2008 that "the impacts [of climate change] in California, compared to the nation as a whole, are not sufficiently different to be considered 'compelling and extraordinary conditions' that merit separate state GHG standards for new motor vehicles." 73 Fed. Reg. at 12,168. The agency based that conclusion on extensive factual findings concerning the effects of climate change in California, examining (and rejecting) every disparate impact California alleged. *See id.* at 12,163–68. As discussed below, EPA's decision to disregard its prior factual findings and conclusion in the current Waiver Decision cannot survive arbitrary-and-capricious review. *See* pp. 53–56, *infra*.

Finally, even if the general problem of climate change is somehow "linked" to California's local or regional air pollution problems (*e.g.*, ozone), *see* 74 Fed. Reg. at 32,763, California's standards still cannot qualify for a waiver. The

existence of any such "link" would not change the fact that climate change is not caused by conditions *in California*—or that California's state-specific GHG standards are incapable of addressing that global environmental condition. In fact, California has *acknowledged* that "the reductions in climate change associated with individual policies or the actions of individual regions"—including its own GHG standards—"*will not be identifiable*." J.A. __ (CARB Final Statement at 376) (emphasis added). In other words, whether or not California's local pollution problems are "exacerbated" by the general condition of climate change, there is no indication that California's GHG standards will do anything whatsoever to meaningfully ameliorate climate-change effects—including whatever effects California may experience.[6]

Simply stated, elevated GHGs and climate change are *not* California-specific problems caused by California-specific conditions. Rather, these are *national*

[6] California suggested that the impacts of its GHG standards could be quantified by computer model. *See* CARB Final Statement at 376. But there is no indication in the *Federal Register* or in CARB's Final Statement of Reasons that California ever performed that computer modeling. In fact, an expert retained by CARB offered testimony that modeling the effects of California's standards would be a "wast[e of] computer time" because the effects would be so small. J.A. __ (EPA Hearing Transcript, EPA-HQ-OAR-2006-0173-0421, at 69:13–18 (May 30, 2007) (quoting testimony of Dr. James Hansen)). Likewise, several environmental groups that supported California's waiver request have acknowledged they are not aware of "any credible scientific evidence to support the theory that $CO_2$ emissions reductions resulting from the adoption of [California's GHG standards] . . . would change average ambient temperatures in any place by a measurable amount," even if those standards were adopted in "all 50 states." *Id.* at __ (Trans., 68:13–20).

environmental issues that are properly addressed (if at all) on a national level. Indeed, though not yet in effect, federal GHG vehicle emissions standards have now been promulgated by EPA and NHTSA, and were in fact under consideration at the time that California made its waiver request. *See* pp. 13–14, *supra*. EPA's decision to grant that request and authorize enforcement of California's state-specific GHG standards—even when a *national* response was on its way—contravenes the meaning and core purpose of the Clean Air Act's preemption provision.

* * *

In sum, the text, purpose, and history of Section 209(b)(1)(B) demonstrate that Clean Air Act preemption can be waived *only if* the standards California proposes are necessary to address pollution problems caused by local or regional conditions in that state. In this case, California proposed emissions standards that are not "need[ed]" to meet "compelling and extraordinary conditions" in California. Instead, California's proposed standards are an attempt to hold sway over the national response to climate-change issues—a goal California has now achieved as a result of EPA's unlawful Waiver Decision.

## II. EPA BASED ITS WAIVER DECISION ON AN UNLAWFUL INTERPRETATION OF SECTION 209(b)(1)(B)

Because elevated GHG concentrations are not caused by California-specific conditions, and climate change is not a California-specific problem, Section

209(b)(1)(B) required EPA to deny California's waiver request. EPA reached a contrary conclusion only by applying an interpretation that cannot survive *Chevron* review.

