**ORAL ARGUMENT NOT YET SCHEDULED**

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

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

**BRIEF OF *AMICI CURIAE***
**FORMER U.S. EPA ADMININISTRATORS**
**WILLIAM K. REILLY AND RUSSELL E. TRAIN**
**IN SUPPORT OF RESPONDENT UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

Deborah A. Sivas
Robb W. Kapla
Collin P. Wedel, Law Student
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94306-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426

*Counsel for Amici Curiae*
*Former U.S. EPA Administrators*
*William K. Reilly and Russell E. Train*

**CORPORATE DISCLOSURE STATEMENT**
**PURSUANT TO FED. R. APP. 26.1 AND CIRCUIT RULE 26.1**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *Amici Curiae* William K. Reilly and Russell E. Train state that they are individuals and have no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad. *Amici* are former Administrators of the U.S. Environmental Protection Agency with an interest in how the United States government is addressing climate change issues.

/s/ *Deborah A. Sivas*
Deborah A. Sivas

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES PURSUANT TO CIRCUIT RULE 28

*Amici Curiae* William K. Reilly and Russell E. Train submit this certificate as to parties, rulings and related cases:

**(A) Parties and Amici**

**(i) Parties, Intervenors and Amici Curiae Who Appeared in the District Court:** None of the parties, intervenors or amici curiae herein appeared in the District Court because these consolidated cases are of original jurisdiction in this court.

**(ii) Parties to These Cases:** All parties, intervenors and amici appearing in this court are listed in the Opening Brief for Petitioners .

**(B) Rulings Under Review:** References to the rule at issue appear in the Opening Brief for Petitioners.

**(C) Related Cases:** *Amici* are not aware of any other pending related case. EPA's prior decision denying the same California waiver at issue in this case was previously the subject of a petition for review before this Court in *California v. EPA*, Nos. 08-1178, 08-1179, 08-1180 (D.C. Cir. filed May 5, 2008, and dismissed Sept. 3, 2009). That proceeding was held in abeyance and ultimately dismissed before a decision on the merits.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## FEDERAL CASES



## DOCKETED CASES



## FEDERAL STATUTES



## FEDERAL REGISTER

## LEGISLATIVE HISTORY



## AGENCY REPORTS

## JOURNAL ARTICLES



## OTHER AUTHORITY

## GLOSSARY OF TERMS

| | |
|---|---|
| CAA | Clean Air Act |
| DPM | Diesel Particulate Matter |
| EPA | United States Environmental Protection Agency |
| GHG | Greenhouse Gas |
| LEV | Low-Emissions Vehicle |
| NLEV | National Low-Emissions Vehicle |

## INTERESTS OF *AMICI CURIAE*

*Amici* William K. Reilly and Russel E. Train are former Administrators of the Environmental Protection Agency ("EPA") serving under Presidents George H.W. Bush and Richard Nixon/Gerald Ford, respectively. As Administrators, both granted crucial waivers to California pursuant to Section 209(b) of the Clean Air Act ("CAA"). *Amici* believe that EPA's consistent and successful implementation of the Section 209(b) waiver provision over the last four decades has enabled California to play an instrumental role as the nation's laboratory for innovation in mobile source emissions control technology. That role has become even more important as the nation faces the herculean challenge of dramatically reducing greenhouse gas ("GHG") emissions. *Amici* have an ongoing interest in seeing EPA adhere to its long-established precedent of implementing Section 209(b) in a way that facilitates California's "pioneering efforts" to reduce motor vehicle pollution. *See* S. Rep. No. 90-403 at 33 (1967).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1960, California's muscular motor vehicle emissions control program has spurred enormous technological innovation and served as a highly successful model of cooperative federalism.[1] This program not only is the lynchpin for the State's ability to reduce local automobile emissions and improve air quality, but it also has proved pivotal to U.S. emissions reduction efforts more generally. California's policy innovations have spawned increasingly efficient and effective mobile source control technologies and have provided invaluable information upon which federal regulators can and do draw when deploying new pollution reduction strategies nationwide.

