UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATE OF OHIO et al.,
Petitioners,
v. No. 22-1081 et al.
ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,
Respondent.
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Friday, September 15, 2023

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES WILKINS, CHILDS, AND GARCIA

APPEARANCES:

ON BEHALF OF THE FUEL PETITIONERS:

JEFFREY B. WALL, ESQ.

ON BEHALF OF THE STATE PETITIONERS:

BENJAMIN M. FLOWERS, ESQ.

APPEARANCES (Continued):

ON BEHALF OF THE RESPONDENT EPA:

CHLOE H. KOLMAN, ESQ.
ERIC G. HOSTETLER, ESQ.

ON BEHALF OF THE RESPONDENT-INTERVENOR CALIFORNIA:

M. ELAINE MECKENSTOCK, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case No. 22-1081 et al., State of Ohio et al., petitioners, versus Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency.

JUDGE WILKINS: Good morning. I believe we hear first from Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

ON BEHALF OF THE FUEL PETITIONERS

MR. WALL: Thank you, Judge Wilkins. May it please the Court. As a general rule, EPA sets emission standards in this country. Congress drew an exception for California so that it could address local problems, like smog in Los Angeles, but it did so subject to meaningful limits. One of them is that EPA must find that California needs its own emission standards to meet compelling and extraordinary conditions in the state. The waiver here doesn't satisfy either part of that test.

First, climate change is a global problem. There's nothing extraordinary about the conditions in California, and second, EPA last found in 2019 that California's standards will do nothing to impact climate change in the state or around the globe, but there's a larger problem here. EPA is claiming the authority to let California be a climate change regulator and drive

electrification of the nation's vehicle fleet. That's a hugely significant question. So EPA needs clear congressional authority for the waiver, doesn't have --

JUDGE CHILDS: But is it your ultimate goal that you want the California waiver denied and then therefore everybody just goes back to the federal limits, which essentially serve as a ceiling and a floor?

MR. WALL: So it would take away the reinstatement of the waiver. So California would not be able to have greenhouse gas standards aimed at climate change, only the EPA would have greenhouse gas standards aimed at climate change, and this Court yesterday heard an argument on those federal standards. That's right.

JUDGE CHILDS: But you wouldn't want to promulgate your own standards? You're not asking to do that?

MR. WALL: Well, EPA is -- EPA is taking its own effort. So EPA and NHTSA have two rules that were in front of this Court yesterday that represent the federal efforts to get at this problem. So there is a federal effort underway. The third prong in the strategy that the EPA devised was to say not only would we have federal rules but we would give a waiver to California in order that California could go even further and outstrip the federal efforts, and what we're here saying is, that waiver under Section 209 is impermissible.

California can aim at local conditions, like smog in Los Angeles. It has for a long time.

JUDGE CHILDS: But the waiver is only going with respect to California.

MR. WALL: Well, yes, California gets the waiver, and then under Section 177 other states, if they have local air quality problems, can adopt California standards, and our --

JUDGE CHILDS: But that gives you two opportunities then: California waiver and the federal standards.

MR. WALL: Well, but our point, Judge Childs, is, that entire regime under 209 and 177 is meant for truly local problems. That's why Congress designed it. So if California has some truly local problem, like smog in Los Angeles, then it can adopt a standard, and if Columbia, South Carolina, finds that it has the same smog problem, it can, under 177, adopt the same standard. What the regime isn't meant to cover under the text of the statute are national and global problems. We expect the federal sovereign to deal with those.

So this wasn't about, like, climate change or global warming, things that affect, to the extent that they do affect, all of us. This was about state-specific problems and coming up with state-specific solutions that

address those problems, and what --

JUDGE CHILDS: But California did insert in the record its particular concerns about its global -- or about its climate change issues.

MR. WALL: So I think if we're all agreed that it's really got to be distinctive in the state, like the smog in Los Angeles, right, then you're right, there is this sort of rear-guard effort to say, ah, but California just has a really bad climate change in a way that's different from all other states, and the problem for them, Judge Childs, is that the EPA, the last time it addressed this, said the opposite.

So I'm reading from the JA. This is at page 522: California's conditions are, quote, not sufficiently different from the potential conditions in the nation as a whole to justify separate state standards, and then at page 528 -- this is really, I think, the quote -- California is not worse-positioned in relation to certain other areas of the U.S. and, indeed, is estimated to be better-positioned, particularly as regard to the Southeast region of the country.

EPA did not come back here, Judge Childs, in 2022 and make a different factual finding. Now, to be sure, it said California has it bad, but it didn't say what it needed to say, which is California has it worse than other states.

If it had, it would have been changing its view on key facts, and under the Supreme Court's opinion in FCC v. Fox --

JUDGE WILKINS: What about all of that language in EPA's -- that's cited in the EPA's brief pointing out that the EPA found that California did have a need with respect to -- specific needs with respect to climate change --

MR. WALL: So two separate questions --

JUDGE WILKINS: -- in the 2022 restoration decision?

MR. WALL: So two separate questions under the -- under 209(b)(1)(B). One is need, and one is whether you have the right kind of conditions. So what I was saying to Judge Childs was, they didn't reverse the factual finding on the conditions and, if they had, under Fox they would need, according to the Supreme Court, a, quote, more detailed justification. So on the conditions, they didn't offer a sufficient detailed justification. I don't even think there's a finding, but if there is, it didn't match.

To your question, Judge Wilkins, that's the -- second part of the statute is, okay, let's say that we grant that climate conditions in California are just worse than everywhere else in the United States, even the Southeast or the Southwest. Then do they need these standards to meet those conditions? That's the text of (b)(1)(B), and what

the EPA said -- and I'm reading from 521; this is a quote, Judge Wilkins -- quote, the waiver would result in likely no change in temperatures or physical impacts resulting from anthropogenic climate change in California, end quote -- likely no change.

The agency did not come back in 2022 and try to make a contrary finding, and if it had, again, it wouldn't be able to satisfy Fox. And the problem that they have is, in the Obama administration, when NHTSA looked at this, it, NHTSA -- now, a separate agency but looking at fuel economy standards -- it looked at standards that were more stringent than what California is doing and said, if you run that out to 2100, 75 years from now, more stringent standards, .02 degrees Celsius, right, one-fiftieth of 1 degree, and the agency relied on that in 2019 to say these standards are not going to make any difference to temperatures in California or across the globe, and then the agency didn't come back in 2022 -- you'll search this record in vain for the -- for some factual finding that says, no, no, if they --

JUDGE WILKINS: The problem that I have with that reasoning -- and I guess it's kind of -- EPA's argument puts it a little differently, you know. You know, those of us from the country have a saying that, like, when you're in a hole, kind of, like, the first rule of holes is, like, stop digging. So isn't EPA essentially, and California, saying

that, well, at least if we -- they're effectual to the extent that they will keep the problem from getting worse --

MR. WALL: So --

JUDGE WILKINS: -- and that is consistent with the language of the statute?

MR. WALL: So, Judge Wilkins, I guess I -- I sort of think of a different country saying because what the EPA said here was, look, okay, you know, we're not going to try to quantify what difference it would make; they're allowed to whittle away, right? They can make -- they can do something, and if I -- if you came along as a young boy and I said I was whittling on a stick and you came along 75 years later and I had the same stick and the same knife and you couldn't tell whether I touched the stick and I told you I was still whittling, you'd think either I didn't know what I was doing or I was pretty bad at my job.

And so when the statute says you need the standards to meet extraordinary and compelling conditions, the administrator has to make a finding of that. That's what the statute says. The EPA has to find that California needs them, and it -- it's a pretty weird world, I think, if California just says, hey, we don't have to make a finding that it's actually going to get better, and EPA says, we don't have to make a finding that it's actually going to get better, we're just going to say we need it because the

problem is really serious, and if they tried to justify, Judge Wilkins, on your type rationale, like, we need these in order to prevent them from getting worse, you'd still have to have a set of factual findings about what the world would look like factually absent the standard and all the rest. There's none of that.

The last time the agency turned to this, it said these standards will make no difference for climate change. And we shouldn't be surprised by that. That's a global problem. It is a national problem. We expect our federal sovereign to put in place standards to deal with that problem. This regime was never meant for that.

JUDGE CHILDS: Well, going to that issue, then, you're not challenging the -- kind of the statutory scheme of 209(b); you're just challenging the waiver.

MR. WALL: Oh, that's -- so for a long time, Judge Childs, I mean, for decades --

JUDGE CHILDS: Yes.

MR. WALL: -- right, California had its own emission standards, even zero-emission and low-emission standards, aimed at criteria pollutants to try to improve smog in Los Angeles. That was no problem. What was new was that they came along in 2005 and they said, we want to do this, not for criteria pollutants, we want to do this for greenhouse gases because of global warming, and the agency

has gone back and forth on that from one administration to the next. Right? The Bush administration denied the waiver. The Obama administration granted it. The Trump administration took it away. The Biden administration reinstated the waiver.

So when the agency comes to you and says, like, there's a long historical practice of this, they're right for non-greenhouse gas stuff. On the greenhouse gas side, this has been a political football over the last 20 years. The agency has never agreed on how to interpret the statute, and what we would say is, just turn to the text. The text says the state has to show and that the EPA has to find that it needs these standards to meet extraordinary and compelling conditions. This isn't the kind of condition that qualifies --

JUDGE WILKINS: The EPA's --

MR. WALL: -- and even if it were, they don't --

JUDGE WILKINS: -- brief points out that the 2022 restoration decision did make findings with respect to greenhouse gas emissions impacting ozone and temperature -- rise in temperatures impacting the ozone and that having a connection to articulate and other pollution. In other words -- I don't know if I have the particular language right in front of me --

MR. WALL: No, I know what you're talking about.

JUDGE WILKINS: -- but the EPA says that, essentially, even kind of taking your view of the statute, the requisite findings were made.

MR. WALL: So, Judge Wilkins, three quick points -- the first is, I mean, this is --

JUDGE WILKINS: But this is about pages 84 to 90 or so in their brief.

MR. WALL: That's right. It's sort of their last-line argument, you're right, and the first point is, it is remarkable historical revisionism. When California filed this waiver application, it doesn't say a word about criteria pollutants. It proclaims it is about climate change, and not only does it not say that greenhouse gas standards are needed to improve criteria pollutants and, you know, solve a problem with ozone, it actually says that its ZEV mandate will have no criteria pollutant benefit, and that's at page 151 of the JA.

So California specifically disclaims it for the ZEV mandate and doesn't claim it for the greenhouse gas, but I will grant you that now that it's in sort of litigation, everybody on that side of the vee has made this backup argument about criteria pollutants, but it doesn't work for two reasons, Judge Wilkins. The first is the Supreme Court's opinion in Gade, which tells you, if you aim at something that is preempted, it doesn't matter if you also

have a non-preempted purpose, and here they aimed at climate change, and that's preempted.

So it doesn't matter whether they had some other purpose, and even if you don't buy my legal argument, as a factual matter, they didn't satisfy the Fox standard, because they didn't revisit that 2019 finding at page 521 of the JA that says this isn't going to have any effect on California.

They did, Judge Wilkins -- and this is the language you're picking up on -- they did say there's a logical link between reducing greenhouse gas emissions and improving criteria pollutants, but if you dig into what they mean by that, what they mean is, if you decrease greenhouse gas emissions, you will drive down temperatures and, if you drive down temperatures, that will improve ozone. So they're all -- it's all piggybacked on the climate rationale.

If it's right that the agency last found it wasn't going to make a temperature change and they didn't revisit that, their logical link gets kind of blown up, because the factual predicate is, it's going to drive down temperatures. I think even the Government will acknowledge that if this doesn't make a temperature change in California, it's not going to improve smog in Los Angeles.

JUDGE WILKINS: I'm having a little trouble

understanding your argument in the sense that under -- I guess it's under 7521(a)(1), which is the provision dealing with the federal emission standards, EPA is allowed to promulgate standards for air pollutants that they find contribute to air pollution which will endanger public health and welfare, and the EPA has said that greenhouse gases are those types of pollutants that endanger public health and welfare. The Supreme Court upheld that interpretation in Massachusetts v. EPA.

So for this whole waiver scenario, the first determination that California has to make that allows them to have a separate program at all is that their standards will, in the aggregate, be at least as protective of public health and welfare as the federal standards. So why is it, then -- I mean, let me just ask this first: Does public health and welfare in 209(b)(1) mean the same thing as it does in 7521(a)(1)?

MR. WALL: So I want to clearly draw the line between the case this Court heard yesterday and this case because I think the questions are pretty distinct. So under a separate provision, 202(a) or what's 7521(a), that's the standard-setting authority for the federal government. It set a standard, and this Court heard a case about yesterday whether the standard had gone too far in regulating various kinds of emissions.

Here, 7543 or 209(a) is the preemption provision. So it says no state can -- it's a general preemption provision, and everybody agrees it puts this off limits to the states, and then (b) is the carve-out. (B) says, ah, but you can give a waiver to California, effectively California -- it's the only one grandfathered in under the standard -- if the administrator finds three things, finds that California's determination that its standards as a whole would be as protective as the federal standards -- that's not arbitrary and capricious -- if the administrator finds that the state needs it to meet conditions, and the administrator finds that they're otherwise consistent with the statute, which is to say that manufacturers can comply with them and they are feasible. And so it requires that you sort of make three findings that don't turn on the public health and welfare phrase that appears, then, in (b)(2), which deals with the stringency of the state standards and which isn't at issue here, and our point is that in (b)(1)(B), they can't satisfy either part of that.

Now, what they -- their main move, Judge Wilkins, just so I get to it before I --

JUDGE WILKINS: I don't -- I don't see how you answered my question. So I'm not talking about (b)(2). I'm talking about the language in 209(b)(1).

MR. WALL: Which language?

JUDGE WILKINS: California has to -- California initially has to make a determination, right?

MR. WALL: Yes.

JUDGE WILKINS: And that determination are that the state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

MR. WALL: That's right.

JUDGE WILKINS: And my question to you is, does public health and welfare in (b)(1) mean the same thing as it does in 7521(a)(1)?

MR. WALL: Judge Wilkins, I'd have to look at 7521(a)(1) to see, but I -- the reason I don't know is that no one here has focused on that language in the statute as doing any of the work here, because you're right, they do have to make a protectiveness determination. They've got to come in and say, our standards are as protective on the whole, in the aggregate as the federal standards, and we haven't disputed that. We're not saying they messed up on the public health and welfare part.

So California made that determination. The administrator determined under (b)(1)(A) that that wasn't arbitrary and capricious, and we haven't challenged that. So --

JUDGE WILKINS: Well, I mean, but you're saying

that they can't determine -- California isn't allowed to determine that limiting greenhouse gases is protective of the public health and welfare.

MR. WALL: Oh.

JUDGE WILKINS: Isn't that your argument?

MR. WALL: Sorry, Judge Wilkins. No. That's -- there are two separate issues here. Yes, California has to determine -- and I'm sorry I didn't understand this earlier -- California has to determine that its standards are as protective of the federal standards of public health and welfare, and then the administrator's got to find that's not arbitrary. That's one set of determinations -- haven't challenged it, not on the table. We're not saying they cannot make that determination.

Then, after you've done the protectiveness, you have to do the need under (b)(1)(B), and there you're not looking to what the state has found. It says the administrator has to find that the state needs them to meet the conditions, and that's separate -- I think everybody agrees, I think even the Government and the intervenors agree, need and protectiveness are separate under the statute.

Now, their argument, Judge Wilkins -- and I thought this might be where you were going, but it turned out it wasn't -- their main move in their brief, their

primary statutory argument is that that in the aggregate that's in commas in (b)(1) travels down the statute. So California and the administrator look at protectiveness on a whole-program basis, not standard by standard, and their main argument is to say, well, you got to do need the same way, and we need our program because we've got smog in Los Angeles --

JUDGE GARCIA: Counsel --

MR. WALL: -- so you don't have to look at whether we need any particular standard.

JUDGE GARCIA: Sorry to interrupt. I think -- so I have some threshold questions about our jurisdiction, but just on this point, while we're on it, the State and EPA make an argument that if, for the protectiveness determination, if that's done in the aggregate, the very purpose of that was to allow California to have some individual standards that are less stringent than their federal counterpart.

