ORAL ARGUMENT NOT YET SCHEDULED

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

No. 19-1230 (and consolidated cases)

UNION OF CONCERNED SCIENTISTS, et al.,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION et al.,
Respondent-Intervenors.

On Petition for Review of Final Action of the
National Highway Traffic Safety Administration
84 Fed. Reg. 51,310 (Sept. 27, 2019)

COMBINED BRIEF OF THOMAS C. JORLING, MICHAEL P. WALSH, AND MARGO T. OGE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and other *amici* appearing in this case are listed in the brief for State and Local Government and Public Interest Petitioners ("Joint Petitioners"). The parties have consented to the filing of *amicus* briefs.

References to the rulings under review and related cases also appear in the brief for Joint Petitioners.

Respectfully submitted,

/s/

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GLOSSARY

"CAA"	Clean Air Act
"CAFE"	Corporate Average Fuel Economy
"EPA"	Environmental Protection Agency
"EPCA"	Energy Policy and Conservation Act
"GHG"	Green House Gases
"LEV"	Low Emission Vehicle
"NHTSA"	National Highway Traffic Safety Administration
"ZEV"	Zero Emission Vehicle

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), *amici* Thomas C. Jorling, Michael P. Walsh, and Margo T. Oge state that they are aware of other planned *amicus* briefs in support of Joint Petitioners. Separate briefing is necessary given the unique experiences of *amici*, respectively as, (i) a drafter of the 1970 Amendments to the Clean Air Act ("CAA") and former Commissioner of the New York State Department of Environmental Conservation, (ii) a former top regulator of EPA's automobile emissions division and international technical advisor on automobile emissions technology, and (iii) former director of EPA's Office of Transportation and Air Quality who oversaw the development of the 2010 and 2012 Light-Duty Vehicle Greenhouse Gas Emissions standards and EPA's grant of the 2009 waiver for the first phase of California's greenhouse gas ("GHG") emissions standards. Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

No person other than *amici curiae* or their counsel contributed money that was intended to fund preparation or submission of the brief.[1]

[1] Ms. Oge is a member of the board of Union of Concerned Scientists and of Volkswagen Group's Global Sustainability Council. She is not compensated for her roles.

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

Thomas C. Jorling, Michael P. Walsh, and Margo T. Oge are each uniquely qualified to expound on the historic and current importance of California's and other states' authorities under the CAA, and the irrationality of EPA and NHTSA's position regarding the CAA and Energy Policy and Conservation Act ("EPCA").

Thomas C. Jorling has been a leading environmental regulator, Senate staff member, and educator for the past 50 years. He developed expertise in clean air and environmental policy in his roles as Minority Counsel for the U.S. Senate Committee on Public Works; EPA Assistant Administrator for Water and Hazardous Materials; Commissioner of the New York State Department of Environmental Conservation; Director of the Center for Environmental Studies at Williams College; and Vice President of Environmental Affairs for International Paper Company. Mr. Jorling served as Minority Counsel to the Republican members of the Committee throughout the development and passage of the 1970 CAA Amendments. He is widely recognized as an "architect" of the 1970 Amendments. As Commissioner of the New York State Department of Environmental Conservation, Mr. Jorling was involved in the negotiation of the 1990 CAA Amendments and New York State's adoption of California's mobile source emissions standards.

Michael P. Walsh is a technical expert and former top regulator in the field of motor vehicle pollution. He served at the City of New York Department of Air Resources (1970 to 1974) and EPA (from 1974 to 1981), eventually serving as director of both agencies' motor vehicle pollution control efforts. Since leaving government, he has been an independent technical advisor on auto emissions and technology. He served as advisor to the U.S. Senate Environment and Public Works Committee during development of the 1990 CAA Amendments and co-chaired EPA's Mobile Source Technical Advisory Subcommittee for 12 years. Mr. Walsh served as a consultant to the Organisation for Economic Co-operation and Development in the 1980s in a multiyear effort to advance early motor vehicle pollution controls in Europe. He subsequently brought his expertise to consulting work across Asia and Latin America.

Margo T. Oge served with EPA for 32 years, most recently as Director of EPA's Office of Transportation and Air Quality from 1994 to 2012 during the Clinton, Bush, and Obama administrations. She is widely recognized as a key architect of EPA's efforts to reduce motor vehicle air pollution. During Ms. Oge's tenure, the Office took numerous major regulatory actions to safeguard the health and environment of Americans, oversaw review of 35 California waiver requests, and worked with NHTSA and California on development of both phases of the landmark light-duty vehicle GHG and Corporate Average Fuel Economy

("CAFE") standards (75 Fed. Reg. 25324 (May 7, 2010); 77 Fed. Reg. 62624 (Oct. 15, 2012)).[2]

Amici represent three distinct perspectives but all reach the same conclusion: the Waiver Withdrawal,[3] Section 177 Determination,[4] and NHTSA Preemption Rule[5] are contrary to the structure and intent of the CAA and a half-century of practice by California and EPA.