According to EPA, as long as California has a continuing need for its vehicle emissions program "as a whole," the agency is compelled by Section 209(b)(1) to waive preemption for whatever specific standards the state may propose. *See* 74 Fed. Reg. at 32,761. Under EPA's interpretation, that is true even if California does not need the particular standards it proposes, and even if those standards do not deal with "local or regional air pollution problems," but instead "are designed to address global air pollution problems" with no special effect on California. *Id.*

EPA's interpretive position is foreclosed by the plain meaning of Section 209(b)(1)(B), which unambiguously requires EPA to consider whether the particular "State standards" California proposes are "needed" to "meet compelling and extraordinary conditions" in that state—and to deny the waiver if no such need is present. *See* pp. 31–34, *supra*. Even if EPA's interpretation could survive *Chevron* Step One review, it must be rejected under *Chevron* Step Two. Section 209(b)(1)(B) cannot reasonably be interpreted to permit a waiver based on California's continuing need for its vehicle emissions program "as a whole"—especially where the standards in question do not address a state-specific pollution

problem, but instead are an effort by California to impose its own preferred response to a *national* environmental issue.

1. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. "In undertaking [the] *Chevron* step one inquiry into whether Congress has directly spoken to the precise question at issue," the Court employs "the traditional tools of statutory construction . . . including examination of the statute's text, legislative history, and structure, as well as its purpose." *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (citations, quotation marks, and brackets omitted). Furthermore, "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Here, the text of Section 209(b)(1)(B)—considered in light of the structure, history, and purpose of the Clean Air Act—demonstrates that EPA's interpretation is foreclosed.

a. Taking text first, Section 209(b)(1)(B) directs EPA to consider whether California needs "such State *standards* to meet compelling and *extraordinary* conditions." 42 U.S.C. § 7543(b)(1)(B) (emphasis added). That

language directs EPA to assess the particular "State standards" proposed for a waiver, and to consider whether California "needs" those standards to address conditions "extraordinary" to California. Congress could have used the phrase "State program" or some similar term in Section 209(b)(1)(B); it could have omitted the comparative phrase "extraordinary." But it did neither. By assessing "need" on a whole-program basis, and by waiving preemption in the absence of conditions "extraordinary" to California, EPA contradicted Congress's explicit textual choices.

EPA's interpretation does not merely misread Section 209(b)(1)(B)'s statutory mandate—it reads the "compelling and extraordinary conditions" requirement *out of the statute entirely*. Under EPA's approach, as long as no one questions California's continuing need for state-specific standards to regulate *some* vehicle pollutants, the state will enjoy free license to promulgate any additional standards it chooses, regardless of whether those additional standards—with all of the additional burdens and regulatory complexity they impose—are "need[ed] to meet compelling and extraordinary conditions" in that state. 42 U.S.C. § 7543(b)(1)(B).

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (quotation marks, brackets omitted).

Here, EPA's interpretation would have exactly the effect *Corley* prohibits: it would render Section 209(b)(1)(B) "inoperative" by allowing countless California emissions standards to go into effect without Section 209(b)(1)(B)'s "compelling and extraordinary conditions" criterion being applied to those standards at all.

In the proceedings below, EPA countered the criticism that its interpretation would render Section 209(b)(1)(B) "a nullity" by asserting that the agency "must still determine whether California does not need its *motor vehicle program* to meet the compelling and extraordinary conditions discussed in the legislative history." 74 Fed. Reg. at 32,762 (emphasis added). But again, by that reasoning, *any* standard proposed by California would satisfy the "compelling and extraordinary conditions" requirement, absent a party's exceptional demonstration that the entire purpose of the Clean Air Act's waiver provision had run its course. Such an interpretation would give California practically unlimited discretion: the state could propose a regulation prohibiting vehicles from producing *any* carbon emissions—and so long as the regulation's opponents did not prove that California lacked any need for its emission program "as a whole," the regulation would be enforceable.

Contrary to EPA's position, the purpose of Section 209(b)(1)(B) is not to require an episodic, broad-brush assessment of California's overall need for its entire state emissions program. The purpose—as demonstrated by the statute's

text, structure, and history—is to require EPA to consider whether particular "standards" proposed for waiver are "needed" to "meet compelling and extraordinary conditions" in that state. 42 U.S.C. § 7543(b)(1)(B). Only by carrying out that statutory mandate can EPA enforce the "compromise" embodied in the waiver provision: that the critical need for uniformity will yield to California's state-specific interests, but only where those interests are sufficiently compelling to warrant that result. *See MEMA*, 627 F.2d at 1109. EPA's decision to waive Clean Air Act preemption of California's GHG standards based on nothing more than a whole-program review was an unlawful abdication of its statutory responsibility under the Act. 74 Fed. Reg. at 32,762.