If you then turn to (e)(1)(B) and ask do you have a need for every individual standard, how can they ever justify a less stringent individual standard --

MR. WALL: Oh.

JUDGE GARCIA: -- under (B)?

MR. WALL: So their --

JUDGE GARCIA: What's your response to that?

MR. WALL: So they -- it's a great question, Judge Garcia. They go to two different things. You're absolutely right about the statutory history. They used to have to determine protectiveness on a standard-by-standard basis, and then the problem was, they couldn't drop one in order to make another more stringent. So they had this problem with the trade-off between nitrogen oxide and some of the other pollutants. So they said, we need to be able to do protectiveness on a whole-program basis, and Congress agreed with that.

So we don't take any issue with that, and then your --

JUDGE GARCIA: Exactly. So if you look at just, for example, the carbon monoxide standard, and the State is saying, we want to make this less stringent --

MR. WALL: Yes.

JUDGE GARCIA: -- it seems like they're suggesting that under your test that would just -- every time it would fail, because you couldn't show you need that particular standard. Is that --

MR. WALL: I don't think --

JUDGE GARCIA: -- how your test works?

MR. WALL: No, that's not right. What the agency said in 2008 and then again in 2019 was, you do need on a standard-by-standard basis, and it is possible, Judge

Garcia, that you need some standards in order to address localized problems but you don't need others. You don't have to do need on a whole-program basis. So it's just not true that they'll never be able to satisfy need for individual standards.

JUDGE GARCIA: But for the individual less stringent standard, how would they explain why they need that standard?

MR. WALL: If that still meets some condition in the state, in other words, if it still makes some meaningful improvement in the problem they're aiming at, be it criteria pollutants or what have you, then they would need that individual standard, and that's -- and by the way, just so you think I'm, you know, I'm not sort of nuts about the statutory interpretation, the such standards means the same thing in (C), because you're asking whether the manufacturers can comply -- wouldn't make any sense to do that on a whole-program basis. You wouldn't say, well, you got a whole suite here, they can comply with some but not others.

JUDGE GARCIA: But I think it might if you think of it as the following, basically, under feasibility or under need -- well, let's take feasibility: To know whether the new standards are feasible for manufacturers to comply with, you probably need to understand how they relate to all

the other standards that California has in place and, in that sense, its whole program. Does that make sense under --

MR. WALL: Oh, sure, and I don't think --

JUDGE GARCIA: -- (B)?

MR. WALL: -- I don't think we're here arguing with if the standards interact in some way that affects need or feasibility: Like, look, it's not just what this standard does; you have to understand how it operates with some other to produce a combined effect.

JUDGE GARCIA: Right.

MR. WALL: That would be different. That's not -- they're taking a much stronger version of the argument, which is what they need to prevail, Judge Garcia, which is, once they say that they need any standard, they need the program and (b)(1)(B) is a blank check. California can dump in anything, and you will always get the same answer. As long as there's smog in Los Angeles, the administrator will always, under (b)(1)(B), say thumbs-up, and I don't think on compliance it would be sort of sensible to say, well, the manufacturers can comply with some but not others, so they can comply with the whole program.

And there's this footnote 10 in the Government's brief where it seemed -- I don't really know what the Government means, but they seem to be saying that sometimes

they've done whole program under (C) and sometimes they haven't, but the last time the agency addressed this -- and this is at page 525 of the JA -- the EPA said, we don't do whole program under (C) because it wouldn't make sense; we look at whether manufacturers can comply with individual standards, same thing for need.

JUDGE GARCIA: Understood. Thank you. And I think with the indulgence of my colleagues, I do have some threshold questions about jurisdiction.

MR. WALL: Sure.

JUDGE GARCIA: And so the first is just -- your petition and the waiver concerned model years '22 to '25. Is the petition now moot as to model years '22 and '23? Just as a technical matter, those vehicles have been rolled out. Is that the right way to think about it?

MR. WALL: I'm not sure, Judge Garcia, because I think you would -- the mootness is for the claim, and the claim is made against all the model years. So I think the claim isn't moot. Whether we could --

JUDGE GARCIA: Fair enough. Fair enough. So --

MR. WALL: -- whether we could obtain relief for those model years, I --

JUDGE GARCIA: Right.

MR. WALL: -- nobody has challenged that -- I'm honestly not sure.

JUDGE GARCIA: Okay. So I think if we're thinking about standing and, in particular, redressability, at least the way to think about that is to focus on model years '24 and '25, because that's still what's in the future and plausibly affected --

MR. WALL: I -- I mean --

JUDGE GARCIA: -- and --

MR. WALL: -- at a minimum, Judge Garcia, no one on the other side of the case -- and they've made every argument, I think, they could -- no one has said we cannot get effective relief through the end of the application of this waiver. No one is here sort of saying, you have a --

JUDGE GARCIA: But that's respectfully not accurate. The States --

MR. WALL: Yes.

JUDGE GARCIA: -- on page 15 of their brief, make an argument that you haven't demonstrated redressability --

MR. WALL: So --

JUDGE GARCIA: -- and so here's --

MR. WALL: -- I took -- I took the States to be challenging our Article III standing on harm grounds. Maybe they do also say something about redressability, but I think it is clear that we could get relief for the later model years under the rule.

JUDGE GARCIA: So let's -- let me ask the

question, then, because I think in the Chamber of Commerce case, which was a generally similar situation, the Court addressed redressability and said there was no evidence that if the waiver were vacated, manufacturers would proceed on a different course more favorable to petitioners, and here we have statements from several of these manufacturers -- not all of them, but many manufacturers -- saying they would not change their electrification plans, and we have a lot of evidence that in this industry, pricing and production plans are made years in advance.

So the question is, what is the evidence in this record that any manufacturer would change its fleet in model years '24 and '25 if we were to rule in your favor?

MR. WALL: So I think the two things I'd point you to, Judge Garcia -- the first is in page 477 of the joint appendix. Toyota said -- and Toyota is not among the automakers coming in in this case -- Toyota said it had designed around the withdrawal, strongly suggesting that it wanted the -- it wanted the withdrawal of the waiver to stay in place because it had made decisions based on that, and the -- the industry brief, I think, confirms this at page 17, because what they say is, they -- those automakers, the ones that filed the brief -- have made investments in electrification in order to meet California standards, and they say they are worried that if the waiver is withdrawn,

they'll be at a competitive disadvantage vis-à-vis their rivals.

JUDGE GARCIA: I think -- so just as to the industry brief, I think in context that particular statement is talking about the program as a whole mitigating competitive disadvantage risks, but probably more to the point -- I think it's a little bit of a stretch to read that brief as a whole as to (indiscernible) redressability and -- but the Toyota comment is important, and it -- to me, it leaves open a question that seems material on redressability, which is lead time, and one of the things that comment says is, please don't make this effective until we have -- it was about two years to plan ahead and make adjustments. So that, to me, leads to a question: If we rule in your favor, how quickly can manufacturers actually adjust their prices?

And just to add one other thing here, the one direct piece of evidence we have on that, it seems to me, is, California's expert on page 97 of their addendum says, pricing decisions for model years '24 and '25 have likely already been made, and that was earlier this year. And so I'm just left with a question of, how much time do folks actually need to change their production and pricing plans in a way that would help your clients?

MR. WALL: So it seems to me, Judge Garcia, that

where we've come in -- and we've said we've got clear harm from the rule in an Article III sense, and we know the rule extends for several years, and we have at least one automaker in the record that has said it made its decisions in reliance on the withdrawal -- it seems to me the Government should bear a pretty heavy burden in trying to show that we somehow can't get any effective relief before the end of this rule, and if that were true, Judge Garcia, I think it would start to raise a pretty serious capable of repetition problem, because these are done by sets of model years.

We came right in. We came to this Court as quickly as we could. If the answer now is you can't get effective relief, it seems to me we're going to be in a real bind every time we do this.

JUDGE GARCIA: I appreciate that that might be the case in this particular case, but sort of because of the long-term planning requirements in this industry -- these are generally set 10 years at a time, right? The 2013 waiver was for 2015 to 2025, and I'm, candidly, entirely with you. Common sense would just dictate that the whole point of this rule is to reduce liquid fuel consumption over a 10-year period. That's certainly going to happen -- but in this particular case, it seems like we're in a unique situation where now, my understanding is, some model year

'25 vehicles might be rolled out in six months or so, next spring, and it seems very speculative to say that when these manufacturers have produced these fleets, the fact that we vacate is going to somehow cause them to cannibalize their own sales on electric vehicles and redress this harm.

MR. WALL: Judge Garcia, all of that information is outside the record and, it seems to me, awfully unfair to the petitioners or the -- I mean, if the Government -- if the EPA wanted to come in and make an argument about redressability and build the record here, we could have briefed it and addressed it, but it seems to be a little --

JUDGE WILKINS: You've got the burden on standing.

JUDGE GARCIA: Right.

MR. WALL: We --

JUDGE GARCIA: I think going back to Lujan and in our Chamber of Commerce case itself, we say, we recognize it's more difficult to establish standing, in particular, redressability, when it relies on the actions of third parties. So while I am sympathetic, I agree that it's pretty clear that it was your burden to come in with this evidence so that we're not just speculating about the effect of what we're doing here.

MR. WALL: So it seems to me, Judge Wilkins, we satisfied the burden. We came in with a number of -- they're in the standing declarations; obviously, Judge

Garcia, the panel has looked at them closely -- saying that this will have an effect on fuel consumption in California in a way that harms all of the petitioners, and it -- you know, EPA did not fire back in its brief with, no, it won't, you can't get relief by the end of the model years, there's no way to get redressable judicial relief. It's just not in the EPA's brief.

So it seems to me we satisfied our burden of coming forward and saying we would be harmed in exactly the way, as Judge Garcia said, that common sense expects, and if they want to say, no, there is -- even though the model years are still open for the rule and you challenged it as quickly as you could, you can't get any effective relief and it's somehow still not --

JUDGE WILKINS: Well, saying that you challenged it as quickly as you could is a little rich, isn't it, when you didn't challenge it in 2013?

MR. WALL: Well, in fairness, Judge Wilkins, you're -- the earlier opinion you talked about in Chamber of Commerce from 2011 said we couldn't because California had a provision that said you were deemed to comply with California standards if you complied with the federal standards, and you said in Chamber of Commerce that if there are two sets of standards that require you to do something, the second can be an independent barrier to your standing to

challenge the first.

It was -- California stripped the deemed to comply in 2018, and that's why we're here. California no longer wants to have a standard but say you can -- you're deemed to comply with it if you meet what the feds do. California wants standards now that far outstrip what the EPA is doing, and that created a problem for the industry. The EPA came in in 2019 and withdrew the waiver, and as soon as they reinstate it in 2022, we filed our petition, which is, you know, I would say, jurisdictionally proper and timely. We did it as quickly as we could.

And I think -- the burden, by the way, of the sort of capable of repetition evading review, I think, ultimately falls on them. If they want to say, look, you can't possibly get relief now but this isn't going to keep happening again and again and again, I think the Government should have -- be put to the -- to its proof when they're trying to explain why that's true --

JUDGE CHILDS: But even if you --

MR. WALL: -- but that's never been briefed.

JUDGE CHILDS: But even if you show injury, redressability wouldn't fall on the EPA. Wouldn't that still be your burden?

MR. WALL: There's separate elements of standing, to be sure. Injury, traceability, and redressability are

all distinct, but because the model years extend into the future and automakers have said that the -- they planned around the waiver, I think the Government would need to come forward with some evidence that they've now planned around the restatement in a way that couldn't be withdrawn by 2025, and the Government's never said anything like that. There's not one word about that in the briefs before this Court, not from the Government.

JUDGE GARCIA: Yes. I think, just to put on the table, I believe the only discussion of redressability, at least the only evidence in this case, is in the States' addendum. There's about a five-page section of the expert declaration, and nobody sought to address that, but I think what you were saying about the -- basically, the Toyota comment and how folks plan based on this, I think, sort of reflects my concern here.

What the Toyota comment says is, we need about two years to plan. So for there to be injury, they have to make those plans and they have to hit the market. Now, for us to come in 18 months after this waiver was granted and vacate, I think the natural inference, without any other evidence, is, you need about two more years to plan and adjust how you're producing vehicles, and I don't see how we can assume that's going to happen by model year '25. That's my concern.

MR. WALL: I take the point, Judge Garcia. I think between the Toyota comment and between what you have in the States' brief -- or the industry brief, which is a concern that they've made investments in electrification that will be less valuable if the waiver is withdrawn, I think it is a very fair and reasonable inference that not all automakers are electrifying at the same pace. We pointed to some evidence of that in our brief, and I think what that all shows is, this is not some sort of monolithic move, and if you pull back the waiver, there will be real-world consequences. Automakers will make different sets of decisions about how to comply, and that's all as a result of your judicial relief that you'd be ordering in the case. So it would redress, at least in part, the petitioners' injuries.

JUDGE GARCIA: Thank you, counsel.

JUDGE WILKINS: All right. We'll give you some time on rebuttal.

MR. WALL: Thank you.

MS. KOLMAN: Can you hear me all right?

JUDGE WILKINS: Yes. Ms. Kolman.

ORAL ARGUMENT OF CHLOE H. KOLMAN, ESQ.

ON BEHALF OF THE RESPONDENT EPA

MS. KOLMAN: Many pieces of paper. May it please the Court. My name is Chloe Kolman on behalf the United

States of America. With me at counsel's table are my co-counsel, Eric Hostetler; David Dickinson of the United States Environmental Protection Agency; and Elaine Meckenstock on behalf of the State of California. I will be responding to fuel petitioners' challenges as just presented, Mr. Hostetler will be addressing state petitioners' challenges, and Ms. Meckenstock will be responding to both.

Before I address the flaws in petitioners' interpretation of Section 209 and the factual allegations they've made here, I'd like to address EPA's conclusion that the 2019 waiver withdrawal was procedurally improper, which is a basis for decision that would resolve petitioners' challenges without the need for this Court to address Section 209 at all.

As Your Honors have seen in the briefs, this case comes before the Court in a unique posture. EPA granted a preemption waiver to the State of California in 2013 under a Clean Air Act provision that preserves California's authority to set vehicle standards for in-state vehicles. That waiver was not challenged within the period for judicial review, and it remained in force, uncontested, for another six years.

That changed in 2019 when EPA reopened the waiver adjudication and attempted to withdraw the portions of the

waiver applicable to California's tailpipe greenhouse gas standards and California's regulatory program for zero-emission vehicles, but EPA's 2019 attempt to reopen a six-year-old adjudication was procedurally improper because it crossed a red line in administrative law. It failed to address the reliance interest that had accrued since the waiver's grant, both within the regulated community of automakers who have joined this case in support of EPA and in California and other states that lawfully relied upon California's program of vehicle standards to advance their quality goals and comply with other specific obligations in the Clean Air Act.

The Supreme Court explained in Department of Homeland --

JUDGE GARCIA: Counsel, can I ask, before we get to the reliance aspect of this, EPA, in the order itself, pretty clearly advanced the position that the waiver withdrawal was improper because it was not based on new facts and, instead, was based on new legal interpretations. The petitioners say you've disclaimed that argument on appeal. Is that correct? Are you relying on that ground or just the reliance?

MS. KOLMAN: Your Honor, we don't think you need to reach that ground at all because regardless of what the scope of the agency's reconsideration authority is --

frankly, regardless of the legal interpretations it took in that reconsideration, it was not empowered to jump over reliance interest. And so, you know, we recognize there's a lot of dispute in the case law about agency reconsideration authority, and so we've asked this Court to take sort of the easiest flaw here and use that as a -- as, we think, a separate basis.

JUDGE GARCIA: That sounds like you're not asking us to rule that EPA's inherent reconsideration authority is in fact limited to the discovery of new facts.

MS. KOLMAN: No, Your Honor. We don't think you need to rule that to resolve this case. It's simply not necessary, because long before you get to questions about the outer limits of the agency's reconsideration authority, you run up against the Regents case, the Supreme Court case from 2020, which says that you cannot ignore serious reliance interests engendered by a prior agency policy.

And if you look at what happened in 2019, there were six years in which both states and industry invested quite a bit of money, did quite a bit of, you know, sort of long-term Clean Air Act planning on the basis of the waiver that was granted, and so, you know, this -- the 2019 withdrawal really just said, we don't want to deal with that; you know, we'd like to skip over that and say that we're, you know, we're sort of interested in these other

statutory interpretations. You just can't do that.