First, Mr. Jorling's knowledge of the legislative history of the CAA and his experience as a state regulator show that the agencies' actions (i) ignore states' valid interests in addressing pollution problems affecting their citizens, which are embedded in the letter and intent of the CAA, and (ii) deprives states of a critical means of reducing GHGs, the source of today's climate crisis. EPA's statutory duties and responsibilities are to assist the states in protecting the public health and welfare—this action directly obstructs states from meeting these obligations.

Second, Mr. Walsh shows that for over fifty years, and as intended by Congress, California has served as a "laboratory for innovation" in the field of

[2] *See generally,* Margo T. Oge, *Driving the Future: Combating Climate Change with Cleaner, Smarter Cars* (2016).
[3] (JA__-__[FinalAction51328-50]).
[4] (JA__-__[FinalAction51350-51].
[5] (JA__-__, __-__[FinalAction51311- 28,51361-63]).

motor vehicle emissions reduction. This action effectively eliminates California's ability to lead in the reduction of GHGs.

Third, Ms. Oge's experience makes clear that the Waiver Withdrawal contradicts decades of EPA practice in analyzing and granting waivers to California. Furthermore, based on Ms. Oge's lead role in crafting the light-duty vehicle GHG emission and CAFE standards in conjunction with NHTSA, the NHTSA Preemption Rule is incompatible with (i) the purposes of EPCA and the CAA and (ii) basic factual distinctions between GHG emissions and fuel economy.

ARGUMENT

I. THE ACTION ILLEGALLY DEPRIVES STATES OF THEIR CAA AUTHORIZED ABILITY TO REGULATE GHG EMISSIONS UNDER THEIR POLICE POWER, AND IS CONTRARY TO THE TEXT, HISTORY AND INTENT OF THE CAA

Congress enacted the CAA to address nationally the scourge of air pollution and its effects on human health and the environment. Based on Mr. Jorling's first-hand knowledge gained while drafting and negotiating many provisions of the CAA, Congress enacted Sections 209 and 177 of the CAA with the specific intent of reserving to the states the right to impose stricter standards on vehicle emissions in order to protect their citizens from harmful air pollution. The present action directly contradicts this statutory language and intent. Section 116 of the CAA allows the states to adopt emission standards that are more restrictive than the

federal standards for *any* air pollutant, including GHGs, with limited exceptions. 42 U.S.C. § 7416. EPA and NHTSA's repudiation of the established understanding of the CAA and EPCA hamstrings the states' ability to adequately protect their citizens from air pollution by setting more restrictive standards for pollutants, including GHGs. The action contravenes both the letter and spirit of the CAA and must be overturned.

A. Congress Reserved to States the Right to Set Standards More Stringent than the Federal Standards for Air Pollutants, Including Greenhouse Gas Pollutants

1. Congress created Section 209's waiver provision to enable California to address its extraordinary air pollution problems and to continue innovating in vehicle emissions controls.

During negotiation of the Air Quality Act of 1967, California's congressional delegation successfully advanced the case that the state required a special exception to federal preemption of state motor vehicle emissions standards, because of the severe problems facing California, which justify standards "more stringent than national standards" and its "pioneering efforts" in regulating vehicle emissions. *See* S. Rep. No. 403, 90th Cong., 1st Sess. 33 [1967](noting "[t]o date only California has actively engaged in this form of pollution control and, in fact, the initial Federal standard is based on California's experience").

As a result, Congress included a waiver provision in the Air Quality Act, allowing California to establish standards for mobile sources, given certain

conditions. Pub. L. 90-148, § 2, 81 Stat. 501 (1967). The provision was refined in the 1970 CAA Amendments that resulted in the modern CAA. Pub. L. No. 91-604, § 8(a), 84 Stat. 1694 (1970). The Section 209(b) waiver provision allows California to adopt standards that are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543.

2. Congress enacted Section 177 to allow other states to protect public health and the environment through regulation of air pollutants emitted from mobile sources.

By 1977, non-California states were unable to sufficiently protect their citizens from air pollution or meet the federal ambient air quality standards, because of Section 209(a)'s preemption of their efforts to reduce emissions from new motor vehicles. As the Committee on Interstate and Foreign Commerce stated in 1977:

> [t]he Committee is concerned that this preemption (section 209(a) of the Act) now interferes with legitimate police powers of States, prevents effective protection of public health, limits economic growth and employment opportunities in nonattainment areas for automotive pollutants, and unduly stifles enforcement of present federal emission standards.

H.R. Rep. No. 294, 309 [1977]. Congress responded by enacting Section 177 as part of the 1977 CAA Amendments to enable other states to adopt California's mobile source standards. Public Law 95-95, § 1, 91 Stat. 750 (1977).[6]

[6] Notably, Congress heightened the importance of the California waiver provision after years of EPA implementation of Section 209(b). *See also* Petr's Br. at 43-44.