In recognition of California's role as the nation's testing ground for motor vehicle emissions reduction technologies, Congress required EPA to waive federal preemption of California's program under Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b)(1), absent specific statutory findings to the contrary. EPA Administrators have faithfully adhered to this congressional directive – and the intent behind it to foster technological innovation – by regularly granting waivers to California. Here, Administrator Jackson's grant of a waiver for California's

[1] The California legislature created the Motor Vehicle Pollution Control Board (which along with the Bureau of Air Sanitation later became the California Air Resources Board) in 1960 with the passage of Sections 24378 through 24398 of the California Health and Safety Code.

GHG tailpipe emissions standards was in keeping with EPA's longstanding and highly successful interpretation of Section 209(b) and in full accord with the recommendations of her policy and technical staff. In contrast, Administrator Johnson's initial denial of the waiver in 2008 significantly departed from EPA's consistent statutory interpretation dating back more than 30 years. Equally important, that decision disregarded the advice of the Administrator's legal staff and the unanimous recommendations of his in-house technical experts. Administrator Jackson's reversal of the initial denial decision was, therefore, appropriate. It will ensure that California continues to function as a laboratory for the technological and policy innovations that will be necessary to combat what is unquestionably the greatest environmental crisis of our generation.

## ARGUMENT

### I. Consistent With The Federal-State Partnership Created By The Clean Air Act, Congress Explicitly Intended That California Would Serve As A Laboratory For Technological And Policy Innovation On Mobile Source Pollution Control.

For four decades, the Clean Air Act has operated as a successful model of cooperative federalism and a vehicle for technological innovation.[2] Recognizing

[2] There is a robust academic literature on the history and benefits of cooperative federalism in the environmental regulatory arena, including under the Clean Air Act. *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 Iowa L. Rev. 377, 384-87 & n.35 (2005) (discussing cooperative federalism schemes); William W. Buzbee, *Contextual Environmental*

the states' early primacy in air pollution regulation, Congress carefully crafted statutory language in 1970 to balance the nation's interest in setting minimum national levels of environmental protection with local interests in ensuring protection of public health and welfare. *See, e.g.*, 42 U.S.C. § 7402(a) ( "The administrator shall encourage cooperative activities by the States and local governments . . . "). That careful balancing is evident in Section 209(b), where Congress quite deliberately accommodated the unique role that California has played and can continue to play in fostering technological innovation to reduce mobile source pollution.

Congress was fully aware that the liberal waiver language of Section 209(b)(1) would likely result in two sets of mobile source emissions standards, but it viewed that outcome as positive: "The Nation will have the benefit of California's experience with lower standards which will require new control systems and design. In fact California will continue to be the testing area for such lower standards." S. Rep. No. 90-403, at 33 (1967). California Senator Murphy

---

*Federalism*, 14 N.Y.U. Envtl. L.J. 108, 122 (2005) (discussing how federal and state interaction influences regulatory innovations and environmental law's content); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 Wake Forest L. Rev. 719 (2006) (same, in article focused on legal developments undercutting cooperative federalism schemes); Robert V. Percival, *Environmental Federalism: Historic Roots and Contemporary Models*, 54 Md. L. Rev. 1141 (1995) (same).

explained:

> [T]he United States as a whole will benefit by allowing California to continue setting its own more advanced standards for control of motor vehicle emissions. In a sense, our State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.

113 Cong. Rec. 32,478 (1967). In fact, Congress affirmed and expanded California's role as an incubator for innovation in 1977 by enacting Section 177, which provides that any other state may follow California standards adopted pursuant to Section 209(b). 42 U.S.C. § 7507.

As Congress hoped, technological breakthroughs initially developed for the California market are regularly exported to other states, and the federal government benefits from California's research and experience by adopting the State's most successful approaches on a nationwide basis without having to bear the cost. *See* J.R. DeShazo and Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. Pa. L. Rev. 1499, 1510 (2007); 123 Cong. Rec. 16,630 (1977). In this way, California's innovations have paid significant national dividends. The National Research Council of the National Academies recently summarized the success of Section 209(b)'s federalism approach:

> The mobile source emissions standards developed by [the California Air Resources Board or CARB], like those developed by EPA, have typically been "technology forcing." In forcing technology

> development, California has been a laboratory for emissions-control innovations. An advantage of having a state laboratory for innovation is that the risk of failure to develop the required technologies is restricted to a limited geographic area. CARB's regulatory process is supportive of this laboratory role in that California's standards can be amended rapidly in the face of changing market and technological conditions in contrast to EPA's regulatory process.