b. Any remaining question that EPA's interpretation of Section 209(b)(1)(B) is foreclosed is resolved by reference to Section 209(b)(1)*(C)*, the provision that requires EPA to consider whether California's proposed standards give manufacturers sufficient "lead time" to prepare for enforcement. 42 U.S.C. § 7543(b)(1)(C). Like Section 209(b)(1)(B), the lead-time provision directs EPA to review "*such* State standards." *Id.* (emphasis added). In the case of the "compelling and extraordinary conditions" criterion, EPA interpreted the phrase "*such* State standards" to mean California's entire program of emissions standards. *See* 74 Fed. Reg. at 32,761. But even if the term were susceptible to that interpretation in Section 209(b)(1)(B), it cannot possibly bear that meaning in

Section 209(b)(1)(C). Reviewing California's emissions standards for lead-time adequacy on an "aggregate" or "whole-program" basis would make no sense. EPA recognized as much in this Waiver Decision. *See* 74 Fed. Reg. at 32,767.

It is a "standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). EPA's interpretive position—which gives "such State standards" one meaning in Section 209(b)(1)(B) and the exact opposite meaning in the very next subsection—violates that principle.

c. EPA tried to justify its interpretation of Section 209(b)(1)(B) by pointing out that a *different* portion of the statute dealing with California's protectiveness determination includes the phrase "in the aggregate." *See* 74 Fed. Reg. at 32,761; 42 U.S.C. § 7543(b)(1) (permitting California to request a waiver 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") (emphasis added). But far from supporting EPA's position, Congress's use of "in the aggregate" in the protectiveness provision—and its *failure* to use the same language in Section 209(b)(1)(B)—confirms that the agency's interpretation is foreclosed. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, Congress's selective inclusion of "in the aggregate" demonstrates that it intended to permit "aggregate" review for the protectiveness determination—but not anywhere else.

Section 209(b)'s history confirms that conclusion. The statute, as originally enacted in 1967, required EPA's predecessor to waive preemption for California standards unless it found that California "does not require standards more stringent than applicable federal standards to meet compelling and extraordinary conditions or that such State standards . . . are not consistent with section 202(a)." There is no question that "standards" and "such State standards" in the 1967 version of the statute referred to the specific standards for which California sought a waiver. As this Court explained, the original provision required that "*each* California standard had to be 'more stringent' than the corresponding federal standard" for a waiver to be granted. *MEMA*, 627 F.2d at 1110 n.32 (emphasis added).

In 1977, Congress inserted the phrase "in the aggregate" into the portion of Section 209(b) that addresses the protectiveness determination. It did so for a particular purpose: to allow California to make an "aggregate" determination about the comparative protectiveness of its standards, rather than considering each standard on its own. *See id.* (citing Pub. L. No. 95-95, § 207, 91 Stat. 755). In particular, Congress sought to permit California to enforce more stringent

standards for oxides of nitrogen than EPA required, but less stringent standards for carbon monoxide, which (California had determined) would result in greater overall environmental benefits for the state. *See id.* at 1110 & n.32 (quoting H.R. REP. NO. 95-294, at 301–02 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1380).

Nothing in the history of Section 209(b)(1) gives any indication that by including "in the aggregate" in the protectiveness provision Congress intended to do anything other than modify the *protectiveness provision*. There is no basis for concluding that, with this three-word amendment, Congress intended to radically rewrite Section 209(b)(1)(B)'s entirely separate "compelling and extraordinary conditions" criterion to allow EPA to waive preemption for any standard California might present based on nothing more than the state's continuing, generalized need for its emissions program.[7]

2. Even if there were any ambiguity concerning Congress's intent in Section 209(b)(1)(B), EPA's interpretation would fail scrutiny under *Chevron* Step

[7] Indeed, it is not even clear that by adding the "in the aggregate" phrase to Section 209(b)(1) Congress intended to permit "whole-program" review for the purposes of California's protectiveness determination—as opposed to allowing California to consider the "aggregate" protectiveness of the set of standards presented to EPA for waiver consideration at that particular time. *See* 43 Fed. Reg. 25,730 (June 14, 1978) (explaining that California had "determined that *the standards under consideration in this decision* were, in the aggregate, at least as protective of public health and welfare as the applicable federal standards") (emphasis added).