In 1990, under Mr. Jorling's leadership as Commissioner of the New York Department of Environmental Conservation, New York was the first state to use its Section 177 authority to adopt California's Low Emission Vehicles standards.[7] Primary reasons for adoption were to obtain additional emissions reductions to protect communities from harmful air pollution and help meet the national ambient air quality standards.[8] Twenty years after the enactment of the 1970 CAA Amendments, improvements to New York City's air quality began to recede due to the growing number of automobiles emitting nitrogen oxides and other smog-producing pollutants.[9] Without imposing tougher mobile pollution control standards, the state could not meet the federal ambient air quality standards.[10] Numerous states, in the interest of protecting the health of their citizens, have adopted California's standards [11]

The objective of the CAA is to protect Americans from the health hazards of air pollution. The California program and its adoption by other states has done that, and continues to do so. By limiting the adoption of measures necessary to protect

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[7] Decl. of Steven E. Flint, Dir. of the Division of Air Resources, N.Y. State Dep't of Envtl. Conserv., B-083 (June 18, 2020).
[8] Allan Gold, *After Years of Becoming Cleaner, New York City Air Grows Dirtier*, N.Y. TIMES (Apr. 18, 1990).
[9] *Id.*
[10] Allan Gold, *New York Sets Stricter Rules on Emissions*, N.Y. Times (Sept. 18, 1990).
[11] Cal. Air. Res. Bd., *States that have Adopted California's Vehicle Standards under Section 177 of the Federal Clean Air Act* (2019).

public health as mandated by the CAA, EPA's action constitutes an unlawful act. There is no colorable technical or legal justification for rolling back a program fully in compliance with the CAA and which has had such demonstrable public health and technology-forcing benefits.

B. EPA's Action Deprives States of an Essential Means of Reducing Greenhouse Gas Pollutants

Sections 209 and 177 were designed to protect the rights of states to promulgate standards and controls that are at least as protective, and may be stricter, than the federal standards and controls in order to mitigate the harm caused by dangerous air pollution from vehicles. The EPA action undermines states' ability to achieve this objective in the case of GHGs. Individual states are vulnerable to climate change and have already experienced serious harm to the well-being of their citizens as a result of climate driven events: wildfires (i.e. Colorado); severe and destructive storm events (i.e., New York, New Jersey, Massachusetts, and Connecticut); and sea level rise in all coastal states, to name a few examples. California faces each of these risks and more,[12] and there is a "particularly serious confluence of climate impacts affecting the natural resources and residents of California…" Joint Petr's Br. at 57.

[12]*See* Petr's Br. at 55-56. To name a few, California is also prone to deadly heat waves, water supply shortages, and threats to its agriculture industry which affects the nation's food supply.

Under Section 116 of the CAA, states have authority to set more restrictive pollution control standards or requirements than the federal standard for any "air pollutant":

> Except as otherwise provided in section[] 7543 [Section 209]… nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. 42 U.S. Code § 7416.

This provision reflects a congressional recognition of states' valid interest in addressing their own pollution problems, which should inform interpretation of Section 209. Section 209(b) was intended to carry over to mobile source standards this traditional respect for states' ability to go further than federal standards, albeit with special limits on and procedures for California and the states to adopt such standards. The language "[e]xcept as otherwise provided in [Section 209]" does not prohibit states from setting stricter air pollutant standards which must be achieved through mobile source emissions standards. Rather, if a state chooses to set a standard for an air pollutant and seeks to achieve that standard through promulgation of mobile source emission standards, it may only elect to adopt such standards for which California has received a waiver, in accordance with Sections 209(b) and 177.

There is no language in Section 116 limiting states' rights to impose standards for certain types of air pollutants. Based on a plain reading of the statute,

states have the authority to set more restrictive standards for *any* air pollutant, which includes GHGs (*see Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) ("greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant'"). The absence of pollutant-specific constraints on preemption exemptions in Sections 209(b) and 177 is further evidence that "except as … provided" in Section 116 means exactly that: EPA may not impose additional preemption (for example, for specific pollutants) that is not expressly indicated.

Many states and the District of Columbia have adopted GHG emissions targets and ZEV mandates.[13] Transportation is the largest source of GHGs.[14] California and other states have taken the logical step and used Sections 209 and 177 to adopt more stringent mobile source controls on GHGs. In 2020, New York set strict GHG emission standards through passage of the Climate Leadership and Community Protection Act. Environmental Conservation Law § 75-0107. Regulation of mobile source emissions in New York is critical to meeting emission reduction requirements.[15] Without the ability to regulate GHG emissions from mobile sources, many states have no viable means of securing the GHG reductions that they may mandate and implement under Sections 116, 209, and 177.

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[13]Ctr. For Climate and Energy Solutions, *U.S. State Greenhouse Gas Emissions Targets* (2019),
[14] EPA, *Sources of Greenhouse Gas Emissions*.
[15] Decl. of Steven E. Flint at B-087.