National Research Council, *State and Federal Standards for Mobile Sources* 4 (2006), available at http://www.nap.edu/catalog/11586.htm.

## II. Until the 2008 Waiver Denial Decision, EPA Administrators, Including *Amici*, Had Faithfully Interpreted And Consistently Implemented Section 209(b) By Deferring To California's Policy Judgment And Routinely Granting Waivers.

Cognizant of California's past success in pollution control experimentation and regulatory policy innovation, EPA Administrators have invariably given the State wide latitude to run its own program, consistent with the expressed intent of Congress. Prior to Administrator Johnson's waiver denial decision in 2008, EPA granted, in whole or in part, every one of California's 95 prior waiver requests. *See* James McCarthy and Robert Meltz, *CRS Report For Congress: California's Waiver Request to Control Greenhouse Gases under the Clean Air Act* 14 (December 27, 2007). In those rare instances where EPA granted only partial or conditional waivers, the Administrator's decision was based on the advice of staff, most often over concerns about feasibility. *Id.*

Three significant waivers granted over the last three decades highlight the routine deference EPA Administrators afford to California's innovative regulations; these prior decisions also reveal the agency's long-standing interpretation of Section 209(b) and demonstrate the significant technological and public health benefits that flow from granting a waiver. Specifically, the catalytic converter waiver, the diesel exhaust waiver, and the low-emissions vehicle waiver have each substantially improved California's – and ultimately, the nation's – emissions control regulations. The success of these prior waivers in spurring more efficient and effective pollution control technology and their potential for moving us toward a healthier environment confirm that Administrator Jackson was correct to grant the waiver at issue here. Given the influence of the California market, the nation is likely to reap substantial benefits from the GHG emissions waiver. *See, e.g.*, Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. Davis L. Rev. 281, 311-319 (2003) (describing why California's special regulatory status under Section 209(b) may be particularly useful in producing innovation to reduce GHG emissions).

### A. The Catalytic Converter Waiver

EPA's first major waiver decision had precisely the impact Congress desired. In 1970, Congress set strict statutory standards on tailpipe emissions for

1975 and 1976 model year vehicles. Pub. L. No. 91-604, § 6, 84 Stat. 1676, 1690 (1970). Although the Administrator temporarily suspended these requirements as allowed by the statute, 84 Stat. 1676, 1691, he nonetheless granted a Section 209(b) waiver allowing California to enforce the stricter statutory standards on times, primarily as a way to ensure rapid nationwide deployment of new pollution control measures necessary to meet the new standards. These standards required domestic automakers to install what turned out to be a revolutionary emissions control technology, the catalytic converter,[3] on all vehicles sold in California. 38 Fed. Reg. 10, 317, 10,319 (Apr. 26, 1973).

The Administrator's goal in granting the waiver was to perpetuate California's long history as an incubator for innovation; indeed, he viewed such cooperative federalism as one of the main rationales behind Section 209(b). 38 Fed. Reg. at 10,318. Starting with the California market, the Administrator reasoned, would allow automakers an opportunity to ensure that the new technology would perform as designed. *Id.* at 10,319. The waiver thus provided a critical step to nationwide deployment of the new technology: "A phase-in of catalysts during the 1975 model year will lay the necessary foundation for [national] use of catalysts in 1976." *Id.* at 10,324. Noting California's

[3] Catalytic converters of the type proposed in this waiver decision convert carbon monoxide and uncombusted hydrocarbons to carbon dioxide and water.

longstanding role as "the leader in automobile emission control," Administrator Ruckelshaus viewed the waiver as both a statutory obligation and an invaluable opportunity: "[This] requirement . . . will minimize adverse economic effects . . . associated with initial use of new technology, will require all manufacturers to gain experience in the mass production of catalyst-equipped cars . . . and will maintain the accelerating momentum of technological progress." *Id.* at 10,318-19.

The Administrator's vision proved prescient. California paved the way for deployment of a technology that significantly lowered national hydrocarbon emissions from 5.10 grams per mile in 1968 to 1.07 in 1979, and carbon monoxide emissions from 67.92 grams per mile to 15.58. Lawrence J. White, *The Regulation of Air Pollutant Emissions from Motor Vehicles* 48-51 (1982). Thus, the first major Section 209(b) wavier satisfied Congress's desire that California continue to exercise leadership in the nation's efforts to improve air quality.