Two. Congress's directive that EPA consider California's "need" for its proposed "State standards" has to mean *something*. *See Corley*, 129 S. Ct. at 1566. But, as explained above, if EPA's interpretation were accepted it would render that directive effectively meaningless. It would allow California to enforce *any* emissions standards it wanted—regardless of need—subject only to withstanding a claim that the overall purpose of the waiver provision had passed. In this very case, EPA concluded that it was compelled to waive preemption for California's GHG standards simply because the agency had "not received any adverse comments suggesting that California no longer needs a separate motor vehicle emissions program . . . ." 74 Fed. Reg. at 32,763. A statute designed to protect regulatory uniformity—except in the case of California's "compelling and extraordinary" "need" for state-specific "standards"—cannot reasonably be read to permit that result.

Nor can EPA's unreasonable interpretation be made reasonable by what it characterizes as agency "tradition[.]" *See* 74 Fed. Reg. at 32,761 n.104. EPA's "whole-program" approach to Section 209(b)(1)(B) review has never been considered, much less approved, by any court. And this Court has made clear that consistency in agency practice is never sufficient to satisfy *Chevron*: "No matter how consistent its past practice, an agency must still explain why that practice

comports with the governing statute and reasoned decision making." *S.E. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009).

In any event, the approach taken in EPA's Waiver Decision does *not* comport with a long line of agency tradition. As EPA explained in its 2008 Denial, the agency's practice of waiving preemption based on California's continuing need for its own state-specific emissions program arose in the context of California proposing standards designed to address *state-specific* conditions. *See* 73 Fed. Reg. at 12,161. In the case of such standards, the agency concluded that it was appropriate to waive preemption so long as there was no indication that California's need for a state-specific emissions program to address *state-specific conditions* had passed. *Id*

California's GHG standards present a completely different situation. Here, for the first time, California sought permission to enforce vehicle standards designed to take on a *national*—indeed, global—environmental issue, one that cannot be attributed to state-specific conditions. Even if EPA's "whole-program" review could be accepted as a reasonable application of the statute in the case of California's typical standards, it makes no sense to apply it to the standards presented for review here. The fact that California has a continuing need for a program to address *state*-specific conditions is irrelevant to the state's need for

emissions standards that do not, and are not intended to, address state-specific conditions at all.

## III. EPA'S ALTERNATIVE BASIS FOR GRANTING THE WAIVER WAS ARBITRARY AND CAPRICIOUS AND OTHERWISE CONTRARY TO LAW

"[I]f the [EPA] Administrator ignores evidence demonstrating that [a Clean Air Act] waiver should not be granted, or if he seeks to overcome that evidence with unsupported assertions of his own, he runs the risk of having his waiver decision set aside as arbitrary and capricious." *MEMA*, 627 F.2d at 1121. EPA's alternative basis for waiving preemption of California's GHG standards suffers from precisely those flaws.

EPA concluded that, even under the (proper) interpretation of Section 209(b)(1)(B) applied in the 2008 Denial, it was compelled to grant California's waiver request. *See* 74 Fed. Reg. at 32,763. That conclusion ignores the indisputable fact that elevated GHG levels are not *caused* by California-specific conditions. And it disregards the agency's prior conclusion, supported by extensive factual findings, that the *effects* of climate change in California are not sufficiently different from the rest of the country to justify a state-specific response.

The primary basis for EPA's conclusion-in-the-alternative is that there is a "logical link" between the issue of "global climate change" and California's "local

air pollution problem of ozone." *Id.* at 32,763. But the agency rejected the same "link" as insufficient to justify the waiver in its 2008 Denial—and for good reason. GHG emissions in California do not *cause* the local problem of ozone. And California admits that reducing GHG emissions in California will do nothing meaningful to fix it. *See* pp. 7–8, *supra*; J.A. __ (CARB Final Statement at 376).