II. CALIFORNIA HAS SERVED AS AN INNOVATIVE LABORATORY FOR NEW EMISSION CONTROL TECHNOLOGIES THAT HAVE SPREAD ACROSS THE NATION AND THE GLOBE

Congress intended that Section 209(b) would enable California to continue serving as a "laboratory for innovation" of emissions control technology. *Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1120–1121 (D.C. Cir. 1979) (''[t]he history of the congressional consideration of the California waiver provision…indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards"). For the past 50 years, California has effectively done so and a clear pattern has emerged. California identifies a pollution problem, creates a framework of "technology-forcing" legislation (which is successful at encouraging new technology), and the federal government and the world adopt similar standards. The present action would put an end to California's proven leadership in motor vehicle GHG emissions control, which has achieved healthier air, not only for the state, but across the nation and the world.

A. California's Early Leadership in the Control of Conventional Pollutants

By the 1940s, visibility in Los Angeles often fell to a few blocks and the beautiful mountains surrounding the city were shrouded by smog. California scientists quickly determined that carbon monoxide, hydrocarbons, and nitrogen

oxides emitted from rapidly growing auto traffic, trapped by the surrounding mountains, contributed greatly to this phenomenon.[16]

In 1959, the California legislature adopted innovative legislation requiring the promulgation of standards for contaminants from automobile exhaust. However, the standards would not take effect until at least two workable emissions control technologies were developed. Ch. 200, § I, [1959] Cal. Stats. 2091. Automobile manufacturers repeatedly asserted that the technology to reduce emissions did not exist. Yet, by 1964, California had certified that three independent manufacturers had developed four workable fume-suppressing devices that could be substituted for the conventional muffler.[17] The majority of the devices used chemicals to catalytically convert hydrocarbons and carbon monoxide into water and carbon dioxide. This triggered the legal requirement that new automobiles comply with California's hydrocarbons and carbon monoxide exhaust emissions standards—the first in the nation—for the 1966 model year. Soon afterward the "Big Three"— Ford, General Motors, and Chrysler— announced that, rather than use these add-on technologies, they would meet the standards by utilizing technology they had quietly been developing in-house.

[16] Douglas Smith, *Fifty Years of Clearing the Skies* (2013).
[17] *California Moves to Cut Car Fumes*, N.Y. Times (June 18, 1964).

Following California's pioneering efforts, Congress recognized the national benefits of auto pollution reduction and enacted the 1965 CAA Amendments, which applied the 1966 California auto emission standards nationally as of 1968.[18] In 1970, Congress enacted the 1970 CAA Amendments, which required EPA to establish regulations to reduce motor vehicle emissions by 90% for model-years 1975 and 1976 compared to 1970 and 1971 models. The Clean Air Act of 1970, Public Law 91-604, § 6, 84 Stat. 1690 (1970).

The below table summarizes key examples of (i) California's innovative policies, (ii) the resulting technological or regulatory advances, and (iii) the subsequent federal adoption.

Model Year	**California Requirement**	**Resulting Technology or Regulatory Innovation**	**Federal Model Year**
1966	First hydrocarbon and carbon monoxide emission standards	Early advances in catalytic conversion (Universal Oil Products), leaner carburetors (Chrysler), and air pumps (Ford and GM)	1968
1970	First evaporative emission standard	Reduced volatile organic compound emissions using carbon canisters	1971
1974	NOx exhaust emission standard tightened	Increased use of exhaust gas recirculation	1977
1975	Hydrocarbon and carbon monoxide exhaust standard tightened	Use of oxidation catalysts	1975 (concurrent, but slightly weaker standards)

[18]Nat'l Research Council, *State and Federal Standards for Mobile-Source Emissions* 91 (2006).

1977	Hydrocarbon and nitrogen oxide exhaust standard tightened	Use of on-board computers and improved catalysts; three-way catalytic converters begin to appear	1980
1980	Evaporative emission standard tightened by 67%	Reduced volatile organic compound emissions using larger carbon canisters	1981
1980	Nitrogen oxide standard tightened by 33%	Universal use of three-way catalytic converter	1981
1982	Nitrogen oxide standard tightened by 30%	Use of improved three way catalytic converter; fuel injection on more models	Did not adopt
1988	First on-board diagnostic systems	Alerted driver to failing emissions component	Did not adopt
1989	Nitrogen oxide standard tightened by 43%	Universal use of electronic fuel injection systems	1994
1990	Zero Emission Vehicle Mandate	Requirement of zero emissions vehicles	Did not adopt
1994	Second generation onboard diagnostic systems	Dashboard alerts for maintenance on light-duty vehicles	1996
1994	First-generation Low Emission Vehicle Program	Average fleet-based approach	1998 National Low Emissions Vehicle Program
2004	Second-generation Low Emission Vehicle Program	Required sport-utility vehicles and pickup trucks to meet same emissions limits as cars	2004
2009	Pavley standards	First GHG emissions standards	2012

1. Emissions Control Technologies

The earliest catalytic converters were developed to meet California's 1966 hydrocarbons and carbon monoxide emissions standards. California's continuous tightening of these standards and institution of nitrogen oxide standards triggered a series of technological advances, including the three-way catalytic converter, which reduces not only hydrocarbons and carbon monoxide, but also nitrogen oxide; advanced electronically controlled fuel injection systems; and onboard diagnostic systems—all of which remain critical parts of emission controls in new cars worldwide today.