**B. The Diesel Exhaust Waiver**

EPA continued to adhere to this successful model as it considered the problem of diesel particulate matter ("DPM"), or soot, a decade later. DPM is a carcinogen than can penetrate deep into the lungs, cause tissue damage, and exacerbate existing lung problems. *See* 46 International Agency for Research on Cancer, *Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to*

*Humans: Diesel and Gasoline Engine Exhausts* (1989); EPA, *Health Assessment Document for Diesel Engine Exhaust* 9-24 (May 2002). Yet until 1987, DPM emissions were unregulated. California was the first state to regulate this harmful pollutant after EPA granted a Section 209(b) waiver.

California's DPM standards could only be met using new and not-widely-available technologies such as the trap-oxidizer.[4] As with the catalytic converter, deployment of this technology in the California market was meant to "help ensure successful implementation on a nationwide basis the following year." 49 Fed. Reg. 18,887, 18,895 (May 3, 1984). In granting the waiver, the Administrator explicitly articulated a key purpose of Section 209(b) as facilitating California-led innovation: "EPA has consistently recognized Congress's intent that California pioneer efforts in automotive emission control." *Id.*

Moreover, building on the policy approach first articulated by Administrator Train's in the mid 1970's, Administrator Ruckelshaus deferred to California's public policy decision to regulate this pollutant for the first time. There, as here, opponents of the waiver argued that DPM standards would produce only negligible improvements in air quality and that Section 209(b) required EPA to make an

[4] A trap oxidizer reduces DPM emissions by filtering out particulates and periodically incinerating them. *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 655 F.2d 318, 332 (D.C. Cir. 1981).

individual finding of need for the new DPM standards. 49 Fed. Reg. at 18,889-90. The Administrator, however, carefully reviewed the statutory language and relevant legislative history of Section 209(b) to reveal that Congress intended the "need" inquiry to address "the question of standards in general, not the particular standards for which California sought [a] waiver in given instance." *Id.* at 18,890. This interpretation of the statute, articulated in 1984, is precisely the same one that underlies Administrator Jackson's grant of a waiver for the GHG emissions standards at issue in this case. Ultimately, Administrator Ruckelshaus determined that EPA could not and should not prevent California from making a public policy decision to regulate a new pollutant. Rather, "the question of whether these particular standards are actually required by California . . . 'fall[s] within the broad area of public policy. The EPA practice of leaving the decision on such controversial matters of public policy to California's judgment is entirely consistent with the Congressional intent [behind the waiver provision].'" 49 Fed. Reg. at 18,891 (quoting directly from Administrator Train's earlier decision at 41 Fed. Reg. 44,209, 44210 (Oct. 7, 1976) to grant a Section 209(b) waiver for California's more stringent hydrocarbon standards for motorcycles).

### C. Low Emissions Vehicle Standards Waiver

EPA Administrators continued to adhere to this statutory interpretation and policy approach throughout the next two decades in responding to California's waiver requests for its Low-Emissions Vehicle ("LEV") program, with the same positive results. To address the nation's worst ozone concentrations in the South Coast Air Basin, California adopted the LEV program in September 1990. Designed to reduce ozone-causing pollutants, the program established progressively more stringent standards for four newly defined classes of vehicles and limited overall fleet emission standards to achieve a 55 percent reduction in organic gas emissions and a 15 percent reduction in nitrogen oxide emissions. Danielle Fern, *The Crafting of the National Low-Emission Vehicle Program: A Private Contract Theory of Public Rulemaking*, 16 UCLA J. Envtl. L. & Pol'y 227, 233 (1997).

Deferring to California's conclusion that the regulations were technically feasible, Administrator Reilly granted the requested waiver for the original LEV program in 1993. 58 Fed. Reg. 4,166 (Jan. 13, 1993). In December 2000, California adopted "LEV II" follow-up amendments to set higher standards and EPA, this time under the leadership Administrator Whitman, again deferred to California's judgment in granting a waiver. 68 Fed. Reg. 19,811, 19,812 (Apr. 22,

2003).