Waiving federal preemption so that California can disrupt national uniformity by enforcing emissions standards that California *admits* will have no identifiable effect on the state's local pollution problems is both arbitrary and capricious. It is only made more so by the fact that, at the time EPA granted California's waiver request, the agency was preparing to promulgate *federal* GHG emissions standards, exactly the kind the Clean Air Act envisions for dealing with *national* issues, like climate change. California, for its part, had committed to discard its EPA-approved standards and adopt the federal regulations as its own, as long as the standards promulgated were to California's liking. *See* pp. 14–15, *supra*. California's readiness to jettison its own standards in favor of a (California-approved) national response shows that, far from "need[ing]" a state-based approach to the problem of GHG vehicle emissions (which Section 209(b)(1)(B) requires to allow a waiver), California's primary motivation was to exercise influence over the federal process.

### A. A "Logical Link" Between Climate Change And California's Ozone Problem Cannot Justify The Preemption Waiver

Until this Waiver Decision, EPA had long recognized that Section 209(b)(1)(B) requires "conditions" that are "unique to California" and "primarily responsible for *causing* its air pollution problems." *See* 73 Fed. Reg. at 12,160–63 (emphasis added). That interpretation is compelled by the text, structure, and history of the statute—and it required EPA to deny a preemption waiver in this case. *See* pp. 30–35, *supra*. Instead, EPA concluded that Section 209(b)(1)(b) did not preclude a waiver because it saw it a "logical *link* between the local air pollution problem of ozone" and "California's desire to reduce GHGs as one way to address the adverse impact that climate change may have on local ozone conditions." 74 Fed. Reg. at 32,763. That conclusion is flawed for two reasons.

First, it is contrary to the plain meaning of Section 209(b)(1)(B), which requires a *causal* connection between California-specific conditions and the pollution problem the state seeks to address. As EPA explained when it rejected the "logical link" theory in its 2008 Denial,

> While climate change may impact levels of ozone in California, this does not change the fact that the factors causing elevated concentrations of [GHGs] are not solely local to California. This is in contrast to the kinds of motor vehicle emissions normally associated with ozone levels, such as [volatile organic compounds] and [oxides of nitrogen], and the local climate and topography that in the past have lead to the conclusion that California has the need for state standards . . . .

73 Fed. Reg. at 12,163.

Second, EPA's "logical link" justification is disproved by California's own submissions. In those submissions, California disclaims any ability to achieve "specific ozone reductions" through its GHG standards. J.A. __ (CARB Final Statement at 232). It acknowledged that "the reductions in climate change associated with individual policies or the actions of individual regions"—including its own GHG standards—"*will not be identifiable.*" *Id.* at __ (CARB Final Statement at 376 (emphasis added)); *see id.* at __ (CARB Final Statement at 232). In other words, whatever "logical link" may exist between global climate change and California's "local or regional" problem of ozone, the record contains direct evidence that California's GHG proposed standards would have no meaningful ability to address either problem.

Faced with this record, EPA contended that "there is no need to delve into the extent to which the GHG standards at issue here would address climate change or ozone problems," insisting that the agency "does not second-guess the wisdom or efficacy of California's standards." 74 Fed. Reg. at 32,766 (citing CARB Comments, EPA-HQ-OAR-2006-0173-0004). But whatever deference California may be due cannot excuse a total abdication of EPA's statutory responsibility to consider whether the state actually "needs" its proposed standards to address "compelling and extraordinary conditions" under Section 209(b)(1)(B). Nor can it

justify a finding of "need" where *California itself* admits that its GHG standards will have no meaningful effect on the problem they purportedly seek to address.