For a three-way catalytic converter to perform optimally, an engine's air fuel mixture must be precisely controlled, leading to the development of electronically controlled fuel injection. Today, over 95% of new gasoline powered cars sold *worldwide* are equipped with a three-way catalytic converter.[19] The use of three-way catalytic converters and electronically controlled fuel injection allow for greater than 90% reduction in hydrocarbons, carbon monoxide, and nitrogen oxide.

[19] Subsequent to its creation to meet California standards, the three-way catalytic converter became the technology of choice to comply with by legislation in Japan during the late 1970s and early 1980s, the European Union in 1992, and India and China in 2000. Emissions standards adopted by South Korea, Hong Kong, Russia, Taiwan, Thailand, Indonesia, Malaysia, Singapore, Australia, Brazil, Argentina, Chile, Canada and Mexico all effectively require new cars to have three-way catalytic converters.

To better identify when these technologies broke down, in 1988, California began requiring onboard diagnostic systems on all new cars, which alert the driver to problems related to the vehicle's emissions control systems by the now ubiquitous dashboard light. Onboard diagnostic systems also help the mechanic to identify the specific problem and repair it. As more electronically sophisticated vehicles appeared, onboard diagnostic systems became universal. Europe mandated onboard diagnostic systems with the introduction of its 2000-2001 emissions standards and China recently revised its onboard diagnostic system requirements to more closely mirror California's current requirements.[20]

2. Low Emission Vehicles I Program

In 1988, the California legislature mandated that the state achieve a 55% emission reduction of hydrocarbons and a 15% emission reduction of nitrogen oxide from 1987 motor vehicle emissions by 2001. Cal. Health and Safety Code Section 43018(b). As a result, California adopted the Low Emission Vehicle ("LEV") I program in 1990, which included stringent new exhaust emissions standards for nonmethane organic gas, carbon monoxide, particulate matter, and formaldehyde. The LEV I program had two path-breaking features.

[20] Hui He & Liuhanzi Yang, *China's Stage 6 Emission Standard For New Light-Duty Vehicles (Final Rule)* 6 (2016).

First, LEV I allowed manufacturers to produce cars with varying emission reduction capabilities, rather than requiring that every vehicle meet the same standard. A manufacturer could produce and sell vehicles in each of four emissions categories, as long as the fleet's sales-weighted emissions average complied with the standard. This format reduced compliance costs for manufacturers. Rather than having to comply with standards that tightened every year for every model, manufacturers could gradually increase the sales of their lower emission cars. Second, LEV I mandated the production and sale of ZEVs, which became one of the major technologies for reducing both conventional pollutants and GHGs from cars worldwide, discussed below, *supra* Section II.B.2.

LEV I was adopted by several states under Section 177 in the early 1990's and an EPA voluntary alternative, the National Low Emissions Vehicle Program began to be phased in nationwide in 1998. [21] EPA acknowledged that this program "provide public health and environmental benefits by reducing air pollution nationwide" and "reduce ground level ozone, the principle harmful component in smog, as well as emissions of other pollutants, including particulate matter [], benzene, and formaldehyde." 63 Fed. 4927 (Jan. 7, 1998).

B. California's Expansion into the Control of GHGs

1. Low Emission Vehicles II Program and the Pavley Standards

[21]Nat'l Research Council, *supra* note 18 at 176-77.

California approved its second-generation LEV II standards in 1998 to be phased in starting in 2004. In 2002, the California Legislature passed Assembly Bill 1493, sponsored by Assemblywoman Pavley, directing the establishment of the first mandatory GHG emissions standards for passenger vehicles. In conjunction with its 2004 implementation of the LEV II program, the "Pavley standards" were adopted for MYs 2009 through 2016 requiring carmakers to also reduce carbon dioxide, nitrous oxide and methane emissions from their vehicle fleets by approximately 30% by 2016.

The national Tier 2 standards, promulgated by EPA in 2000, were modelled on LEV II. California standards were responsible for incentivizing the nationwide adoption of LEV technology. [22] EPA based the federal Tier 3 standards on California's third-generation LEV III requirements, as well.

The federal government, again following California's lead and using the Pavley standards as a model, established the first national GHG standards for light duty vehicles in 2010. 75 Fed. Reg. 25324 (May 7, 2010). In 2012, California adopted the Advanced Clean Cars Program at the center of this case, which includes the LEV III requirements, revised GHG standards, and a revised ZEV

[22] *M.J. Bradley & Associates, California Transportation Policy Leadership* 1-2 (2018).

program. Thirteen other states have adopted California's LEV GHG standards via Section 177 of the CAA.[23]

California's influence has spread well-beyond the U.S. In 2009, the European Union finalized binding carbon dioxide vehicle emissions standards following California's lead. California's leadership also paved the way for the mandatory carbon dioxide standards now in place in South Korea and Canada.