And so, you know, the question of reconsideration authority is undoubtedly something this Court, you know, will deal with in other cases. It just doesn't need to do that here.

If I may, Your Honor, I'll turn a little bit to the merits, but I want to address the statutory interpretation first because Mr. Wall has spent a great deal of time talking about the underlying factual determinations with respect to greenhouse gases but you'll only reach that question if you believe that petitioners' statutory interpretation of 209 is plausible, and we think the statutory interpretation advanced by petitioners in the 2019 withdrawal decision was contrary to the plain text of Clean Air Act Section 209(b) and to more than 50 years of EPA practice. So EPA correctly -- or appropriately corrected itself here.

You know, petitioners are venturing several different lines of attack in their brief on the plain text, but we think the heart of the interpretive question is relatively simple. The umbrella text in 209(b)(1) states that EPA must grant a waiver to the State of California if the state determines that its vehicle emission standards in the aggregate are at least as protective as the federal standards, and the text then states that EPA can only reject

a waiver under one of three specified criteria, the second of which, (b)(1)(B), is at issue here, and it states that EPA cannot grant the waiver if California does not need such state standards to meet compelling and extraordinary conditions.

The phrase such state standards creates only one interpretive possibility because such state standards has only one possible antecedent, which is the vehicle standards previously referenced in 209(b)(1), which is to say California's vehicle standards in the aggregate. This is what's known as the traditional interpretation or whole-program review, and it allows EPA to reject a waiver under the second waiver criterion only where EPA can determine that California no longer needs a separate program of vehicle standards to address compelling and extraordinary conditions.

And I would note that petitioners have no actual answer to the plain meaning of this text. Their reply brief does not contain a single word addressing the grammatical effect of the word such in such state standards, and we think the briefs show definitively that there's no construction of the plain text of the second waiver criterion that yields the result petitioners want, which is a standard-specific review process that would require EPA to ask whether each individual standard California has proposed

is necessary to meet compelling and extraordinary conditions.

As Judge Garcia --

JUDGE GARCIA: Could you address the argument that, you know, one oddity with your approach is that (b)(1)(B) seems to have very little meaning? You have a meaning, but as I understand it, the question basically has nothing to do with the particular standards that California comes forward with, and instead, you just ask the abstract question about whether California still has air pollution problems that need to be addressed. Is -- do I understand how you think the prong works, and then what do you say about this concern that that seems like a very small role to be playing?

MS. KOLMAN: You're correct, Your Honor, that our interpretation of (b)(1)(B) is that so long as California needs its program as a whole, then (b)(1)(B) is satisfied.

I think it's difficult for all of us sitting here today, you know, looking back and saying, well, you know, California is never going to resolve its smog pollution, you know, this is going to sort of exist in perpetuity, how can that be a reasonable constraint? I think we have to put ourselves in the shoes of Congress in 1967, which was creating, essentially, a legislative compromise.

You know, it had -- at the, at the time that it

adopted the preemption provision, federal standards -- the federal standards program was getting on its feet but states were empowered, all 51, including the District of Columbia, were empowered to have their own separate standard, and that became a real concern for the automotive industry, to have 51 separate programs potentially to comply with.

And so Congress sat down and said: Okay. What is a reasonable compromise here? We don't want to go all the way to full federal preemption, and we don't want to do that because California already has a highly effective program and, in addition to the fact that California has these unusual pollutant conditions, it's also been sort of a valuable testing ground for new kinds of technology. And the Senate report specifically said that, you know, the values behind this legislative compromise were both that it had these conditions to deal with but also that, you know, this would allow for the advancement of new technologies without burdening the entire nation with the cost of that.

So if you're coming into this situation and trying to say, well, what are the legislative terms of this compromise, that's where you get the three waiver criteria. The first is ensuring, of course, that California doesn't end up with worse air quality than what the federal standards would provide. The third is obviously making sure that automakers have a feasible program, not being asked to

do something infeasible, and what the second asks is, are we still in the world in which we need this dual system, where we need a California car that can sort of advance policies and take risks that the federal program is not going to, or are we sort of at the point where there's no longer a distinction between California and other states and, you know, we don't, we simply don't need a sort of --

JUDGE WILKINS: Here's why I --

MS. KOLMAN: -- two-vehicle program?

JUDGE WILKINS: -- have a problem with looking at it that way. I mean, I could say that, you know, I need to have a, you know, nutritious meal in order to, you know, sustain myself, and so every meal I'm going to have, you know, some protein and some vegetables and some fruits and a dozen doughnuts for dessert.

I think that the doctor -- my doctor would say, yes, you need the meal, but you don't need the dozen doughnuts, you know, at every meal, and what you seem to be saying is that EPA can just kind of, like, ignore the California plan that has a dozen doughnuts in it because, you know, in the aggregate, you know, the meal, you know, sustains itself. That doesn't make any sense to me.

MS. KOLMAN: Well, Your Honor, I think the first answer to that is, it's this Court's obligation to apply the plain text. We do not think petitioners have advanced a

plain-text meaning that would actually provide for standard-specific review, but I think it's important to recognize here that, you know, this isn't a circumstance in which California then gets to do whatever it wants.

This is a preemption provision and a preemption waiver, and so, you know, it's essentially asking EPA to judge whether California needs a separate program and then to take federal hands off that program. That doesn't mean that the state program is not subject to other constraints. As with any state acting under its sovereign authority, it's going to be subject to, you know, state courts; it's going to be subject to state voters. There are a lot of things that still move in as a check and balance against what California is doing, but Congress --

JUDGE WILKINS: But there's no other federal check and balance --

MS. KOLMAN: Well, there --

JUDGE WILKINS: -- once that, once that determination is made that, in the aggregate, it's at least as protective.

MS. KOLMAN: Well, there is -- there are still the other two criterion. The feasibility criteria, in particular, would take care of a circumstance in which, you know, California is doing something that's, you know, blatantly outrageous, right? I mean, you know, it doesn't,

it doesn't constrain every exercise of California's discretion to the extent that California is putting forward feasible standards, but certainly, some of the sort of parade of horribles of what might get through this waiver are going to be resolved by (b)(1)(C).

But you're right. I mean --

JUDGE GARCIA: Counsel, doesn't that answer suggest that under (C) you don't take a whole-program approach --

MS. KOLMAN: No.

JUDGE GARCIA: -- or -- as I take it, one of their responses on the text, as you've referenced, is that (B) and (C) both refer to such state standards, and they say you've always taken a standard-by-standard approach to feasibility under (C), and there's some commonsense appeal to that, which is, at least in the sense to know whether the program is feasible, you've got to look at each of the individual standards, whereas your position on (B) is that you don't need to look at each individual standard when assessing need. So how do I -- maybe to -- in what sense is the analysis under (C) a whole-program approach?

MS. KOLMAN: Well, I want to clarify that it has always been EPA's position, with (indiscernible) of the 2019 waiver withdrawal, that (C) requires whole-program review.

And I want to sort of address the meaning of the

word feasibility because I don't think it's true that a program can be feasible if one piece of it is not, and that's why you're looking at each individual standard. You have to ask the question of, you know, is this individual standard -- if any link in the chain is infeasible, you would say that the program is infeasible, but you can't look at (b)(1)(C) through standard-specific review, precisely because these are integrated machines. So if you're only asking the question is this standard feasible, you're missing whether or not accomplishing that standard would be infeasible relative to other things that are also required from the same, you know, vehicle and the same automakers.

And so I would point Your Honors to the record at 87 Fed. Reg. 14361 and note 266, which is where you had vehicle manufacturers coming in and saying, oh, no, no, no, no, (C) cannot be standard-specific review because what if we get into a circumstance where, for example, we can't comply with a stringent NOx standard and a stringent carbon monoxide standard? Those --

JUDGE GARCIA: So this is where I get a little bit mixed up, because I don't know what makes that standard-by-standard or whole-program, right? So what you're saying is, obviously you have to look at every standard. You can do that by reference to the whole program.

I can say the same thing about (B). When you come in with a less stringent standard under (B), we look at each one. Maybe the reason you need that less stringent standard is by reference to the rest of the program, but you're still looking at each standard to decide whether you need it. Does that make sense?

MS. KOLMAN: Your Honor, I think need and feasibility work differently in that respect. I think if you're asking, you know, is it feasible for me to buy a new vehicle, you need to make sure that every link in that chain is feasible. If you're asking do I need to buy a new vehicle, you can't say, well, you don't need a new radio, so you must not need a new vehicle, right? There are ways in which these terms, I think, just apply differently, and ultimately, (C) is a program, a wide review.

Now, it may be that you don't have to review the whole program. You look at the one standard. You say, oh, boy, that's not going to be feasible, there's no way we can find that the whole program is going to be feasible, but the end of the analysis is always going to be whole program, and that's simply just sort of not how need works. I don't think you can say California doesn't need this program because it doesn't need one individual standard.

Now, of course, our brief, you know, has quite a bit of factual material as to why we think that's actually

sort of not true, but you know, petitioners have painted that factual material as a rear-guard action here, and I think that reflects the fact that we have several additional bases before you even get to applying their interpretation of the statute --

JUDGE WILKINS: But isn't --

MS. KOLMAN: -- factually.

JUDGE WILKINS: -- isn't the assessment of whether something is as protective -- I mean, I guess that's why I was going to use -- maybe it wasn't the best hypo for the meal, but assessment of whether something is as protective is different than -- a different type of assessment than whether something is needed.

So you can say that, like, as a whole, you know, to go back to my meal hypo, it's at least as nutritious, whatever, as the federal or the typical meal, but it may be that individual components of it are different, and that's why you have, I think, (b)(2), right? (B)(2) wouldn't make sense if all of the individual components were always at least as stringent as the federal standards, right? Do you agree with that?

MS. KOLMAN: Your Honor, I think there are two important things to keep in mind. One is what Judge Garcia has already asked about, which is, how would the aggregate protectiveness test in (b)(1)(B) line up if you were going

to bump out a standard that was not independently needed to address pollution challenges? Right? I mean, that's the carbon monoxide example. It's exactly what the -- what Congress was dealing with in 1977 when it said, we know that you're not going to be able to meet the most stringent CO2 standards possible, the federal CO2 -- or, pardon me, not 2 --

JUDGE WILKINS: CO.

MS. KOLMAN: -- CO standards; we know that you can't do that and do the NOx standard simultaneously.

If you were to really follow through on what petitioners are asking this Court to do, you get into a circumstance where now you have a (b)(1)(B) analysis that says, is your CO standard required to meet compelling and extraordinary conditions? California is not going to be able to say that because it is in fact loosening the emission standards for carbon monoxide, and that is yet another indicia that the plain language here --

JUDGE WILKINS: See, I just don't agree -- I don't think I agree with that way of looking at it because, you know, you can have some flexibility when you consider what does need mean?

MS. KOLMAN: With all due respect, Your Honor, I'm not sure where that flexibility is coming from. The indicia we have are, plain language says such state standards, and

then we have a wealth of legislative history that is talking here about how Congress intended California to have the broadest discretion possible, both in the 1967 -- or the 1967 promulgation and the 1977 amendments and the ratification again in 1990 and the provisions that it has adopted in 42 U.S.C. 7586 and 13212, which are places where Congress has continued to build on this framework on the assumption that California is in fact sort of exercising whole-program, you know, authority over this second vehicle.

And I do want to just answer one other thing about (b)(1)(B), and perhaps this is helpful, which is, the phrasing of (b)(1)(B) is not that EPA has to find a need. It has to find that California does not need these standards, and I think that actually does some work here, because what it's saying is, we can't just say that California doesn't need this individual standard because we know such state standards refers to the standards in the aggregate. Then the question is whether California does not need its program, and in a circumstance where you have 20 doughnuts, you still need that meal. If the phrasing is do you -- you know, sort of do you need or do you not need, I think that really does affect the way the need test works here.

And I would remind the Court that, you know, we've been doing this uncontested for more than 50 years. You

know, California's regulations of ZEVs and greenhouse gases are not themselves new either. The greenhouse gas program dates back 15 years. The ZEV program dates back 30 years.

JUDGE WILKINS: But don't you make the point in your brief that, yes, we have this -- you know, the statute can be -- we think that the statute means that kind of whole program, you don't look at any individual aspects, but EPA did look at the individual aspects anyway and that that's the way that EPA normally operates. Isn't that what you argue in your brief?

MS. KOLMAN: No, Your Honor. I mean, we do an alternative analysis because we're -- we know we're likely to be coming into litigation and it's helpful to explain to a court and to our opponents that, you know, even if you walk all the way through the analysis they would prefer, we don't see a reason to do anything differently here.

So I don't think the fact that we sort of, in the alternative, apply a standard-specific review does anything other than shore up the agency's basis, but the traditional interpretation has been in place since 1967. There's a Federal Register notice from 1984 where EPA speaks at length about why the needs analysis is a whole-program review and not a standard-specific review, and that comes out of the legislative history; it comes out of the text.

And, Your Honor, in -- you know, this Court in the

MEMA I and MEMA II case has already spoken at length about the congressional purpose here. We don't think there is room to sort of identify a new congressional purpose with respect to (b)(1)(B). There's quite a bit of precedent talking about what Congress was trying to do in this area, and that may not be with respect to the traditional interpretation under 209(b)(1)(B) specifically, but it certainly guides this Court in thinking about what it was that Congress was seeking to accomplish and what reading of the text would do that.

JUDGE WILKINS: Before I forget, because I think I forgot to ask this question of Mr. Wall, is there, in your view, any reason for us to wait to decide our case until we have the disposition of the cases argued yesterday?

MS. KOLMAN: No, Your Honor, I don't think that's necessary. You know, the EPA standards here at issue are obviously, you know, relevant to the waiver in the sense that California standards get measured against those in the aggregate protectiveness test, but that's obviously already happened with respect to sort of a comparison in 2013 when the waiver was granted.

I don't see any reason why the authority that EPA has is going to affect what California can do with its police power once it receives a preemption waiver, and I think that's sort of the most important thing to remember

here, which is, you know, EPA is not in the position, it was not asked by Congress to assess the wisdom of California's policy. Congress said that outright in the legislative history, that EPA was intended to give the broadest -- you know, the widest deference, the broadest discretion to California.

And so, you know, regardless of what's happening on the federal side, the structure of 209(b)(1)(B) and 209 in general is to give California the opportunity to continue the program it already had before the federal program was enacted and to give it an opportunity to be a laboratory for innovation -- that was this Court's word -- a laboratory for innovation with respect to vehicle standards.

JUDGE WILKINS: Another procedural question, there's some points in the EPA brief where it appears that the EPA is relying upon a factual finding in a prior rulemaking proceeding. You know, you refer back to, you know, some fact that EPA found in 2009 or 2013 or whatever, 1984. Is it appropriate for us to consider any of those if they were not explicitly adopted in the restoration decision in 2022? I guess I'm just trying to understand what, if any, relevance do prior factual findings of EPA have -- factual findings, not statutory interpretation.

MS. KOLMAN: Right. I -- Your Honor, I think EPA has been very good about adopting by reference its previous

determinations. So I do think the rulemaking documents here incorporate, where appropriate, the factual determinations and do so explicitly. So, you know, the 2009 decision spoke a great deal about sort of greenhouse gases. The 2013 decision talks about that and, I think, pulls that in directly.

You know, with respect to the 2013 versus 2019 factual determinations here, you know, we are not in a circumstance where the 2022 decision was granting a waiver. It was not reviewing the waiver anew. It was reviewing a 2019 attempt to withdraw a settled adjudication. And so the factual findings here that are relevant are, in particular, those in the 2013 waiver because that's the waiver grant, and so I do think it's very appropriate for this Court to look back and ask what those factual findings were.

2022 decision talks a great deal about why the 2019 decision was not actually fairly reckoning with those factual determinations and, of course, in doing so, expresses the agency's opinion again about several of these factual issues, but you know, 2022 is not a new waiver grant. You know, it's merely sort of addressing an, you know, an administrative, you know, complication posed by the 2019 withdrawal decision.

JUDGE WILKINS: So how are we to consider these arguments made by your friends on the other side that, well,

there were factual findings that were made in 2019 that weren't disturbed in the 2022 restoration decision, so those factual findings are the ones that are operative for our -- for the purposes of our review?