### B. EPA's Conclusion That The Impacts Of Climate Change In California Warranted A Waiver Lacked Any Record Support And Arbitrarily Disregarded Its Prior Factual Findings

EPA also concluded that the "impacts" of climate change in California justified its state-specific GHG standards. *See* 74 Fed. Reg. at 32,764. That justification fails at the outset because it is based on California-specific *effects*, rather than California-specific *causes*; and the latter is what Section 209(b)(1)(B) requires. *See* pp. 30–35, *supra*. Even if the statute permitted EPA to rely on effects, its decision to do so here fails scrutiny. As an initial matter, it is difficult to see how the "impacts" of climate change in California—however severe or disproportionate—could justify its state-specific GHG standards where California has admitted that those standards *will have no "identifiable" effect on climate change*. J.A. __ (CARB Final Statement at 376). Aside from that threshold issue, EPA's disproportionate-impact conclusion finds no support in the record. To the contrary, the available evidence (which EPA considered in its 2008 Denial) demonstrates that the climate-change impacts California has identified do *not* uniquely affect that state. *See* 73 Fed. Reg. at 12,168. Finally, EPA provides no reasoned basis for rejecting its prior conclusion (based on extensive factual findings) that the effects of GHGs in California are not "sufficiently different from

the nation as a whole" to warrant a waiver. 73 Fed. Reg. at 12,164. For each of these reasons, EPA's conclusion fails arbitrary-and-capricious review.

As EPA recognized in 2008, "compelling and extraordinary conditions" do not exist simply because climate change, caused by elevated GHG concentrations in the global atmosphere, has or is expected to have an effect in California. Rather, a waiver could be justified only if there were a basis to conclude that the effects of climate change are "compelling and *extraordinary*" in California *as compared to* the nation as a whole. *See* 73 Fed. Reg. at 12,164; pp. 31–33, *supra*.

EPA conducted that comparison in 2008—and concluded that California-specific impacts are not "sufficiently different" from those elsewhere to "merit separate state GHG standards for new motor vehicles." *Id*. at 12,168. It based that conclusion on detailed factual findings concerning the comparative impacts of climate change in California and the country at-large. *See* 73 Fed. Reg. at 12,165–68. EPA found, for example, that "California's precipitation increases are not qualitatively different from changes in other areas," *id.* at 12,168; and that "[r]ises in sea level in the coastal parts of the United States are projected to be as severe, or more severe, particularly in consequences, in the Atlantic and Gulf regions than in the Pacific regions," *id*. EPA likewise concluded that "temperature increases have occurred in most parts of the United States, and while California's temperatures

have increased by more than the national average, there are other places in the United States with higher or similar increases in temperature." *Id*.

EPA also observed in 2008 that, while "many of the effects of global climate change (*e.g.*, water supply issues, increases in wildfires, effects on agriculture) will affect California," those same effects "are also well-established to affect other parts of the United States." *Id.* at 12,168. It explained that "many parts of the United States may have issues related to drinking water (*e.g.*, increased salinity) and wildfires," and that "effects on agriculture are by no means limited to California." *Id*.

Unlike its 2008 Denial, the Waiver Decision's consideration of the comparative-impact issue is supported by no factual analysis whatsoever. Instead, EPA's entire treatment of this issue boiled down to: (1) a statement that "California has identified a wide variety of [climate change] impacts and potential impacts within California"; (2) a belief that waiver opponents 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"; and (3) a conclusion that, as a result, the waiver must be granted. *See* 74 Fed. Reg. at 32,764–65. In other words, EPA concluded that a waiver of federal preemption is warranted without pointing to *any* affirmative record evidence that climate change has disproportionate effects in California as opposed to elsewhere in the country.

In fact, what the available evidence shows is that the impacts of climate change in California are *not* disproportionate—as EPA itself recognized in 2008.[8] And, despite its complete reversal of position (just a year later), EPA gives no explanation for why its prior factual findings concerning comparative climate-change impacts were wrong. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). It must explain how "the relevant facts have changed." *Am. Farm Bureau Fed. v. EPA*, 559 F.3d 512, 521 (D.C. Cir. 2009). Here, EPA's Waiver Decision reached a conclusion that contradicts extensive factual findings it made in its 2008 Denial. EPA's failure to explain why it rejected those findings, or to provide any other reasonable basis for abandoning its prior conclusion, cannot survive arbitrary-and-capricious review.

### C. EPA's Rulemaking On GHG Vehicle Emissions Standards—And California's Response To That Rulemaking—Demonstrated That California Had No Need For State-Specific GHG Standards

Section 209(b)(1)(B) requires EPA to deny a waiver if California does not "*need*" its proposed standards to meet "compelling and extraordinary conditions."