2. California's Zero-Emission Vehicles

California adopted its Zero Emission Vehicle ("ZEV") mandate in 1990 after it concluded that a mandate was necessary because "a significant penetration of ZEVs is crucial to long-term attainment of the ambient air quality standard in the South Coast."[24]

The ZEV mandate has widespread appeal to governing bodies seriously interested in reducing air pollution. ZEVs are increasingly seen as the primary technology that will enable countries to achieve both their conventional air pollution and climate goals. China, the largest vehicle producer and vehicle market in the world, has closely aligned its 2017 "New Energy Vehicle" program with

[23] Colorado, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Vermont. Cal. Air. Res. Bd., *supra* n. 11.
[24] Cal. Air. Res. Bd., *Proposed Regulations for Low-Emission Vehicles and Clean Fuels: Staff Report* 3-4 (1990).

California's ZEV program.[25] Europe is also embracing ZEVs. Since California's adoption of the ZEV program, Norway, Denmark, Iceland, Ireland, the Netherlands, Sweden, Scotland, the United Kingdom, France and Spain have all enacted national policies targeting the elimination of gasoline and diesel powered vehicles by 2040 at the latest.[26] By demonstrating technical feasibility and consumer acceptance, California's ZEV program paved the way for this global commitment to the reduction of emissions from vehicles.

Congress' intent that the Section 209 waiver provision would allow California to serve as a "laboratory for innovation" has been realized. For over 50 years California has led and the nation and world has followed. EPA's attempt to constrain California's emission control efforts is directly contrary to this statutory design and will put an end to a program that created a technology pathway capable of dramatically reducing an array of harmful air pollutants, including GHG emissions worldwide.

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[25] Hongyang Cui, *China's New Energy Vehicle Mandate Policy (Final Rule)*, (2018). In 2018, California and the Chinese Ministry for Ecology and the Environment entered into a Memorandum of Understanding agreeing to cooperate in "activities that increase the usage of electrified transportation." Memorandum of Understanding to Enhance Cooperation on Climate and Environment Between the Ministry of Ecology and Environment of the People's Republic of China and the State of California of the United States of America.

[26] Sandra Wappelhorst, *The End of The Road? An Overview of Combustion Engine Car Phase-Out Announcements Across Europe* 5 (2020).

III. THE WAIVER WITHDRAWAL CONTRADICTS 30 YEARS OF EPA PRACTICE AND THE FOUNDATIONAL INTENT OF BOTH THE CAA AND EPCA

EPA's Office of Transportation and Air Quality is responsible for establishing national standards covering emissions from all new mobile sources, ranging from personal vehicles and commercial trucks and buses to aircraft and locomotives. The Office also reviews applications made by the state of California for waiver of the CAA's preemption of mobile source emission standards, and makes recommendations to the EPA Administrator.

The Waiver Withdrawal is contrary to the strong presumption in favor of waiving preemption codified in the CAA and related legal precedent and the practice of the Office of Transportation and Air Quality for five decades. Furthermore, NHTSA's new interpretation of EPCA confuses the foundational purposes of EPCA and the CAA and contradicts basic factual distinctions between the regulation of automobile pollutants and automobile fuel economy.

A. The Current Waiver Withdrawal Contradicts Decades of Interpretation of the California Waiver Provision by EPA

Since its inclusion in the 1967 Air Quality Act, California has used Section 209(b)'s waiver provision over 100 times[27] to establish and enforce its own

[27] Rebecca Beitsch, *California Sues EPA Over Trump Revoking Emissions Waiver*, The Hill (Nov. 15, 2019).

vehicle emission standards. Under Section 209(b), the EPA Administrator must grant a waiver if California has determined that its standards will be, "in the aggregate, at least as protective of public health and welfare as applicable federal standards." 42 U.S. Code § 7543(b)(1). The EPA Administrator can deny a waiver *only if* the Administrator determines that: California (1) was arbitrary and capricious in its finding that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards; (2) does not need such standards to meet compelling and extraordinary conditions; or (3) California's standards and accompanying enforcement procedures are not consistent with Section 202(a). § 7543(b)(1)(a)-(c).

The Office of Transportation and Air Quality leads a team of scientists, engineers, and lawyers, on a thorough review of each waiver application to determine if any of the above criteria for waiver denial exist. The Office has developed a rigorous process to evaluate California's waiver requests, considering the statutory requirements, previous precedents, the waiver record, and carefully evaluating information provided by all stakeholders as part of a public comment process.