MS. KOLMAN: Well, I think the answer to that is multifold. I mean, in some instances, I do not think petitioners are fairly characterizing the record about what the 2022 decision actually said about those same factual findings. And so in many circumstances with respect to, for example, whether or not, you know, ZEVs are going to reduce criteria pollutants, that's something that's very clear in the 2013 record; it's something that's very clear in the 2022 record.

You know, we're in a circumstance where we have zero-emission vehicles. They have no on-road emissions -- or, rather, no tailpipe emissions of any pollutant. That clearly includes criteria pollutants, and there's a great deal in our brief about why it is that the singular statement that petitioners are relying on is really not reflective of the record as a whole.

So there are circumstances in which I think my colleague has merely misrepresented what is there, but many of the things that they're relying on factually depend on buying into their legal interpretation. So, you know, with respect to sort of this issue about whether greenhouse gases

are going to reduce temperature, you know, we're not here standing up, suggesting that the California standards are going to reduce, you know, global temperature by 1 degree Celsius, right? I mean, these are a part of a much bigger problem, but we think legally that that's not a barrier to what's happening here because the Supreme Court already described in Mass v. EPA that the regulation of greenhouse gas emissions from new vehicles is appropriate, even if you're in a circumstance where it is an incremental step vis-à-vis a much larger global problem.

So that's a circumstance where we just don't think the factual material that petitioners are citing is relevant, and of course, we don't even get to that question if the Court, under -- you know, sort of agrees with us that 209(b) does not actually require a standard-specific review of every standard that California adopts.

If --

JUDGE GARCIA: Briefly on the major questions doctrine, the main argument -- maybe the only argument in your brief was that the doctrine just shouldn't apply because this is about preserving state authority. If we put that argument aside, do you believe or do you have an argument that this is not the type of question of vast economic and political significance in the way the Supreme Court's cases have framed that?

MS. KOLMAN: Yes, Your Honor, and I do believe that is in our brief as well. This is a circumstance in which EPA is not adopting sort of a new interpretation of the statute that would transform it into, you know, a fundamentally different regulatory regime. It's not an unheralded authority. It's not a long-extant statute.

This is EPA, you know, following through on an interpretation its had for more than 50 years, and even with respect to these particular standards, California is exercising the same scope of authority its always had. It has always had the authority to regulate a second vehicle, and what standards it actually puts on that vehicle don't actually, you know, sort of affect the scope of its authority. It is still sort of mandating a California car for California, you know, consumers in California.

And so I think, you know, when we're looking at whether or not this is a major question, you know, we're sort of failing at every test. You know, as we say, I think, you know, the doctrine really shouldn't apply here, where you're talking about was EPA sort of appropriate in exercising the least possible authority as a federal agency? I think that's a very strange match with the major questions doctrine to begin with, but even looking at the sort of consequences here, you know, California has been pushing ZEV penetration since 1990. It's -- in this, you know, set of

regulations, it's gone from 10 percent to about 15 percent ZEV penetration. You know, these are all sort of the incremental kinds of changes that I don't think the major questions doctrine speaks to at all, and in a circumstance where we have very clear, I think, you know, statutory text, congressional indicia, history, you know, there's very little reason, I think, to apply the major questions doctrine.

If Your Honors have no other questions, I would just close by reminding you that at every possible opportunity, Congress has affirmed that it intended 209(b) to afford California the broadest possible discretion to regulate vehicle emissions and to continue the state's experiments in the field of emission control to the benefit of the nation. EPA has abided by that principle for half a century. This Court has repeatedly affirmed it, and so the 2019 withdrawal of the 2013 waiver was a procedurally and substantively improper deviation from the text, history, and precedent governing Section 209. For those reasons we feel petitioners' challenges should be denied.

JUDGE CHILDS: And just --

MS. KOLMAN: Oh.

JUDGE CHILDS: -- one other thing, can you think of other examples where the Congress has allowed other states to essentially regulate a global issue?

MS. KOLMAN: Well, Your Honor, I mean, there are a number of circumstances in which states are exercising authority with respect --

JUDGE CHILDS: Yes.

MS. KOLMAN: -- to climate change. I mean, I don't think that's sort of a controversial idea. States have --

JUDGE CHILDS: Yes.

MS. KOLMAN: -- you know, mandates with respect to their own, you know, energy production. They have, you know, a carbon pricing scheme. So in and of itself, you know, those are not, you know, unusual and they're not preempted directly by federal law in most cases.

So, you know, having a state play in this field I don't think is particularly strange, and in a circumstance where Congress was already making a big decision to let California regulate a second car, we don't see an inconsistency in allowing California to do that with respect to new technologies, new pollutants, new ideas when that was really what Congress was anticipating in the first place. Thank you.

ORAL ARGUMENT OF M. ELAINE MECKENSTOCK, ESQ.

ON BEHALF OF THE RESPONDENT-INTERVENOR CALIFORNIA

MS. MECKENSTOCK: Can you guys hear me okay? May it please the Court, Elaine Meckenstock for

respondent-intervenor California. I want to start, Judge Garcia, with your questions about standing. Petitioners have not advanced any evidence of redressability. Their declarations refer only to California's analysis that it did in its original rulemaking back in 2011 or 2012, which provides no evidence about current market conditions.

And to their point that -- and then the Toyota comment, what Toyota was saying -- what Toyota was asking of EPA was not to restore the waiver for the years during which the withdrawal had been in effect. Those years are in the past. Toyota said nothing about its inability to meet California standards in the future -- all the years that we are now dealing with -- or indicated that it would, you know, not be able to meet them or would change its plans if the restoration decision was vacated.

JUDGE GARCIA: Well, their argument on standing certainly has a pretty strong commonsense appeal, right? The goal of this is to reduce liquid fuel consumption. If it's not going to make any difference, why did California and EPA go through all this trouble, and by the same token, wouldn't vacating it reverse that effect? I mean, why isn't that the simple open-and-shut way to think about this?

MS. MECKENSTOCK: Well, so two points, Your Honor, and first, this is a threshold matter. The point of these standards is to reduce emissions, not reduce fuel

consumption directly.

The second thing I want to say is that when EPA looked at California's need for these standards under petitioners' interpretation of the single-standard review, it was looking at the entire model year period from 2017 to 2025 because that's what it had looked at in 2013 and what it had withdrawn in 2019. So when we got to the restoration, it's looking at the same time period. Almost all of that time period is in the past.

So essentially, where we are now is, the standards have had the effect -- and they've actually had more effect than California wanted them to have -- and we now are at the point where we have one model year left and manufacturers are selling more clean vehicles in California than the standards require and they're selling them at price premiums, and so petitioners need to provide some evidence that the manufacturers will stop selling these cars that consumers want and are buying beyond their legal obligations and are paying price premiums for, and I just don't think the evidence is there.

So -- and we're in this place, this temporal distinction between the standing inquiry and the need inquiry under petitioners' single-standard review, because of the odd procedural history here, because the waiver was granted in 2013, it was in effect for six years before it

was withdrawn, it was -- that withdrawal was immediately challenged, so the automakers continued to plan to comply with it, with the original waiver, and now here we are 10 years after the fact, and there just isn't any time left for them -- and beyond that, it's their burden to show redress, and they literally didn't put in any evidence about market conditions now that could support the conclusion they need.

And as to their point that they couldn't have challenged the original waiver in 2013, that's not true. They rely on the deemed to comply provision, but I think it's important for this Court to understand, the deemed to comply provision only ever applied to the greenhouse gas emission standards. There's never been a deemed to comply provision in the zero-emission vehicle standards. So they certainly could have challenged the waiver as to those.

I want to turn, then, to the statutory interpretation and EPA's whole-program approach, and I want to start at the very beginning of the statute with what it directs EPA to do, which is to waive application of preemption to the state -- not for particular standards, but to the state.

JUDGE GARCIA: I'm very sorry, one more question on standing.

MS. MECKENSTOCK: Sure.

JUDGE GARCIA: In your view, what evidence would

they need to show redressability? Is it some version of that in a certain time line, manufacturers would decide to reduce prices on conventional vehicles by model year '25?

MS. MECKENSTOCK: So fuel petitioners' arguments are not really about pricing. They're just about sales. So they would need evidence that manufacturers are going to change their product lines and sell different vehicles in model year 2025, which starts as early as January 1st of next year, if you -- if --

JUDGE GARCIA: I think their injuries are redressed if more people buy gas-powered cars, and one way to do that would be to reduce the price on it, right?

MS. MECKENSTOCK: I suppose that manufacturers could do that. I just --

JUDGE GARCIA: Okay.

MS. MECKENSTOCK: -- I was just trying to distinguish between the price injury that state petitioners assert.

JUDGE GARCIA: I appreciate that. Sorry, go ahead.

MS. MECKENSTOCK: No, no problem. No, all -- and all I'm saying is, I think they would need some evidence establishing a substantial probability that automakers would stop selling the clean vehicles that consumers in California are demanding at levels above what the standards require and

that consumers are paying price premiums for. In other words, manufacturers are currently making the cars people want and people are willing to pay a lot for them. So I think they need a lot of evidence to show that manufacturers are going to stop doing that.

JUDGE GARCIA: Thank you. Please proceed with the statutory points.

MS. MECKENSTOCK: So, as I was saying, the waiver provision directs EPA to waive application of preemption to the state, not for particular standards, and if Congress had intended the waiver to be standard-specific, it would have used the language it used in 209(b)(2), where it says each state standard, and as counsel for EPA explained, Congress maintains that program-level review by starting with the first criterion as an aggregate test and then carrying through that aggregate language with the such state standards, and there is no other set of standards to which such could refer other than the standards in the aggregate, and this is all consistent with Congress's intention that California have a complete program.

And, Judge Wilkins, to your point about 202(a) and EPA's program being comprehensive, you're right, EPA is required to regulate every pollutant it concludes is harmful, and it doesn't make sense that California would -- that Congress would have said, compare that comprehensive

program to a program from California that can only regulate smog and particulate matter, because EPA regulates carbon monoxide, greenhouse gas emissions, and formaldehyde and, if California can't regulate those pollutants, how could its program ever be as protective, much less more protective? And if we have a question about whether that scope of pollution is covered by the word protectiveness, I would refer this Court to the Finnbin, LLC v. Consumer Product Safety Commission case at 45 F.4th 33.

And to -- and then as this Court has repeatedly indicated, the statute creates a California car that is certified by California to California standards and a federal car certified by EPA to EPA standards, and petitioners have never explained how the California car would be regulated as to greenhouse gas emissions or carbon monoxide or any other pollutant that EPA -- that they don't think we have extraordinary conditions for, and if the answer is the California car is not regulated as to those pollutants, no one has explained why that would have been Congress's goal -- that we would have millions of cars sold in California and the Section 177 states unregulated as to pollutants just because California doesn't have extraordinary conditions for that specific pollutant. So the whole-program review makes perfect sense because Congress always intended California to have a complete

program.

And to your point, Judge Garcia, about the carbon monoxide --

JUDGE WILKINS: Wait. How is that inconsistent with saying that, yes, you can have a complete program and we look at the program as a whole but, as a whole, if you don't -- you know, if there are ten parts to the program but, really, you only need nine of them, then your program can go forward with the nine but not all ten?

MS. MECKENSTOCK: Well, my point, Your Honor, is, they say we only need standards for a couple of different pollutants, and we can't have an adequately protective program if we can't regulate all of the harmful pollutants.

JUDGE WILKINS: I agree with that, but I guess I'm saying I don't know why it can't be something in between the two extremes of your argument. That's why I was trying to come up with something with my, you know, doughnut example, but you know, you can need the meal for sustaining your health, but you know, that doesn't mean that every meal has to have, you know, the doughnuts, and so that's what I'm getting at. You can look at everything as -- you can make an assessment as to whether you need it as a whole while also saying that, well, maybe some of the parts of the whole need a program but maybe some parts of the whole aren't needed. Why isn't that a perfectly reasonable way to read

the text?

MS. MECKENSTOCK: Well, I think a couple points, Your Honor -- so that reading makes the second criterion more or less overlap with the first, because it's the first where we're looking at the protection provided and the level of stringency of -- relative level of stringency of the two programs and, if we're getting into does California need this standard versus that standard and asking the questions petitioners ask about how much improvement we will see from individual standards, then we're back talking about stringency, just now in a much more strict way as opposed to an in-the-aggregate analysis.

JUDGE WILKINS: Protectiveness, though, and need are two different things. I mean, I could say that in order for me to be, you know, as protective as someone else, you know, I have -- I don't know -- the same number -- at least the same number of soldiers as they have in their army, something to protect, to protect me, but that doesn't mean I necessarily need to have, you know, a million more soldiers in my army than they have in theirs. I'm just trying to -- the protectiveness is a different analysis than need, right, especially when you look at need to meet compelling and extraordinary conditions?

MS. MECKENSTOCK: Well -- so, Your Honor, we think, again, that the program review carries down from

protectiveness to need through the word such and that that makes sense, because what Congress was effectively saying was -- was asking EPA to make the same determination about need that Congress had made: Does California still need a separate program? Does it still have compelling and extraordinary conditions for which the second program is warranted?

And you're absolutely right that because California does still have compelling and extraordinary conditions, that sub-provision doesn't do a lot of work, but that's by congressional design. Congress decided it wanted to have two programs because two programs was better than one -- and not just for California, but for the nation. And so, again, this criterion is literally --

JUDGE WILKINS: So under what circumstances would a California plan that was as protective of public health and welfare as federal standards, under what circumstances would it fail (b)(1)(B)?

MS. MECKENSTOCK: It would fail (b)(1)(B) if we reach a point where California no longer has any compelling and extraordinary air pollution conditions, which I will, I will admit is unlikely, right? We've struggled with smog for --

JUDGE WILKINS: But that --

MS. MECKENSTOCK: -- 50 years.

JUDGE WILKINS: But that, then, just reads the word need out of, out of the statute.

MS. MECKENSTOCK: It doesn't, Your Honor.

JUDGE WILKINS: The standard would just be written that says such state does no longer has compelling and extraordinary conditions.

MS. MECKENSTOCK: But the word need is --

JUDGE WILKINS: That's what you just described, not a statute that says the state does not need such standards to meet compelling and extraordinary conditions.

MS. MECKENSTOCK: So we read such state standards as whole program. So does the state need a program to meet compelling and extraordinary conditions? That's how -- that's the determination Congress made when it adopted the statute in 1967, and I will -- and it reaffirmed that in 1977, because not only did it --

JUDGE WILKINS: So such state standards doesn't mean, like, these or this state's standards --

MS. MECKENSTOCK: That's right.

JUDGE WILKINS: -- it just means any state standard.

MS. MECKENSTOCK: It means the state standards in the aggregate. It's the -- it -- the such refers back up to the standards in the aggregate in the header part of the text, and that is, that is how EPA has interpreted this

statute for half a century, and it did that before Congress amended the statute in 1977. There's a 1976 Federal Register notice to that effect, and it did it in -- it defended its interpretation in 1984, which was right before the 1990 amendments in which Congress copied this text almost virtually word for word into 209(e)(2) for non-road vehicles.

So there's not any question that Congress is comfortable with this interpretation, and the text supports it because, again, the waiver is granted to the state. It is not granted for particular standards, and that -- those phrase -- the phrase that petitioners want to be in that provision, each state standard, is not there, and it is in 209(b)(2). So we know Congress knows how to tell us each state standard when that's what it means.

And, Judge Wilkins, to your doughnuts example, I think, you know, that could be resolved if there were a problem with California having a standard about doughnuts, to sort of extend your analogy, that that could be resolved on either protectiveness or feasibility, because if we get to the point where California thinks that doughnuts are good and EPA thinks that they're bad, right, then that's going to cause a potential problem on the protectiveness end, because if California is requiring people to eat doughnuts and EPA doesn't think that's protective, that's a basis on which EPA

might decide that's arbitrary and capricious that you've determined your standards are as protective.

And then if there's a problem for manufacturers in selling enough doughnuts, then that gets resolved under the feasibility criterion, and I will note that that feasibility criterion is the one over which there is almost always the most dispute. In the half century that EPA has been implementing this provision, that is the one that has attracted the most attention. That's the one the automakers come in and say, California is moving too fast, we need more time, this is too expensive. That provision has teeth. So if we're worried about there being a federal check, that's the federal check that Congress wanted. It's the same one they put into -- it's essentially the same one they put into 202(a)(1) for EPA's own program.