[8] *Compare* 74 Fed. Reg. at 32,765 (noting that California identifies a "wide variety of [climate change] impacts and potential impacts" in its state) *with* 73 Fed. Reg. at 12,163–68 (considering each and every one of those "impacts," and finding them to be inadequate basis for waiver).

Here, "compelling and extraordinary conditions" were plainly lacking. *See* pp. 30–35, *supra*. So too was any "need" for a California-specific response—as California itself amply demonstrated to EPA while the state's waiver request was under consideration.

As noted above, at the time EPA completed reconsideration of its 2008 Denial, the agency, together with NHTSA, already had announced plans to implement a national regulatory program to address GHG vehicle emissions for MYs 2012 to 2016. *See* pp. 7–8, *supra*. California, for its part, had already agreed that if federal GHG standards were "substantially as described in [the] Joint Notice[,]" California would treat compliance with the federal standards as tantamount to compliance with its own regulations. *See* Stand. Add. 2 (Nichols Letter at 2).

The fact that California was willing to dispense with its state-specific standards, and apply the federal standards instead, proved that California did "need" its own standards at all.[9] EPA's decision to waive Clean Air Act

[9] The same is true of California's advance agreement to adopt pooling rules that permit manufacturers to achieve compliance in MYs 2009 to 2011 based on the fleet-wide GHG emissions average for vehicles sold in California and the Section 177 States. *See* CAL. CODE REGS. tit. 13 § 1961.1(a)(1)(A)(i). Under those rules, a manufacturer can comply with California's regulations by selling low-GHG-emitting vehicles in *Maryland* (for example), while leaving its California inventory of vehicles (and the associated GHG emissions) exactly as-is. In other words, under California's agreement, implementation of its standards could have no GHG-reducing effect in California whatsoever.

preemption in the face of that proof violated its statutory mandate under Section 209(b)(1)(B), which requires the agency not to waive preemption where "need" is lacking. 42 U.S.C. § 7543(b)(1)(B). Aside from being unlawful under the statute, EPA's decision was also arbitrary and capricious: the notion that California could "need" state-specific emissions standards *that it was not even planning to use* simply makes no sense. Indeed, by giving California the ability to impose its own GHG regulatory regime where a national response was imminent the only thing EPA's Waiver Decision accomplished was to create precisely the kind of burdensome, regulatory overlay that the preemption provision was meant to prevent. *See generally* H.R. REP. NO. 90-728, at 22 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 1938, 1957–58 (recognizing the regulatory burdens that may result from "identical Federal and State standards, separately administered").

## IV. EPA HAD NO AUTHORITY TO DECLARE THAT CALIFORNIA COULD "ENFORCE" ITS GHG STANDARDS

Section 209(b)(1) does not empower EPA to authorize California's enforcement of its GHG regulations, all other federal limitations notwithstanding. Rather, Section 209(b)(1) authorizes EPA to "waive application of *this section*"—*i.e.*, of Section 209 itself. 42 U.S.C. § 7543(b)(1) (emphasis added). EPA's Waiver Decision far exceeded Section 209(b)(1)'s limited scope: rather than merely waiving Section 209's preemption of the California GHG regulations, the Waiver Decision purported to authorize California to "*enforce* its greenhouse gas

motor vehicle emissions regulations." 74 Fed. Reg. at 32,746 (emphasis added). Because it exceeds EPA's authority, EPA's Waiver Decision must be vacated. 5 U.S.C. § 706(2)(C).

EPA cannot categorically declare that California may "enforce" its GHG standards, because those state regulations are subject to preemption under an entirely separate statute: the Energy Policy and Conservation Act ("EPCA,") Pub. L. No. 94-163, 89 Stat. 871 (1975). EPCA authorizes NHTSA to set national automobile fuel economy standards, 49 U.S.C. § 32902, and those federal standards preempt state laws: "When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State *may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards* for automobiles covered by an average fuel economy standard under this chapter," *id*. § 32919(a) (emphasis added).