Accompanying every waiver request, California provides EPA with an extensive application, including the regulations and supporting materials. Each application includes an explanation as to why California is entitled to a waiver

under Section 209. The Office of Transportation and Air Quality then issues a Federal Register Notice inviting public comment and provides an opportunity for public hearings. After the comment period, the Office, including staff from EPA National Vehicle and Fuel Emissions Laboratory, and EPA's Office of the General Counsel conduct an intensive review of California's application and the public comments. The Office of Transportation and Air Quality then prepares a decision document detailing the evidence presented to EPA and applying the criteria for waiver based on Section 209 and EPA's historic practice and case law.

During Ms. Oge's tenure as Director of the Office, only one waiver request was denied in full. Historically, EPA has recognized that Congress intended to create a targeted EPA review based only on the Section 209(b) criteria, to ensure that the federal government did not second-guess the wisdom of California's policy judgments. Ms. Oge's recommendations to EPA Administrators were consistent with previous agency practice in favor of approving California's request in setting standards more stringent than federal mobile source emission standards. Until the present action, EPA had never interpreted Section 177 to grant the agency authority to determine whether other states may adopt California standards. Historically, and during Ms. Oge's tenure, EPA understood the standards that states may adopt under Section 177 to be coextensive with the standards for which California has a waiver, and not limited to particular pollutants, as the agency now asserts.

As Director, Ms. Oge also oversaw review of the waiver applications granted for California's: LEV program in 1999, 2003, 2005, and 2010; ZEV mandate in 2006; and GHG standards for new cars and light trucks in 2009 and 2011, among others. During Ms. Oge's tenure, the EPA Administrator accepted the Office's recommendations, with one exception. In 2008, despite the extensive evidence collected by EPA career scientists, lawyers and engineers and EPA's prior record of waiver approvals, the EPA Administrator denied California's 2004 request for its GHG standards. The basis for denial was a finding alleging that California did not need a GHG program in order to combat local or regional pollution problems. EPA had never before considered whether a specific standard was needed to meet the compelling and extraordinary conditions related to a specific pollutant.[28] Until this decision, EPA had considered the whole California program in determining whether a standard was necessary to meet compelling and extraordinary conditions.[29]

The waiver was subsequently granted by the EPA Administrator in 2009, applying EPA's traditional interpretation of the California waiver criteria. In her decision to approve the 2009 waiver, the Administrator explained:

> Congress intentionally structured this waiver provision to restrict and limit EPA's ability to deny a waiver, and did this to ensure that California had

[28] GAO, *Clean Air Act: Historical Information on EPA's Process for Reviewing California Waiver Requests and Making Waiver Determinations*, GAO 2 (2009).
[29] *Id.*

> broad discretion in selecting the means it determined best to protect the health and welfare of its citizens.

74 Fed. Reg. 32745 (Jul. 8, 2009).

In line with decades of past waiver grants, the EPA Administrator also made clear EPA's position that the proper inquiry under Section 209(b)(1)(B) is whether California needs a vehicle emissions program—not whether it needs specific, individual standards—to meet "compelling and extraordinary circumstances." *Id.* at 32746. Furthermore, the EPA Administrator rejected the idea that "compelling and extraordinary circumstances" also had to be local or regional. *Id*. 32763.

Again applying its traditional interpretation of Section 209(b), EPA granted waivers for California's ZEV mandate in 2006 and GHG standards in 2009 and 2011, and for amendments to both programs in 2013. 78 Fed. Reg. 2125 (Jan. 9, 2013). It is these programs that EPA now attempts to invalidate by the Waiver Withdrawal.

In support of its current revocation, EPA has stated that California does not need the ZEV mandate and GHG standards in order to meet compelling and extraordinary conditions. Up until this point, EPA has granted California numerous waivers for its ZEV program since 1993. In revoking the 2013 waiver, EPA fails to evaluate California's overall program, or even the Advanced Clean Cars Program

in its entirety, and instead evaluates the need for specific elements of the Advanced Clean Cars Program – the GHG standards and the ZEV mandate.

In the fifty-year history of the 209(b) waiver provision, EPA has never revoked a waiver. EPA's revocation of California's 2013 waiver is inconsistent with the CAA, with Congress' clear intention to enable California to make its own policy choices and prioritize emission reductions different from EPA's, and with EPA's historic practice. That unlawful action not only lacks any basis in Section 209, but also disrupts states' legitimate reliance interests, particularly when taken years after the fact and after the relevant standards have been implemented by California and adopted by other states. *See* Joint Petr's Br. 2, 29-32.

Using the argument that climate change is a global phenomenon to justify its decision to revoke the waiver, EPA also reversed its 2009 and 2013 findings that even if analyzingjust the GHG standards, California meets the "compelling and extraordinary conditions" criterion. The impacts of climate change that California faces are even more severe today than in 2009 and 2013. Finally, the revocation fails to recognize that California, supported by the science, demonstrated that smog (ozone pollution) is exacerbated by climate change and California needs its GHG standards to address ozone, and other impacts of climate change.