I also want to respond briefly to the question about the criteria pollution. California never disavowed that zero-emission vehicles don't produce criteria pollution, and counsel for EPA -- as counsel for EPA explained, EPA concluded in 2013 that California had reasonably refuted -- that's a quote -- this exact argument about this exact isolated quotation, and in any event, the record has evolved substantially from then, and you can look at the appendix to California's comments on the restoration decision to see how much evidence there is of the criteria

benefits of the zero-emission vehicle standards.

Moreover -- and I think this is a really important point -- EPA has approved both of these state standards, the GHG standard and the zero-emission vehicle standard, into five states' plans to attain criteria pollution standards set by the federal government. So if these standards, if we -- if the waiver goes away, those states don't have this measure to achieve that goal but, beyond that, that's an indication that EPA does believe and has found that these standards produce criteria benefits, and no one disputes that California has compelling and extraordinary conditions as to criteria pollution.

And the -- I also want to just touch briefly, if I can, on the major questions doctrine. There's nothing novel here, as counsel for EPA mentioned. We've had a zero-emission vehicle program since 1990. The 2013 waiver was the third waiver we received for that program, and as I said, this is -- you know, these are measures upon which many states are relying on and have chosen to rely on to improve public health and welfare in our states.

JUDGE WILKINS: I'm just going to ask you the same thing I asked your colleague. Do you see any reason why this panel should wait to see the disposition of the panel in the cases argued yesterday?

MS. MECKENSTOCK: No, Your Honor. What we're

talking about here are standards California adopted in 2011 and 2012, for which the waiver was originally granted in 2013. There just isn't a connection between these standards and the standards that EPA promulgated in 2021 or 2022 -- I can't remember which, I apologize -- but no, we don't think that you need to wait.

Sorry, I'm just -- there's a lot of issues in the case, and I just want to make sure I've covered everything.

And then I guess the last thing I would say is, on the (C) criterion, on feasibility, there is -- you know, petitioners claim that EPA can't look at our need in a collective matter under (B), and I don't understand how, if that's true, EPA could look at standards collectively under (C) if, as they say, they have the same meaning, and I think this is concretely demonstrated here because we're here talking about California's greenhouse gas and zero-emission vehicle standards, but California also has put standards for carbon monoxide and formaldehyde and particulate matter that are not at issue here because EPA didn't withdraw the waiver for those in 2019, and manufacturers have to comply with all of those standards in a given model year.

And so feasibility always has to look at the whole program, and it may be that it sometimes looks like a single-standard analysis, but that's largely because EPA is responding to evidence in the record. It's responding to

manufacturers coming in and saying, I can't meet all of these standards at the same time, or I can't meet this particular standard for the following reason.

So EPA's analysis is driven in the same way this Court's analysis is driven on petitions for review by the issues brought forward by the participants in the proceeding. It doesn't make it not a whole-program review, and EPA should not be constrained to looking at standards in isolation under (C) because that would just not make sense. It would break the entire feasibility analysis.

JUDGE WILKINS: And so what happens if California agrees or EPA agrees that -- with a manufacturer -- that it can't -- it's not feasible to meet a particular standard within the time period set in the standard?

MS. MECKENSTOCK: So what would -- it would depend on the circumstances, but there would be some form of denial. So what EPA is looking at is California's revised program that it has submitted with its waiver request, and if EPA decides this revised program is just completely infeasible, then it would deny the waiver and then the California program that was previously waived would remain in effect, and that's kind of like what happens when this Court, say, vacates an amended rule.

JUDGE WILKINS: So the waiver can be denied if it is not feasible to adopt a new standard with respect to,

let's say, one aspect of the standard, one criteria pollutant?

MS. MECKENSTOCK: Yes. Well, it -- you know, sometimes the waiver -- the revision to the program will just be for one standard, but if California's amended program contains revisions to multiple standards -- and I take your question to be what happens if, then, only one of those is a problem -- then what EPA has done in the past is denied the waiver as to that standard, granting it for the rest of the program, and that's essentially like this Court's severability analysis, in that you do what Congress directed you to do, which is, you waive application to the state for everything for which there is not a problem under the three criteria for denial. It's very similar, again, to what this Court does if it finds a problem with a regulation, that there's a way to sever a portion of the regulation so that the amended rule is -- the rest of it is valid.

JUDGE WILKINS: And why wouldn't you do that under the need analysis under (b)(1)(B)?

MS. MECKENSTOCK: Because, again, what you're looking at is the whole program and there isn't a question -- and petitioners don't even dispute -- that you -- you either need a whole program or you don't.

So it's just that feasibility is a different

animal subject to severability in a way that a whole-program review isn't, and of course, this Court faces those issues with severability as well. Sometimes parts of rules are severable, and sometimes they aren't. It's the same basic idea, but just as EPA is deciding that California's revised program satisfies the criteria and should get a waiver, even though sometimes what it's looking at is more granular than the program as a whole, that's the same as when this Court looks at an amended rule. You sometimes have to look at the change between the previous -- the preexisting rule and the amended one --

JUDGE WILKINS: I guess the reason that I'm having trouble with this is that the statutory language is such state standards, right? So it's not just, like, any state standards. It's particular state standards. You need these particular state standards, even as a whole, not just do you need standards? Do you see -- do you see my problem?

MS. MECKENSTOCK: I do see your problem, Your Honor, but as the Supreme Court held in Culbertson v. Berryhill, which is 139 S. Ct. 517, such means of the kind or degree already described. And so what such state standards means here is such -- is standards previously described, which are the standards that are, in the aggregate, at least as protective.

So we're -- you're just carrying down the

aggregate language. So you're asking a -- you're doing protectiveness as an aggregate, you're doing need as an aggregate, and you're doing feasibility as an aggregate, because that's what such does.

JUDGE WILKINS: Any other questions? All right. Thank you. Mr. Wall, we'll give you five minutes, and we're going to take a 10-minute break after you finish, before we go to Part II.

ORAL REBUTTAL OF JEFFREY B. WALL, ESQ.

ON BEHALF OF THE FUEL PETITIONERS

MR. WALL: Thank you, Your Honor. So four points on redressability, reliance, major question, and text. Judge Garcia, I've been sitting there kicking myself for not thinking of the obvious answer to your question, which was, redressability, like all the elements of standing, is determined at the time of filing, when we filed this petition in May 2022, when we plainly could have gotten effective judicial relief, and I looked through the briefs and the comment letters as I was sitting here. I couldn't think of and I'm not aware of anybody who claimed otherwise.

The question now isn't about redressability. It's about mootness, and as the Supreme Court said in West Virginia, the Government bears the burden of showing mootness. So I tried to run down the bread crumbs, and I went to the States' brief at page 15, and it cites the

industry respondents' brief at page 12. So I went to that brief, and it's very carefully worded. It says they have no plans to abandon their financial commitments, and it points to the JA at 370 and 371. So I went to the JA at those pages, and it's a comment letter from Tesla that it put in in July of 2021. It's not talking about the inability to give relief in the later model years. All it is saying is that automakers make decisions in reliance on what the EPA has done with respect to the waiver. Nobody disputes that, but it's not going to meet their heavy burden to show that there's no way to give us effective relief, and I just want to be clear, that's the Government's burden, not ours.

JUDGE GARCIA: I'm glad you said that, Mr. Wall, because I had the same question, and why -- as whether this is redressability or mootness -- and why isn't the burden on redressability to come to court and say, acknowledge the realities, it's going to take a little time to get an order, but here's our showing that if you rule in a reasonable time on this, it will redress our injuries, as opposed to, you know, strictly, you know, the date you filed this in May 2022? I'm just --

MR. WALL: Yes.

JUDGE GARCIA: -- it strikes me as a difficult question.

MR. WALL: Look, it could be a more commonsense

inquiry. I think the Supreme Court has pinned it down in cases like Caterpillar to, you know, time of filing, but the -- I guess what I'd say is, I don't think you need to get into it here because, when we went to court in 2022, everybody -- and if you look at California's comment letter at 236 of the JA, it says, like, do this now, it will immediately incentivize, it will make meaningful changes now -- so everybody agreed that we could get at least some relief and, of course, against the backdrop of Letter -- like the Toyota letter, saying, you know, we made plans based in part on the withdrawal of the waiver.

So it seems to me, in that world, everybody knew that you could do something in the window, and the burden, then, is on them to come along and say you can't -- like, this case is moot, and I just don't see how, based on, like, the comment record you have before you and the briefs, you could say they've satisfied that burden.

On reliance, if you look at pages 21 and 22 of the JA, it's not an independent rationale. When they talk about it, it's always bound up with the merits, but in any event, I don't think it's fair for the Government to say, as I think counsel did, that in 2019 they jumped over reliance interests. If you look at page 514 of the JA, it says -- and this is from the withdrawal -- the EPA disagrees with some commenters' assertions that ostensible reliance

interests foreclose withdrawal of the waiver for the model years, and then it goes on to explain that facts on the ground had changed because California had taken away the deemed to comply; and, also, that the EPA had said it was going to do a midyear review.

The agency is free to think that it got reliance wrong back then, but I don't think it's right to say, oh, in 2019 you just jumped over reliance and all we did in '22 was point out the fact that you hadn't taken into account reliance. It's a far more complicated story than that, and so I don't think it's right that they didn't consider it at all or that it's a standard-alone rationale.

Where does that leave us? How should we resolve the case? The most straightforward way is as a major question. West Virginia, OSHA, student loans cases all have the same message: Look at the power that the Government is asserting. Here the power that the Government is asserting is to allow California to electrify the vehicle fleet, to move to what California wants, which is a hundred percent electrification. That is a major question, as the Supreme Court understands it, economically, politically, and it is a new power that the agency has not previously asserted, to give over all of this power to California, to force a transition to electric vehicles.

If we're right about that, if it's a major

question --

JUDGE WILKINS: But what about the fact that there's been at least some sort of zero-emission vehicle aspect of California plans for -- you know, going back to 1990?

MR. WALL: That's right but not with respect to greenhouse gases, with respect to criteria pollutants. This is not we need our own standards because we want to help smog in LA, right? It's not about criteria pollutants. It's not about local area quality.

This is about what -- what they've announced from -- this is about climate change. It's about global warming. That's why they want to set the standards, and the question is, can EPA let a state be a climate change regulator? That, as I understand it under the doctrine, is a major question, and if I'm right about that, I don't see any serious argument on the other side that the statute is clear in their favor. They assert it at page 81 of their brief, Judge Garcia, but they don't actually try to show how they could satisfy a clear statement rule for purposes of 209.

But let's say you disagree with me on all of that, you don't think it's a major question. Then we're finally at the text, right?

JUDGE GARCIA: Let me pause just briefly on major

questions. The way you just framed it is -- essentially, the major question is, can California target greenhouse gases, and that would -- my question is about whether that actually tracks to the statutory interpretation question, which seems to be, is a whole-program approach allowed?

In other words, there would be a direct connection if there was some vague term -- if emissions was somehow vague and you were saying, well, you can't interpret that to include greenhouse gases, but that's not your argument. Does this make sense? You're saying there's a major question X, so use that to require a clear statement on Y. How do they link up?

MR. WALL: So I don't think that's the right level of generality, right? In West Virginia it was, can you force factories to shift from one power source to another? In the student loan case it was, can you use this power that's formerly been fairly minor and waive hundreds of billions of dollars? I think the -- framed at the right level of generality is here, can they grant a waiver to the State of California so that California can have its own greenhouse gas program to regulate climate change, to address climate change, and framed at that proper level of generality, I don't see how it's not a major question, and if it's a major question, I think, then, it's pretty easy how to resolve the case.

But if you disagree with us on that, then we're down to the text, and for all the reasons you were asking, Judges Wilkins and Garcia, I don't think this whole-program approach stands up. The logical import of what they're standing here saying is that even if they stood before you today and said California does not need this standard at all, it will not do anything to temperatures in California, it will not affect global warming in the slightest, it won't even help with criteria pollutants, they would say, but that doesn't matter because we've still got smog in LA and, until that goes away -- and they're candid enough to admit that's not any time in our lifetimes -- they get a program and they -- it's a blank check -- they can put into it whatever they want.

And the right way to think about it, Judge Garcia, is exactly the way you put it: You look at need on the standard-by-standard basis. Now, you can judge need based on how that standard interacts with other standards, of course, but you still have to ask whether you need that standard in practical operation, and once you strip away the whole-program stuff and you understand that that's what the statute requires, then we're down to the basic question -- which the other side said very little about today -- which is, okay, the agency made findings back in the day, in 2019, that the climate change conditions in California were not

sufficiently different from everywhere else in the United States, including, most notably, the Southeast, to trigger 209(b)(1)(B) and, even if they were, a regulation like this was not going to make any difference in California or anywhere else.

So the only question on the text ought to be, okay, did they make contrary findings in 2022 that are in the rule and do they satisfy the more detailed justification of Fox? If they want to flip on key facts, the Supreme Court says you've got to explain why your factual view is different from what you took before and you've got to offer a, quote, more detailed justification, and in the whole time I sat, I didn't hear a word from the other side pointing to the text of this rule to show you, look, here are the findings where we said California doesn't just have it bad but has it really bad compared to everybody else and here's where we showed you in 2022 exactly how this standard is going to make a difference and here's how we satisfy the Fox standard because we laid all of this out in the rule.

That's why they want to keep pivoting to the whole-program approach, Judge Wilkins, because when you dig down into the text of this rule and what they did, they can't satisfy it, and then all they keep coming back to is, but it says such standards. Well, of course it does. It's pointing up to (b)(1), where it says such standards or the

control of emissions from new motor vehicles or new motor vehicle engines. It's talking about the emission standards that are up in (b)(1), and then the only question is, okay, well, does that, in the aggregate, transfer all the way down, and for the reasons we've already explored, it's not textually right because they put it only in (b)(1), they didn't move it down to (B), it's not a sensible way to read (C), and it turns (B) into a nullity. The answer is always going to be you need it even if you don't need that particular standard, because once you ate your beans, you get as many doughnuts as you want, and that is not a sensible way to read (b)(1)(B).

JUDGE GARCIA: Counsel, I have one last -- or maybe last question about just how your standard-by-standard approach would work. Are you saying that we have to go through with a fine-tooth comb and ask do they need, for example, a carbon dioxide standard of 196 grams per mile, or is it the group of greenhouse gas standards together? How would you propose this be done?

MR. WALL: So it's the administrator that has to make the finding, and I'm not actually sure, Judge Garcia, because it didn't come up here and they didn't make the finding in 2022, I'm not sure whether the administrator could try to group standards in a way, but I think the right way to think about it textually, though I don't know what

the agency's practice is and I don't think it's relevant here, would be you do it on a standard-by-standard basis but, when you are determining need, you ask how that standard interacts with the other standards.

So I think it's fair for the state to come in and say, well, we need this standard and we need it because the standard will do this and, interacting with our other standard, it will produce some combined or added benefit. That seems to me like a fair way to show need.

JUDGE GARCIA: But it would be, the application says, here's why we need our CO2 standard, our methane standard, our nitrous oxide standard --

MR. WALL: I think --

JUDGE GARCIA: -- and, I think, all the criteria pollutants standards as well, right?

MR. WALL: I think it has to be because, once you start to group and you just get to say you need anything in the suite, then you have the blank-check problem, right? You can just group things in, dump things into the program that you don't really need, but I will say, I don't think that's -- I don't think there's, like, a question of grouping here because that's just not the way this case has come up.

In this rule they did not make a sufficient showing of need, again, assuming you think it's not a major

question and assuming you think that this is the kind of condition that this statute was meant to address. It's not an extraordinary condition because it's global warming. This was meant to get at local problems in California, not global problems and global solutions, but as I say, even if you disagree with me on every one of those arguments and we're just down to needs to meet, it's still, where in the rule did they say here's why we got it wrong in 2019 sufficient to justify the Fox standard? I've read this rule multiple times. I don't see it, and I didn't hear anything from the other side about it this morning.

JUDGE WILKINS: All right. Let's reconvene at 11:25 by that clock.

(Recess)

THE CLERK: This Honorable Court is again in session.

JUDGE WILKINS: All right. We'll resume with Part II of the argument. I believe first up is Mr. Flowers.