EPCA's preemption provision is administered by NHTSA, not EPA,[10] and NHTSA has determined through notice-and-comment rulemaking that EPCA preempts any "State requirement limiting $CO_2$ emissions[.]" 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006). According to NHTSA, EPCA expressly preempts state $CO_2$ emissions regulations, because such laws "relat[e] to fuel economy standards"

[10] The statute is expressly committed to the Secretary of Transportation's administration, *see* 49 U.S.C. § 32902(a), but he has delegated his authority to NHTSA, *see* 49 C.F.R. § 1.50(f).

through their "direct effect of regulating fuel consumption." *Id.* at 17,654. "$CO_2$ emissions are always and directly linked to fuel consumption because $CO_2$ is the ultimate end product of burning gasoline. The more fuel a vehicle burns or consumes, the more $CO_2$ it emits." *Id.* at 17,659 (footnotes omitted). NHTSA has concluded that EPCA also impliedly preempts state $CO_2$ emissions regulations because "[i]t would be inconsistent with the statutory scheme, as implemented by NHTSA, to allow another governmental entity to make inconsistent judgments" about how to balance "conservation of energy, technological feasibility, economic practicability, employment, vehicle safety and other relevant concerns." *Id.* at 17,654. NHTSA stresses that EPCA preempts *all* state regulations related to fuel efficiency, regardless of whether the state explicitly labels their requirements "fuel economy standards"; in other words, EPCA's preemptive effect is defined by substance, not form. *See id.* at 17,670.

NHTSA's interpretation of EPCA's preemptive effect on state regulation of GHG emissions has not been overturned by the courts; to the contrary, the Ninth Circuit's decision in the legal challenge to NHTSA's rulemaking order affirmatively stated that that decision did not affect NHTSA's preemption analysis. *Ctr. for Biological Diversity v. NHTSA.*, 538 F.3d 1172, 1181 n.1 (9th Cir. 2008).[11]

[11] Two district courts have held that EPCA does not preempt state $CO_2$ emissions regulations after EPA grants a Section 209 preemption waiver. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007),

Nor has NHTSA made any subsequent modification to its preemption interpretation. In fact, after announcing that it would reconsider the issue, NHTSA subsequently declined in May 2010 to modify its preemption analysis. *See* 75 Fed. Reg. at 25,546. Thus, NHTSA's interpretation of the EPCA as preempting state GHG emissions standards remains in full effect.

To be clear, this Court need not decide whether EPCA preempts California's GHG regulations. In fact, EPA's Waiver Decision specifically "takes no position regarding whether or not California's GHG standards are preempted under EPCA." 74 Fed. Reg. at 32,783. EPA was correct not to take a position on EPCA preemption; EPA does not administer the EPCA—NHTSA does. *See* p. 59 n.10, *supra*.

Instead, the question before the Court is whether EPA has authority to declare that California may "enforce" the state GHG regulations. The answer is that EPA may not. Section 209(b)(1) may empower EPA to remove Section 209(a) preemption as an obstacle to California's enforcement of state-specific GHG emissions standards, but EPCA remains an independent bar against the state standards' enforcement. By broadly declaring that California may "enforce" its

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*appeal voluntarily dismissed*, No. 07-4342 (2d Cir. Apr. 20, 2010); *Central Valley Chrysler-Jeep Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). But neither court considered NHTSA's preemption conclusion in the 2006 rulemaking order. *Compare* 71 Fed. Reg. at 17,670 *with Green Mountain*, 508 F. Supp. 2d at 343–92, *and Central Valley*, 529 F. Supp. 2d at 1161–79.

GHG regulations, the Waiver Decision exceeded EPA's limited statutory authority, and must be vacated. 5 U.S.C. § 706(2)(C).

## CONCLUSION

The petition for review should be granted, and the Waiver Decision should be vacated and remanded.

Respectfully submitted,

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## 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 13,937 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.

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## CERTIFICATE OF SERVICE

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In addition, pursuant to D.C. Circuit Rule 31(b), I have caused to be hand-delivered at the Court, this 25th day of June, 2010, five paper copies of this brief.

Finally, pursuant to Rule 30(c)(1) of the Federal Rules of Appellate Procedure, I have caused to be served on counsel for all parties and *amici*, by first-class mail, Petitioners' Joint Appendix designations.

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