B. The NHTSA Preemption Rule Goes against the Purposes of EPCA and the CAA

The CAA authorizes EPA to reduce the emission of pollutants from mobile sources, whereas EPCA authorizes NHTSA to set fuel economy standards for passenger vehicles. These differing tools are consistent with the differing goals of the CAA—to reduce air pollution, and EPCA—to conserve energy and reduce fuel consumption—though EPA and NHTSA can implement the CAA and EPCA in parallel.

EPCA authorizes NHTSA to establish and enforce CAFE standards for new passenger vehicles. According to NHTSA, the CAFE standards "regulate how far our vehicles must travel on a gallon of fuel."[30] The main impetus for the establishment of fuel economy standards was the Organization of the Petroleum Exporting Countries oil embargo against the U.S. that virtually quadrupled the price of gasoline in the U.S. between 1973 and 1974. As discussed in further detail in Section I, the modern CAA was enacted in 1970 with the main purpose of protecting public health and the environment by reducing harmful air pollution.

Since EPCA's purpose is to reduce the consumption of fuels like gasoline and diesel, the statute prohibits NHTSA from considering advanced technologies, like electric vehicles when establishing the stringency of CAFE standards. Manufacturers, can, however, use electric vehicles in their compliance

[30] NHTSA, *Corporate Average Fuel Economy*, https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy (last visited July 5, 2020).

calculations, where the "fuel economy" of electric vehicles is assigned based on the Department of Energy's assessment of the value of conserving power sector fuels, as well as other factors. 49 USC § 32904(a)(2)(B). Under the CAA, available clean technologies like electric vehicles, which reduce GHGs and other pollutants, can be accounted for fully in both establishing and enforcing the standards, as evidenced by EPA's and California's actions in setting and enforcing the GHG standards.

Congress has required that NHTSA take account of the effect of emissions controls on fuel economy and it never authorized NHTSA (or EPA) to sacrifice emissions reductions and public health when achieving those improvements in fuel economy (let alone to avoid improving fuel economy too much). Joint Petr's Br. 16-19, 87-91.

In order to address the impacts of climate change, the transportation sector must be decarbonized by 2050. The best technologies to achieve this are electric and hydrogen fuel cell vehicles— both ZEVs—which cannot be considered in setting standards under EPCA. California cannot rely on NHTSA to set the most effective standards to protect the public health and environment of its residents from the severe impacts of climate change.

The record of the last 50 years of California's efforts to reduce emissions from vehicles in furtherance of public health and the environment is in stark

contrast to the effort of NHTSA to set fuel economy standards. California has been the nation's—and world's—innovation laboratory with the most advanced regulatory standards that drove technology development to reduce emissions by over 95% from unregulated levels to the benefit of its citizens, the rest of the country, and the world.

C. GHG Emission Standards and Fuel Economy Standards are Not Equivalent

GHG emissions and fuel economy standards are fundamentally different. GHG standards are aimed at reducing pollution and related health and environmental risks. Fuel economy standards are aimed at conserving fuel. EPA and NHTSA's current position that state GHG emissions standards are preempted by EPCA because they are "related to fuel economy standards" is contrary, not only to the governing statutory frameworks, *see supra* Section III.B, but also basic factual distinctions between the reduction of GHG emissions and vehicle fuel economy. First, reductions in GHG emission are not necessarily correlated with increases in fuel economy; as Joint Petitioners point out, some GHG emissions controls increase fuel economy, while others decrease it. *See* Joint Petr's Br. 15-16, 85, 105-106. Second, GHG standards target pollutants other than carbon dioxide such as methane, nitrous oxide, and hydrofluorocarbons which have little or no relation to fuel economy. *See*, e.g. 75 Fed. Reg. 88, 25324, 25423 (May 7, 2010);

77 Fed. Reg. 199, 62642, 62799 (Oct. 15, 2012). As discussed, *see supra* Section II.B.1, the Pavley Standards established standards for carbon dioxide, and included carbon dioxide-equivalent standards to address tailpipe nitrous oxide and methane emissions as well. In addition, the regulations allowed manufacturers to receive credit for the inclusion of systems demonstrated to mitigate fugitive emissions of hydrofluorocarbons, a category of GHGs with a high global warming potential, from vehicle air conditioning systems, which directly release hydrofluorocarbons through leakage and indirectly increase GHG tailpipe emissions.

While some technologies currently used to comply with emission standards reduce carbon dioxide emissions and also improve fuel economy, this overlap will increasingly diverge over time, as future GHGstandards reflect the potential to deploy electrification technologies that are not based on petroleum products as the fuel or power source. Additionally, capture and storage technologies, which trap pollutants after they have been emitted as a byproduct of fuel combustion, are other examples of technological developments that would reduce carbon dioxide, without improving fuel economy.

CONCLUSION

For all the foregoing reasons, this Court should vacate the Waiver Withdrawal and Section 177 Determination.

Dated: July 6, 2020

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point Times New Roman font and that the portions subject to the word limits contain 6,497 words.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, the foregoing brief was served upon all registered counsel via the Court's ECF system.

Dated: July 6, 2020

Respectfully submitted,

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