ORAL ARGUMENT OF BENJAMIN M. FLOWERS, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. FLOWERS: Thank you, Judge Wilkins. May it please the Court, Ben Flowers for the states and I'll try to reserve a couple of minutes for rebuttal. I think in light of this morning's argument, I'd like to actually begin with standing.

Before I get to that, I do want to stress that as long as one party or one group has standing, Article III is satisfied. So if you think the private petitioner has enough standing or you think we have standing, Article III is all taken care of and we can move to the merits, but without --

JUDGE WILKINS: But just on that, though, what about -- does the fuel petitioners' standing give you standing on equal sovereignty claim, which is not a claim that they are bringing?

MR. FLOWERS: I think they would under Bond. So under the Supreme Court's decision in Bond, private parties even can raise Tenth Amendment arguments. They have standing to do so, and the reason for that is because a right held by the states against Congress is also a limit on congressional power, and so private parties are empowered to raise limits on congressional power to protect their own -- themselves from financial harm of sort of their (indiscernible).

So with that windup on standing, I guess I'll come to the pitch. I do want to convince you that the states do have standing. So we have two injuries here, one economic, one constitutional, and a vacatur order here would address both. I'll start with the economic injury.

We submitted a declaration by an economist, whose

expertise nobody questioned. He explains that the manufacturers will respond to the zero-emission vehicles program by cross-subsidizing. So they'll charge more for the vehicles that we buy, posing a dollar of cost, and thus causing an injury. There is not a single piece of evidence in the record that contradicts that. The EPA for its part submits no evidence.

The intervenor states do submit two declarations but neither get them where they need to go. Cunningham's declaration is an unscientific survey of car prices that has conclusions that are consistent with our theory. He shows people are buying these cars at high percentages, that they're paying above-market price. All of that is consistent with cross-subsidization because the manufacturers are driving down the price of these things to sell more of them. So that's not at all surprising.

Then they have the declaration from Gillingham, the economist, who says that generally speaking, manufacturers can respond to technological requirements, not by cross-subsidizing, but by effectively investing in being a first mover in the industry. The problem he has is that he doesn't have -- he doesn't opine that they're in fact doing that here. He acknowledges cross-subsidization is a problem.

And we have more evidence. We have a -- Joint

Appendix 661 into 62 -- a statement from a former auto executive, stating that they'll cross-subsidize, and then maybe most important of all, you have the dog that didn't bark. We have this large group of auto manufacturers here as respondents. If they weren't cross-subsidizing, they would have every reason in the world to tell you that. Number one, it could help undermine our standing argument. Number two, it would help --

JUDGE GARCIA: Counsel, if there was cross-subsidization, wouldn't it have occurred up through 2019?

MR. FLOWERS: Yes. And so we --

JUDGE GARCIA: Wouldn't there be something concrete to point to?

MR. FLOWERS: Well, it wouldn't have been any more -- we think our injury here is concrete -- but it wouldn't have been different form of evidence because absent a statement from the car companies themselves that they're doing this, you're just not going to have that. You'll have to rely on economic theory. So we submitted forward-looking evidence because we're seeking forward-looking relief. If we submitted backwards-looking relief, presumably EPA would have said that that's not good enough.

But it's telling that those -- these car manufacturers don't deny cross-subsidizing. Number one, if

they weren't, they could say that and it would help the EPA's standing argument. Number two, just from a business perspective, one would think they would want to assure Ohio farmers will buy pickup trucks. They're not helping to subsidize electrical vehicle purchases by professors in Berkeley, but there's not a whisper in their briefs about any of this, and I think that is telling evidence in and of itself.

On redressability -- I'm sorry.

JUDGE GARCIA: That was going to be my question. Everything you've said right to now is about injury --

MR. FLOWERS: Right. So on --

JUDGE GARCIA: -- and there's not a section in your expert's declaration about redressability. So I'm curious.

MR. FLOWERS: And so it doesn't -- he doesn't address it in -- he doesn't say in model year 2025, if we prevail, the prices will be affected, but I think it's all implicit in his analysis because he says the thing that's causing the cross-subsidization is this requirement. So if the requirement goes away, there'll no longer be a need to cross-subsidize and they could make more money acting otherwise, and I think it's fair -- if you can look at economic theory, you can look at the economic --

JUDGE GARCIA: But do you have any evidence about

the timing of all this --

MR. FLOWERS: Right.

JUDGE GARCIA: -- because I think that's the difficulty? What we have -- for example, the statement from Tesla is referencing a statement from Mitsubishi that says, we make our product and pricing plans five years in advance. Ford says something similar. The Toyota thing -- statement -- says something like, we need two years to adjust our product and pricing.

MR. FLOWERS: Well --

JUDGE GARCIA: So, you know, it takes some time for the price impact, for the injury to occur, and presumably -- this is just what we don't have any evidence about -- it takes some time for it to unwind as well.

MR. FLOWERS: Well, again, though, one can establish standing, all aspects of standing, with economic theory, and it's true they make decisions on what models to build. That may be tougher to turn the ship around on that, but in terms of pricing, firms exist and, indeed, have a fiduciary duty to maximize their returns. So if this waiver goes away -- we're talking -- when we sued, it was May 2022, I believe -- we're talking about model year 2025 -- they would have ample time to make a change, to give us relief.

If there is any prospect that the injury would be redressed, then we think we've carried the burden there, and

they certainly have not attempted to carry their burden with respect to mootness.

JUDGE GARCIA: So this is -- I'm going to venture into an area of not having evidence, which I think is part of the point, but I think what you just said is somehow that manufacturers would approach this by disaggregating production and pricing, and that might make sense. It also might make sense that the corporations, when they make a plan to build X amount of electrical vehicles and X amount of conventional vehicles, they then have prices that they need to stick to in order to maximize their profits and sell those, and so it just doesn't seem like there's any, but there's an equal intuition that it would take some time to adjust the prices that you're going to want to get back for what you've made.

MR. FLOWERS: So I don't think so, respectfully, because if -- the whole -- the basis of our economist's declaration is that this wouldn't otherwise happen but for the mandate. They have to do this to boost zero-emission sales and offset the losses with traditional vehicles.

So the reason it wouldn't happen otherwise is they would make -- they're not making as much money doing it that way and they're being forced. So if that's the case and they have time to adjust, I think we can reasonably infer the profit-maximizing firms would do it, but if you're

skeptical on this, I -- we also have a constitutional injury that I think seals the deal.

To assume for the sake of argument that we're right on our equal sovereignty theory -- we think we are, but put that to the side -- assuming that we are, we are denied equal treatment that's guaranteed to us by the Constitution. When you're denied equal treatment, that's a constitutional injury. Constitutional injuries are per se Article III injuries. We know from Heckler v. Matthews, from this Court's decision in Cutler v. HHS that that injury can be redressed with an order taking the more beneficial treatment away from the other side.

JUDGE GARCIA: I just want to ask a version of Judge Wilkins' --

MR. FLOWERS: Sure.

JUDGE GARCIA: -- first question. Are you claiming that if you have standing on this constitutional theory for your equal sovereignty claim, that then everybody has standing to raise all the statutory claims? I would have thought this is just tied to the equal sovereignty claim. Is that right?

MR. FLOWERS: I don't think it's right. I think we would have it with -- everyone would have it with respect to everything because, if we're suffering that constitutional injury, an order vacating the waiver would

redress that injury regardless of how it's done. So it's a bit counterintuitive, I'll admit that, but I do think it would extend to everybody.

Now, I think, Judge Childs, at the outset you asked about would the states even be interested in exercising sovereignty? Well, I think part of the misnomer here is that the only way you exercise sovereignty is by affirmatively regulating. Of course you can -- you exercise sovereignty whether you decline to regulate or impose a regulation, whether you deregulate or increase the regulations.

Insofar as California has this power, we want it too, because it's a very powerful bargaining chip they have. I mean, look at the fact that you have a large group of auto manufacturers here begging the D.C. Circuit to let California keep regulating. The reason that's happening, because California gets an enormous stick that it can wield in negotiations with these companies.

So that's a real concrete, on-the-ground effect, but I think more fundamentally than that, we're -- if -- again, if we're right on our constitutional theory, then we came into the Union with equal sovereignty and that's been taken from us by this law, and there is no case that says when something you are constitutionally entitled to is affirmatively taken away, you lack standing to sue to get it

back.

So with that I'm happy to turn to the merits if there are no questions on standing.

JUDGE CHILDS: Well, the equal sovereignty piece just concerns me a little bit because I'm not really sure how you're articulating that term. You know, there's --

MR. FLOWERS: Sure.

JUDGE CHILDS: -- a law review article there. You don't seem to rely on particular Supreme Court cases. I know there's the Shelby County, but there the feds go in and it's indicating that they're encroaching upon local state voting conditions as opposed to what -- you know, some of what you're articulating here. So I just want to get a better sense of that because I'm not sure that equal sovereignty is playing through, as a thread through all the cases.

MR. FLOWERS: Sure, and I totally understand that. Before I get there -- I promise to answer --

JUDGE CHILDS: Sure.

MR. FLOWERS: -- I do want to stress that if you agree with Mr. Wall on the statutory interpretation question, you can avoid all of these constitutional (indiscernible). So if the waiver is struck down on that, you don't have to reach that (indiscernible).

Now, I'll come back to where the principle comes

from. It is true that outside Shelby County there is no case striking down a law -- a post-admission law -- on equal sovereignty grounds. Part of the reason for that is there are vanishing few laws in the history of our Republic that incorporate this -- or that even potentially violate the doctrine, I should say.

I went through the briefs of the amici, the briefs of the respondents and identified a grand total, counting this law, of five that would clearly violate the equal sovereignty doctrine, and most of the laws they cite inarguably don't. For example, they cite tonnage laws where Congress, under Article I, Section 10, allows a state to impose a duty to bring ships into the port of Pennsylvania. That's not an equal sovereignty violation because the Congress gives every state -- the Constitution gives every state exactly the same amount of sovereignty. They can all pass one of these laws and ask Congress for permission to enforce it.

This is unique in that it is -- it's the rare law where California alone is being given power, sovereign power, really important sovereign power that no other state has. That's what violates the equal sovereignty principle, and it's unconstitutional, full stop.

Now, even under --

JUDGE CHILDS: But you've got the Constitution

explicitly -- for example, under Article I, Section 8, Clause 1, all duties imposed and excises shall be uniform throughout the United States -- so you've got some explicit language there, but I'm not sure that there's an equal treatment regarding Commerce Clause, for example, or bankruptcy laws.

MR. FLOWERS: Well, let me first take uniformity point, and then I want to --

JUDGE CHILDS: Okay.

MR. FLOWERS: -- specifically stress the Commerce Clause point. So it's true that there are these uniformity guarantees, but those are guarantees of uniform substantive law throughout the nation. So the duties have to be the same throughout the nation under the clause you just read. They don't bear on unequally depriving the states of sovereignty. So I don't think that negative implication is there.

It would be one thing if there were a provision in the original Constitution that said you must ensure all states have equal sovereignty with respect to navigable waters and it didn't mention it anywhere else. I think, then, we would have the negative inference, but we don't have that here.

JUDGE GARCIA: Counsel, what about the Compact Clause? So that clause envisions that Congress can allow

some states but not others to exercise sovereign authorities, like keeping troops, imposing tonnage duties. Is -- does that give rise to the type of negative inference we're talking about?

MR. FLOWERS: I don't think so because -- there are two ways to look at that. One is, that's just an -- and we're open to either characterization -- one, it's either an express allowance of some unequal sovereignty. We think the better way to look at it, though, is that every state has the same sovereignty. They can all pass those laws. They all just have to go to Congress to ask for permission to implement. That is unlike this law --

JUDGE GARCIA: But Congress can deny them, thereby according greater sovereign authority to some states --

MR. FLOWERS: Right.

JUDGE GARCIA: -- and not others, right?

MR. FLOWERS: It can, but I don't -- but none of them -- in some sense, none of them have the sovereign authority at all because they're basically -- they're acting with the permission of Congress, but I'm open to saying that those are express exceptions that prove the rule.

JUDGE GARCIA: Can I just ask about a specific case?

MR. FLOWERS: Yes. Please do.

JUDGE GARCIA: It's Alabama v. Texas in 1954 --

MR. FLOWERS: Yes.

JUDGE GARCIA: -- and this came after the three seabed cases that you do cite, and as you may know, it's the Submerged Lands Act, and after those seabed cases had said that Congress -- that states, based on the equal footing doctrine, could not have control over the marginal seabed, Congress came back three years later and gave greater sovereign control, control over the seabeds to Gulf states, and Alabama and other states challenged that law on equal footing grounds, and the result was a summary denial of the case with not a lot of reasoning, but it basically says, this was pursuant to the Property Clause and enumerated power, and so the equal footing doctrine has no application. Are you aware of that case, and how would you distinguish that?

MR. FLOWERS: Yes, I am. I'm glad you asked about it and a few distinctions: one, I don't -- it was a per curiam opinion that had -- there's no analysis on point. So it just doesn't set any meaningful precedent. The dissents and the concurrence deal with it, but the opinion itself does not.

The distinction between the Property Clause and this other stuff, I think, actually is pretty relevant. Going back as far as to Stearns v. Minnesota, the Supreme Court has said that when you attach conditions to possession

of land, that's basically not an exercise of sovereign authority, and so they distinguish that from more traditional exercises of sovereignty. I'm not sure that distinction makes sense, but it's the one the Supreme Court has long recognized.

There is another case, though, I'd love to bring up, and it relates to Judge Childs' question about the Commerce Clause. There's this notion floating around in the EPA's brief and in one of the amici's briefs that it doesn't apply -- that the equal sovereignty doctrine doesn't apply when Congress acts pursuant to an enumerated power. Here's why we know that's wrong. There's a case called Escanaba discussed at length in the amicus brief filed by American Commitment, and in that case the Supreme Court held, was that it would violate the equal footing doctrine to admit Illinois pursuant to an act that gave Illinois less sovereign authority over the navigable waters than the other states had. The court acknowledged that the -- Congress does have Commerce Clause authority over the navigable waters but, nonetheless, in admitting the states to the Union, it could not unequally deprive Illinois of that power.

Now, the EPA may respond, well, that's an admissions case, that's not a post-admission case, and respectfully, I just don't think that distinction holds up.

To say that the states come into the Union on equal terms requires that the states already there are on equal terms themselves. So if Congress can vitiate that equality, then there are no equal terms on which to enter, and I think that is a -- that's a key reason why it cannot be limited to Admissions Act, plus Shelby County, and noting Shelby County brings me to another point.

Even if we accept the most -- the narrowest version of this doctrine, EPA's proposed test, where they would just take the Shelby County test and incorporate it in all equal sovereignty cases, not just Fifteenth Amendment cases, and we don't think that's right, but if -- even if it were right, we still win, because under Shelby County any disparate geographic coverage has to be justified with respect to the problem the law targets.

Now, you could maybe say 209(b) in some applications would pass that test, but not when we're talking about global warming. As applied to this context, it is a --

JUDGE GARCIA: Can I ask about the more categorical version of your argument?

MR. FLOWERS: Absolutely.

JUDGE GARCIA: So what Shelby County says is that when Congress is intruding on an area of traditional state control, voting, we're going to require some heightened

showing before you deprive states equal sovereignty, and what you're saying is, when Congress intrudes into an area where states do not generally have control, vehicle emissions, interstate commerce, we apply a higher bar, a categorical bar. Wouldn't the opposite make more sense in that you apply the more stringent test when you're intruding on an area of traditional state control?

MR. FLOWERS: So two answers to that. The first is, I don't think here we're dealing with an area that's actually less traditionally a matter of state control. Traditionally, states do and still are the primary environmental regulators. Even the Clean Air Act acknowledges that. When you look at voting --

JUDGE GARCIA: So you think under our Constitution interstate commerce is as much the province of states as voting?

MR. FLOWERS: Interstate commerce is not, but environmental pollution -- or environmental protection is. It's also critical to note that under Article I Congress actually has immense authority over voting laws, at least with respect to federal elections. So it's not true that that was an area that was completely screened off from Congress before the Fifteenth Amendment.

Second point -- I think this is the, really, the key one -- is that the Fifteenth Amendment -- all the

Reconstruction Amendments worked a sea change for constitutional order. So Congress did there get power that was immensely broader than it had previously had, and so I think it's actually unsurprising that in the Fifteenth Amendment context, Congress has broader power.

Happy to take any more questions on that doctrine but, if there are none, I can, I can shift to EPCA.

JUDGE CHILDS: But --

JUDGE GARCIA: Just want to -- yes, please.

JUDGE CHILDS: I was just going to say, Shelby County wasn't decided on unequal treatment of the states, though, right?

MR. FLOWERS: Well, I think it was. I mean, when states are treated unequally, someone gets more favorable treatment, someone gets less favorable treatment. The laws there, I suppose, pose less favorable treatment, where you could argue here that California is getting more favorable treatment as to its sovereignty but we're getting less favorable treatment. So I think that comes out in the wash.

JUDGE GARCIA: I'd like to just back up a little bit, and it's a version of where Judge Childs started, but I think at a high level, the equality of the states was one of the most, the most contentious issues at the founding, right, and what comes out of that are a lot of very specific provisions and, for example, two forms of representation,

one in the House, one in the Senate; some explicit guarantees of equal treatment, like on bankruptcy law, naturalization law.

I appreciate those aren't about equal sovereignty, but they are absolutely about equality of the states, and it just seems a little bit odd that if there was this fundamental limit on Congress's enumerated authorities, not only is it not in the Constitution but, as far as I can tell, there's no mention of this type of principle at the founding debates or in any case since.

MR. FLOWERS: Well, I mean, we do have the Schooner case that talks about the perfect equality between sovereigns. I readily concede that's not much.

I think I'd actually flip the inference, is that because it was so fundamental, I'm not sure they would have seen a need to address it. And think about the context of the ratification of the Constitution. The founders also didn't think -- many of them did not think we needed a Bill of Rights at first because they thought it was patently obvious from Article I that Congress lacked those powers anyway.

JUDGE GARCIA: We have a very substantial historical record establishing what you just said --

MR. FLOWERS: Right.

JUDGE GARCIA: -- but in none of the briefs here

is there any discussion of a categorical bar that would somehow apply to the new powers being given to our federal government.

MR. FLOWERS: And I guess what I would say is, if they meant to strip the states of that equality, I think that's what you would expect to be expressed, not the opposite. So unless it's expressed, we reserve it. It's effectively one of the, one of the powers reserved --

JUDGE GARCIA: So what's the affirmative support for the idea that there's a concept of equal sovereignty among the states that cannot be violated for commerce?

MR. FLOWERS: Sure. I mean, I think it traces back to international law, the meaning of the states. The law review article we cite lays that out. I think more relevant to this Court maybe is just precedent. We have the equal footing cases. We have Shelby --

JUDGE GARCIA: Let me just pause you on law of nations, right --

MR. FLOWERS: Sure.

JUDGE GARCIA: -- because I do think, as I read it -- I'm trying to --

MR. FLOWERS: Yes.

JUDGE GARCIA: -- look at everything before us -- that is the one piece of affirmative evidence, and Gibbons v. Ogden back in 1824, sort of canonical decision on the

Commerce Clause, discusses those law of nations principles, and what it says is that states do have equal sovereign authority in the sense that they have equal authority to regulate commerce until Congress acts. Here's what it says on page 70 and 71: They have equal authority until that authority is subjected to the superior power of Congress when actually exercised.

It sort of goes back to my dog-that-didn't-bark point. If actually there was a very important limit and equal sovereignty carried through to Congress's commerce power, it seems like they sure would have said that in Gibbons v. Ogden.

MR. FLOWERS: Correct me -- I admittedly have not looked at that case in a while, but if I'm not mistaken, that passage is not -- there was not a, at issue, a disparate treatment between states. It was about the --

JUDGE GARCIA: That is true, but it discusses what the law of nations told the founding era about the nature of the states --

MR. FLOWERS: And so I --

JUDGE GARCIA: -- and what it is, there's no analogy in international law to our federal government and their relation to the states --

MR. FLOWERS: So that's --

JUDGE GARCIA: -- and what Gibbons says is that

equality of states means they all have the default equal sovereign authority to regulate but that that can be displaced by Congress. Again, I'm not saying it resolves this question, but it discusses those law of nations principles.

MR. FLOWERS: But I think one key point is, the Supremacy Clause, and are unique, the splitting of the atom of sovereignty, does deprive the states of that equality vis-à-vis the federal government. I think it's vis-à-vis one another. There's nothing giving up that equality when they answered, but again, I think we also have to deal with the precedent, and I think the EPA basically wants to reach Shelby County in a way that one of the amici does in a law review article, which is sort of an ad hoc, made-up doctrine that was designed to apply in one particular context and no other. I just don't think that's a fair way to read Supreme Court precedent.

We have to take it at its word, this is a fundamental background principle, and if that's the case, then again, at the very least, Shelby County's test applies outside the Fifteenth Amendment, and we think we prevail under that because the problem being targeted, as you heard from Mr. Wall, is a global problem, requiring global solutions, where the geographic constraint can't be justified.

I mentioned EPCA, which is --

JUDGE WILKINS: But if we find that -- if we disagree with your view of what findings the EPA made and we're reviewing those findings in a fairly deferential fashion of substantial evidence, then doesn't that resolve the case, even under that standard?

MR. FLOWERS: I don't think so, and I think we have to look back at the context of Shelby County. In Shelby County you, of course, had this long history of egregious voting rights violations by some states (indiscernible) by the Voting Rights Act, and even there, Congress said, no, looking at this data that establishes some historical connection isn't going to be enough, it's a more demanding test than that, and under that sort of more demanding version of the appropriate inquiry, which I think is what they were doing in Shelby County, I'm not aware of anything in the record that establishes that kind of really strong connection between California, in particular, and climate change.

(Indiscernible) entertain questions on that. I know we've been here a while already. So I'll briefly go through --

JUDGE GARCIA: Can I ask you a question about EPCA?

MR. FLOWERS: As many as you'd like, yes.

JUDGE GARCIA: I appreciate the comparison you make to the MEMA case. Essentially, you say, maybe EPA didn't have to consider the constitutional claim there, but the Court went on to address that on the merits, right?

It seems like one potential distinction there is that the question under EPCA here just seems incredibly fact-intensive to decide whether individual standards are sufficiently related to fuel economy. For example, I think your brief mentions carbon dioxide, and I'm not sure where to look to find evidence about methane --

MR. FLOWERS: Sure.

JUDGE GARCIA: -- and nitrous oxide. And so it just makes me wonder whether the better vehicle for this is a district court case, where that type of a record can be built and -- anyhow, I just want to know what your response is to that concern and potential distinction --

MR. FLOWERS: Yes. No, I'm --

JUDGE GARCIA: -- from MEMA.

MR. FLOWERS: -- I'm grateful for the question because it actually brings me right to where I wanted to go anyway, which is, begin by stressing what we're not arguing. We are not arguing that every emissions control limitation with any connection, no matter how tangential, to fuel standards or average fuel standards is preempted.

We are arguing that related to has some bite, it

means something, and so there is a line to draw somewhere, and wherever you draw that line, the standards here are clearly on one side of it, and let me explain how we know that's true even without the sort of record you might build up at a trial.

It is conceded in this case, and the EPA has specifically found, that there is an intrinsic mathematical relationship between CO2 emissions and fuel economy. So to regulate one is just to regulate the other by a different name. So when we look at the low-emissions vehicles portion of the program, it limits how much CO2 can be emitted from a vehicle. Well, that is a fuel economy standard by a different name and therefore relates to fuel economy. If you look at the zero-emission vehicles program, we don't even need evidence. We have a statutory (indiscernible).

So under the statute, when the Government determines compliance with the average fuel economy standards, it has to assign a miles-per-gallon equivalent to zero-emission vehicles. That means that a percentage of your vehicle -- that -- of your zero-emission vehicles -- the percentage of zero-emission vehicles in your fleet will directly bear on your compliance as a manufacturer with average fuel economy standards.

So, again, we have that incredibly inextricable link between the two, and that's what makes this context

different from other ones where, say, you require a reduction in carbon monoxide or requires a catalytic converter. Well, maybe there can be a debate about how -- what is the relationship there between the rule and fuel emissions, but I don't think we have to worry about that in this case.

And I take your point, it may be easier to deal with this at a district court level, but I think the Court has jurisdiction over it and therefore has a duty to consider it, even if there might be some other forum in which it can be heard.

JUDGE WILKINS: I want to ask you the question I've asked the advocates earlier. Do you see any point or benefit in us deferring our decision until the panel makes its determination from the argument yesterday?

MR. FLOWERS: Judge Wilkins, I think this is one issue on which all the parties are aligned. We think there's no reason to wait for that decision and can go ahead and issue a decision in this one.

I'm happy to reserve the rest of my time -- I guess I'm over time -- but some time for rebuttal.

JUDGE WILKINS: We'll give you some time.

MR. FLOWERS: All right. Well, thank you very much.

JUDGE WILKINS: Thank you. All right. For EPA,

Mr. Hostetler.

ORAL ARGUMENT OF ERIC G. HOSTETLER, ESQ.

ON BEHALF OF THE RESPONDENT EPA

MR. HOSTETLER: Good morning, Your Honors. Eric Hostetler for the United States. Across more than 230 years of constitutional history, equal sovereignty principles have never been construed to limit plenary commerce power in the manner my friend suggests, but if I may, I would like to start with the standing defects, because I think you can start and stop there.

Starting with the alleged constitutional injury, the problem here is that petitioners are not -- have not identified any particularized sovereignty harm. Crucially, these states are not seeking relief that would enable them to exercise any more power than they can presently exercise, quite to the contrary. They're seeking relief that would only deprive them and other states of the ability to adopt the California level of stringency into their own state laws, and we think that any kind of cognizable sovereignty injury does require an alleged loss of power that the sovereign prefers to exercise. That's what sovereignty is all about, the exercise of power. Yet these states make clear that they accept, they embrace federal preemption in this regulatory space.

JUDGE GARCIA: So why aren't they right about the

analogy to the equal protection cases, where you can resolve an inequality injury by --

MR. HOSTETLER: Right. Well, I --

JUDGE GARCIA: -- leveling down?

MR. HOSTETLER: -- I think it's important to recognize that these states aren't advancing a Fourteenth Amendment equal protection claim, such as an individual could assert, and we think the equal protection case law just is inapposite.

In the equal protection context, you have alleged discrimination against a disfavored class of individuals and, in some instances, like where there's race or sex discrimination, that discrimination in and of itself can create a cognizable stigmatization injury that can be remedied through the withdrawal of benefits to the favored class. That's not the dynamic that's going on in the context of a Tenth Amendment-type sovereignty claim. There it's all about an alleged loss of power. That's, again, what sovereignty is all about. It's not about stigmatization per se. So we don't think that Fourteenth Amendment equal protection case law carries over to this sort of Tenth Amendment-type claim.

And I'll move on to their other theory of standing, the alleged monetary injuries. We don't think those fare any better. Their principal allegation here

through their expert declaration is that they think they're going to pay higher prices for the vehicles in their state fleets over the remaining two model years of the waiver.

We think that their expert's academic hypothesis is overly speculative and unsubstantiated, and we think it's disproved by the real-world empirical evidence that's contained in the declaration submitted by Mr. Cunningham that was appended to California's declaration, and just a few things to highlight regarding some of what we think are the deficiencies in this declaration.

First, the declarant doesn't even acknowledge, much less grapple with, the redressability issue. They don't -- they don't grapple with the fact that automakers have announced plans already to greatly expand their production of electrical vehicles to meet market demand. Just look at what the automakers themselves have told you regarding their plans in their brief that supports California's waiver.

Second, their expert's core assumption that automakers are going to need to sell electrical vehicles in a loss in California because otherwise consumers aren't going to be willing to buy them is readily disproved. Look at the sales data in the Cunningham declaration reflecting that in fact are -- electric cars in California are already selling at volumes greater than what California requires.

It reflects that consumers in many cases are paying thousands of dollars in excess of the MSRP -- all of which leads to the conclusion that their expert's corollary ultimate assumption that manufacturers are going to have to raise prices on conventional vehicles nationwide is incorrect and unfounded.

So we think their monetary theories of injury are overly speculative, that there's no redressability, and so we think you could stop at Article III standing with respect to state petitioners, and we do think since their claims are completely independent of industry petitioners' claims, that they need to demonstrate standing on their own.

JUDGE WILKINS: What about their citation of Bond?

MR. HOSTETLER: I'm sorry. What was the question?

JUDGE WILKINS: The citation of Bond, the Bond case, for the proposition that if fuel petitioners have standing, then the state petitioners do as well.

MR. HOSTETLER: Yes. I'm unfamiliar with that particular case, but I think it's well established in the case law that where you have independent claims, standing needs to be demonstrated for each claim. So it doesn't matter what petitioner is asserting which claim. You have two independent claims here. Industry petitioners didn't advance these claims, only state petitioners did; therefore, we think they need to assert -- establish standing, and it's

their burden to do so.

Are there further questions about --

JUDGE GARCIA: There was also a suggestion that if we believe there's standing for the constitutional claim on their theory of equal sovereignty, that that also gives them standing to raise all of these statutory arguments in the case because those would eliminate the waiver and therefore redress, I suppose, part of the sovereign injury. Do you have a response to that?

MR. HOSTETLER: Yes. That can't be correct, Judge Garcia, because let's assume for purposes of discussion that they do have standing based on the constitutional theory. Let's suppose you reject their constitutional claim. They need -- that theory of standing goes away. They need some other theory of injury to survive, to advance the separate EPCA statutory claim. So you would need to reach their monetary theory of injury regardless.

Further questions about standing? If not I'll move on to the merits.

We think the constitutional claim falls short, both because -- two reasons -- both because equal sovereignty principles don't have application to routine private regulation of commerce but also because, regardless, we think these petitioners have forfeited any argument that Congress lacked a good enough reason for the waiver, even if

you were to assume for the sake of discussion that equal sovereignty principles had some application.

I want to start with the latter point because I think it's dispositive in and of itself -- that petitioners are resting their case entirely here on their theory that there's a per se bar on differential preemption treatment, categorical bar. I know my friend has offered some arguments this morning about why he thinks that bar wasn't met, but I didn't see those arguments in their brief. We think that those arguments are forfeited, that they have not made any case that Congress lacked a good enough reason.

So we think you could stop there, but moving on to the -- moving beyond that forfeiture problem, if you do want to address the merits, we do think that there's a sharp distinction between the kind of analysis the court did in Shelby County and what's going on here.

The general context is that, in agreeing to enter the Union and abide by the Constitution, states from the founding agreed to compromise to federal supremacy in the realm of interstate commerce. That's a foundational principle, that where Congress is acting under the Commerce Clause, it holds plenary power to decide how to do so, thus meet regional needs, and that's how the Commerce Clause power has always been understood throughout history, and Congress's choices, of course, are the result of a

democratic process in which all states are represented. And not to put too fine a point on it, but I'm not aware of a single case throughout history where a court has ever applied equal sovereignty principles to routine regulation of private commerce, which is what's going on here. This is the regulation of privately manufactured automobiles.

And in Shelby County, going back to a question you asked, Judge Garcia, the Supreme Court was concerned because there was an intrusion into a sensitive area of core sovereign power: the state's ability to determine its own election procedures. This case doesn't involve anything like that kind of intrusion into a core of state sovereign power. Instead, there's just a displacement of regular police power.

Emission standards for privately manufactured automobiles, you know, aren't directly regulating the states. The states don't have a right to regulate those emissions. That isn't displaced when the federal government acts and preempts them. So we don't think this is even a gray area. We think -- you know, everyone agrees here, including my friend, that petitioners can -- that the federal government can properly preempt regulation in this field.

On a more practical level, also, this is a novel theory that would be very disruptive and, we think,

unworkable. On the disruptive front, we think there are many more than five examples of where there's grandfathering in the U.S. Code or where states are exempted from preemption. Just to take one notable example, Texas has its own authority to regulate the electric grid that no other state -- no other state has that kind of authority. That's very significant and meaningful. That would go under, under their theory.

And we think their theory is also quite unworkable inasmuch as we don't think they've offered any particularly clear test as to when a statute should be deemed constitutional and when it should not be. We think it would create enormous line-drawing problems, particularly when you start thinking about conflict preemption principles and how particular statutes, even where they don't explicitly differentiate between states, might have unequal preemptive effects.

Were there any questions about the merits? If not, I can say a couple words about the EPCA claim.

On EPCA, in Section 209, Congress did specify the factors that it wanted EPA to consider for purposes of waiving preemption under the Clean Air Act, and we think this Court has already sufficiently clarified in its previous decisions, including MEMA I and MEMA II, that EPA should not and need not go beyond the specified

congressional criteria. So here, EPA was not obliged to consider, and appropriately did not consider, preemption principles arising under a statute that it does not administer.

JUDGE GARCIA: What about the point I raised with Mr. Flowers, that in MEMA I the Court did go on to consider the constitutional claim and, by analogy, why doesn't that mean that we're under an obligation to consider EPCA preemption even if EPA wasn't required to?

MR. HOSTETLER: Right. Well, Judge Garcia, I think your jurisdiction is under 7607, is to consider the validity of EPA's Clean Air Act action, and in some cases EPA's Clean Air Act action itself may be closely tied to a constitutional claim, as it is with the equal sovereignty claim. You know, if you agreed with their equal sovereignty claim, that would void this action. We think that's very different than a situation where someone is bringing a claim under an entirely different statute. And this isn't a constitutional claim. The EPCA claim is just a statutory claim brought under a different statute.

So hypothetically, you know, there might be any number of claims someone might conceive of that they want to bring, challenging a particular California state law. It's not your obligation or task to go beyond your jurisdiction and opine on claims that aren't fairly presented.

In this case all your -- your jurisdiction is just to assess whether the Clean Air Act preemption was appropriately decided, and there's a sharp analytical distinction between EPCA preemption and Clean Air Act preemption. EPA's jurisdiction extends to the latter. Likewise, your review jurisdiction covers the latter.

JUDGE GARCIA: So I think what they point to is, they would say in 7607 there's no limiting language; yes, that's in the Clean Air Act, but it essentially says you can seek review, and then we look to the APA, which says we have to ask whether EPA's -- sorry, the APA if I said EPA -- we have to ask whether it was in accordance with law, just like we have to ask if it's in accordance with the Constitution, and why doesn't our review under the in accordance with law --

MR. HOSTETLER: Well, that --

JUDGE GARCIA: -- carry over to --

MR. HOSTETLER: -- that begs the question of what law you're applying. The law you're applying here is the Clean Air Act and did EPA appropriately exercise its authority under the Clean Air Act? You don't go out and try to dream up claims that are unrelated to what the EPA -- EPA action that it actually took.

And look, EPA didn't even address EPCA preemption in this record, and even if you wanted to go out and start

thinking about an EPCA claim, you don't have a record before you that would allow to you do that. I mean, presumably, that would be a very fact-intensive inquiry. A trial court, which is where this claim should be brought, would have the ability to conduct an evidentiary hearing, et cetera. Your record is limited to the EPA record. EPA didn't address the issue.

So the proper remedy -- it's not like someone doesn't have a remedy. If they want to bring an EPCA claim, they can go to a trial court, just like the litigants did in Green Mountain and Central Valley.

JUDGE WILKINS: All right. Thank you.

ORAL ARGUMENT OF M. ELAINE MECKENSTOCK, ESQ.

ON BEHALF OF THE RESPONDENT-INTERVENOR CALIFORNIA

MS. MECKENSTOCK: May it please the Court, Elaine Meckenstock for respondent-intervenor California. I'm just going to make a couple points about petitioners' economic harm standing. I first want to make sure that the Court does understand that state petitioners have not alleged any economic harm from the state's -- from California's greenhouse gas emission standards. They only alleged any harm from zero-emission vehicle standards, and they haven't met their burden there either.

In addition to the timing concerns that Judge Garcia has raised about redressability, which are serious,

there is no evidence of any cross-subsidization ever happening in the past, much less in the future, and in addition, although they submitted declarations from each of their states, there's nothing in those declarations that tells us when, how, and by whom the prices they pay for vehicles are established. So for all we know, they've already negotiated long-term contracts for model year 2025. There's just nothing in the record, and it was their burden.

Moving on to constitutional standing, we agree with the U.S. that state petitioners have not identified any action they wish to take to which Section 209(b)(1) is a barrier. To the contrary, they willingly accept application of federal emission standards in their state, meaning they don't desire to regulate new motor vehicle emissions themselves.

And to the question about whether -- why the equal protection remedy of leveling up or leveling down doesn't establish injury for them, two things: one, the fact that that remedy exists, that remedy exists because it remedies the injuries of people who suffer the concrete harm, those who have been denied the opportunity or privilege that they want -- these petitioners don't claim to want the opportunity or privilege -- and the remedy doesn't expand the scope of who is actually injured. So the fact that someone else observing the unequal treatment who wasn't

concretely injured might be happy about the leveling-up or leveling-down remedy, that it removes the equality; it doesn't expand the scope of injury to that person.

So the fact that you don't want the thing that is being unequally denied and the fact that then other, you know -- anyway, I'm not making sense. I'm sorry.

JUDGE WILKINS: Well, that leads me to a question that I meant to ask your friend on the other side and forgot, but do you know whether any of the state petitioners have ever exercised Section 177, right, privilege, et cetera, to adopt the California standard?

MS. MECKENSTOCK: I don't think so. I'd have to go back and look at exactly the full list. They are not currently exercising that opportunity, but I don't know for sure that they haven't in the past.

I will, just --

JUDGE WILKINS: If they have, do you think it would make any difference?

MS. MECKENSTOCK: I don't think so because that still wouldn't necessarily be an indication that they currently want to adopt their own emission standards.

JUDGE WILKINS: No. I mean, do you think that that would undermine -- if they have in the past, do you think that that undermines their equal sovereignty argument if any of them have?

MS. MECKENSTOCK: I don't know whether it would cut one way or the other. They would be simply, have been exercising a right provided to them by Congress. I'm not sure that it would affect the standing analysis or the analysis on the merits.

The other thing I wanted to say about the leveling up and leveling down is that in addition to not expanding the population of people who are injured, it also demonstrates what's wrong with this case, because the remedy in Shelby County wasn't leveling up or leveling down. There was no question that once the constitutional violation was identified, the only solution was to remove the federal intrusion into state sovereign -- core sovereignty. There was never a question about, well, let's just deprive everyone, all the states, of this sovereign authority, right? And so that whole leveling-up and leveling-down argument just doesn't work in this context.

And this is -- fundamentally goes to the merits as well, because where the federal government unconstitutionally infringes upon core sovereignty, the solution is to remove the intrusion, and we know -- we know that it is that infringement upon core sovereignty that triggers the equal sovereignty doctrine from Shelby County itself, from the equal footing cases, and from the federalism canon cases.

And Shelby County talks about states retaining autonomy, quote, outside of the strictures of the Supremacy Clause. It also talks about the Constitution allocating power between the federal government and the state power, and to Judge Garcia's point, that is what the court was recognizing, that the federal government has paramount sovereignty with its enumerated powers and that what was happening in the --

JUDGE GARCIA: Because their -- their answer to that, right, is that Congress has supreme authority pursuant to the Commerce Clause but what it doesn't have is just that nobody would have assumed that includes the ability to take sovereign authority from some states but not others, and I do think it's fair to say, the examples of this happening, something analogous happening over the course of our history, are a bit few and far between. So how do you respond to that argument?

MS. MECKENSTOCK: Well, they may be few and far between, but they're hardly nonexistent. So -- in fact, if you look to Oklahoma v. Castro, which was a case we cited in our brief, that's a 2022 decision where the Supreme Court is describing Public Law 280, which allows certain states to enforce state law for offenses committed by or against Indians on Indian land. Other states can opt in to that authority, but they need tribal consent, which means other

states may not get it. That's, yes, unequal sovereignty under petitioners' definition. My friend from EPA mentioned Texas's grid. Texas also has authority to regulate more submerged lands than other states. Ohio has some power over vehicles on its highways that other states lack.

And then to the Compact Clause examples, there are myriad of those, and we know from the U.S. Steel case that Congress only has to approve compacts that enhance state power at the expense of federal supremacy, and so every time Congress approves a compact, it's changing state authority for the compacting states and not for everyone else.

And we cited to the Northeast Dairy Compact in our brief, which is almost identical to the structure we have here. It was a group of states who wanted to set their own price for dairy products that was different from the federal price that applied everywhere else -- so just like here, where we have California and 177 states who follow one set of emission standards and everyone else follows the federal standard. It's exactly the same, and petitioners have never explained how that could be constitutional and this isn't. And there are myriad other compact clause examples, including the Red River Compact described in the Tarrant Regional Water District case at 569 U.S. 614.

And even if there were -- and then I also just want to come back to the fact that we know that it is this

federal intrusion into core state sovereignty that is the trigger here. You can look to, for example, Coyle v. Smith, which Shelby County cited extensively, and that is a -- it's an equal footing case, and so it's about states admission into the Union, but it distinguishes between conditions on admission that are, quote, within the scope of conceded powers of Congress -- those are fine -- and, quote, those concerning matters which would otherwise be exclusively within the sphere of state power, and that's where we draw the line, and Congress can't cross it.

And the same is true in Gregory v. Ashcroft, where the court considered a Commerce Clause legislation about age discrimination, and it was perfectly fine, perfectly constitutional, no concern whatsoever that it reached a large population of state employees, but the court drew the line at its application to high-ranking state officials with policy making rules because that would infringe upon core state sovereignty.

So this is the consistent line we see through all of these cases, and there's certainly no reason to depart from that line here, and even if there were, as we talked about earlier this morning, the Section 209(b)(1)(B) finding that EPA makes confirms that every time it grants a waiver for California's revised program, someone is looking at whether California still has a need for that second program.

That's exactly what Congress instructed EPA to do, to make the same finding it made when it passed this statute in 1967, amended it in 1977, and adopted it into 209(e) in 1990.

And then I just do want to make sure that I briefly touch on EPCA. I know I'm over time. On EPCA preemption, a couple points -- I agree with EPA that there is a distinction between constitutional claims and the statutory claim petitioners try to bring here. What I think in accordance with the law means here is, did EPA follow Congress's direction under the Clean Air Act, which means did it look at the three criteria, which are the only bases on which EPA can deny a waiver? There's nothing in this Clean Air Act provision about EPCA preemption. So it was not an error for EPA not to look at it, and this Court doesn't have jurisdiction over that claim.

I also think it's important to mention, if the Court does decide to reach the claim and -- sorry, just backing up one second.

Judge Garcia, you're absolutely right that these can be fact-intensive claims. The Green Mountain court, I think, called a two-week trial to resolve this preemption question under EPCA, and the Central Valley Chrysler-Jeep case was resolved on summary judgment after massive evidentiary hearings. So this is not the appropriate forum

for that to be resolved and neither is the proceeding before EPA.

I also want to mention, my friend from Ohio said that EPA found that there was a mathematical relationship here. I don't see that anywhere in this decision or any other -- even the 2013 decision. That's not in this record. So -- and I'm not exactly sure what he was talking about, but even if EPA made that finding some many years ago, it is true now that most manufacturers are complying with California standards by selling zero-emission vehicles, and the -- those vehicles do not have -- do not use fuel under the definition of the Energy Policy/Conservation Act or have fuel economy, and whether or not they make it easier for automakers to comply or give automakers more options to comply with the fuel economy standards, it doesn't make California's zero-emission vehicle standard related to a fuel economy standard. In fact, we had a whole day of argument yesterday, part of which was about NHTSA being unable to set a zero-emission vehicle standard, and so our standard does exactly what NHTSA is prohibited from doing. So those standards cannot be related to each other.

JUDGE GARCIA: On the question of the record, could you just say a little bit about specifically what types of evidence California thinks is missing from this record that you would put in if there were a litigation over

EPCA preemption?

MS. MECKENSTOCK: My understanding is that the two-week trial in Green Mountain involved a lot of record evidence about how automakers can reduce greenhouse gas emissions. Some of -- some of those technologies also improve fuel economy. Others don't.

So I think there could be a whole evidentiary record about, if we're going to get down into, you know, the numbers, if related to -- I don't think related to -- to be clear, I don't think related to turns on the number, like, is it 60 percent or 70 percent of the technology, but if it did, we would need a trial to uncover all that evidence and figure it out, but as I said, the -- even -- the zero-emission vehicles are now the technology that is predominantly being used to comply with our standards, and they haven't established standing for the GHG standard anyway, and there is no relationship between the zero-emission vehicle standards and the fuel economy standards.

And if the Court has no more questions, I thank the Court for its time.

JUDGE WILKINS: Thank you. All right. Mr. Flowers, we'll give you four minutes.

ORAL REBUTTAL OF BENJAMIN M. FLOWERS, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. FLOWERS: Thank you, Judge Wilkins, and I'll try to be brief. I'll begin by addressing your question. I have the same answer as California. I'm not aware of any exercise of 177 by the petitioner states, but I can't certify it for certain that it's never happened.

On the record point about the finding, about the mathematical connection, it's 84 Fed. Reg. 51315. It's also Joint Appendix 495. This is the joint rulemaking of NHTSA and EPA: The relationship between fuel economy standards and regulations that limit or prohibit tailpipe carbon dioxide emissions from automobiles is a matter of science and mathematics. Commenters did not and cannot dispute the direct scientific link between the two, and there's no -- that's never disclaimed in any (indiscernible).

Just a few additional points -- I think one point I really want to emphasize is that if we have standing on any of our theories, you can address any claims in this case.

I think my friend suggested that if we have constitutional standing and our constitutional claims fail, you can't reach the statutory arguments. Respectfully, that's wrong. Number one, it entangles standing in the merits; two, maybe the more severe problem is, that turns the constitutional avoidance notion on its head. It becomes constitutional collision. You would be required, I think,

to adjudicate a constitutional claim, to ensure that there's standing, before reaching a statutory argument. That cannot possibly be correct.

Now, on standing I think the EPA suggested that, if I understood it right, it's that nothing is -- we're not, we're not being denied anything somehow and that doesn't confer standing. It's important to realize, we're not here complaining that California gets something we don't have. Our main complaint is that something has been taken from us, our sovereign equality. There is no case that says that if a right is taken from you, that's not enough to confer standing. If we have an easement and we never used the easement, we have no plans to sell it, as a private owner does, and the government takes that from them, they don't have to show that they plan to turn it into a bike path or plan to sell it to have standing. The taking of that right is itself an injury.

And they mention the stigmatic harm from the equal protection context. It's true, that's an additional harm, but it's a harm that also applies here. The whole premise of the equal sovereignty doctrine is the equal dignity of the states. I think that's a direct quote from Shelby County. The dignitary interests are implicated here too.

Two additional points, both on the merits of equal sovereignty -- first, I think they suggested that we

forfeited an argument that we could prevail under the Shelby County test. Respectfully, that's not right. You forfeit claims, not arguments. Our claim all along has been that Section 209(b) is unconstitutional, both on its face and as applied.

Now, we proposed a test, which is a bright-line rule. They disagreed with that test and responded by proposing a test of their own, the Shelby County test. We are entitled, as we did in our reply brief, to respond by explaining why we win under that test also. We say this all the time: If a party argues that they win under strict scrutiny and then the other side says it's not strict scrutiny, it's rational basis, they can still argue that even under rational basis they prevail, and that brings me to the final point.

I think my friend from California said that the equal sovereignty doctrine is limited to areas where the state's power is exclusive. We know for certain that's not right. States do not have exclusive power over election law; yet Shelby County applied it there.

I mentioned Escanaba. That's a case about the Commerce Clause, and in that context -- or I should say, it's a case about the regulation of navigable waters. The court recognized Congress's power under the Commerce Clause to regulate that and nonetheless applied equal footing

doctrine.

And my final point is that this is no run-of-the-mill violation here. This is unlike anything you see in the history of our Republic, where you give one state such immense power, particularly in the context of global warming, to regulate something of worldwide significance. So I don't think ruling for us jeopardizes many laws at all and it is certainly very few, or in fact none, of this magnitude.

So if there are no further questions, I'm happy to rest. We ask that you vacate the (indiscernible).

JUDGE WILKINS: All right. Thank you. We'll take the case under advisement.

(Whereupon, the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

_____ September 24, 2023

WENDY CAMPOS

DEPOSITION SERVICES, INC.