The LEV standards succeeded, both in California and as a mechanism for exporting innovation to other states, allowing EPA to build on that foundation. In spite of widespread concern over manufacturers' capacity to meet the California requirements, the evidence demonstrated that "technology . . . kept pace with the demands of [the LEV] standards." Fern, *supra*, at 234-25. In light of such technological progress, Administrator Browner was then able to negotiate with automakers over new National Low-Emission Vehicle ("NLEV") standards based on California's four-class regulation model. 60 Fed. Reg. 4,712, 4,713-17 (Jan. 24, 1995). Faced with the prospect of stringent LEV standards in other regions of the country, automobile manufacturers ultimately agreed to implement a "voluntary" NLEV system. Fern, *supra*, at 240-41.

In 1998, Administrator Browner amended the earlier agreement, proposing Tier 2 NLEV standards to strengthen emission controls. Considered concurrently with California's LEV II standards, Tier 2 matched California' first LEV standards in many areas. *Report to Congress on Tier 2 Light-Duty Standards Before the H. Mobile Source Tech. Rev. Subcomm.*, 105th Cong. 2 (July 1998) (statement of Richard Rykowski, Office of Mobile Sources, U.S EPA). Recognizing that "considerable advances in emission control technology . . . occurred as a result . . .

of California's LEV program," EPA thus took advantage of California's lead to further tighten emission controls across the country. EPA 420-R-98-008, *Tier 2 Report to Congress* 28 (1998). Moreover, when EPA delayed implementing some Tier 2 regulations, twelve other states independently adopted California's LEV II standards pursuant to Section 177 of the Clean Air Act. Matthew Walk, *13 States to Unite to Cut Truck Emissions*, N.Y. Times, Nov. 20, 2000.

As was true for the catalytic converter, California's initial regulatory innovation was crucial to EPA's later efforts to expand a well-functioning emissions program across the country. EPA was thereby able to capitalize on the technological momentum created by its Section 209(b) waiver for California's experimental LEV program, precisely as Congress envisioned.

## III. Administrator Jackson's Granting Of The Waiver For GHG Emission Standards Remedied The Defective 2008 Denial And Restored EPA's Long-Standing Statutory And Policy Interpretation Of Section 209(b).

Administrators inevitably will be forced to make difficult, value-based tradeoffs in their decisions. However, because "[m]ajor rulemaking decisions are often politically controversial . . . an agency needs all the wisdom, technical expertise, and political guidance it can muster" if it expects judicial deference to its decisions. Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 794 (1981).

Administrator Johnson ignored this basic principle when he denied California's GHG emissions waiver request against the virtually unanimous advice of EPA experts. Administrator Jackson subsequently remedied Administrator Johnson's error and, as EPA demonstrates in its brief, properly deferred to the recommendations of her legal and technical staff.

There is no dispute that EPA staff considering California's initial request repeatedly recommended granting the waiver. During Administrator Johnson's first briefing on June 15, 2007, EPA staff presented its initial assessment that California "met the statutory criteria for a waiver." EPA, *President's GHG Rule: Status Briefing* (June 15, 2007).[5] In accordance with past practice, EPA's legal counsel prepared for the next briefing on September 12 by clarifying staff's considered recommendation that "[f]rom a legal, technical and policy perspective (and waiver precedence) California has made the requisite . . . determination and those opposing the waiver have not . . . . [Therefore, a] waiver should be granted." Attachment to e-mail from David Dickinson to Karl Simon, et al., at 3 (Aug. 31, 2007; 4:17 p.m.).

When EPA General Counsel Roger Martella specifically requested a summary of reasons to reject the waiver, members of his staff attempted to comply

[5] This and subsequent sources in this discussion may be found at http://oversight.house.gov/story.asp?id=1956.

by providing some new supporting legal arguments, but they did so with a significant caveat, reiterating their original assessment:

> After review of the docket and precedent, we don't believe there are any good arguments against granting the waiver. All of the arguments discussed here are likely to lose in court if we are sued. The arguments here are the best of a bad lot, going from most to least plausible.

E-mail from Michael Horowitz to Mary Ann Poirier (Sept. 4, 2007; 4:36 p.m.); Attachment to e-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.). This language was subsequently modified to say that "the arguments against granting the waiver have high to very high legal vulnerability." EPA, *California GHG Waiver: Arguments Against Granting* (undated). Karl Simon, the director of the EPA division primarily responsible for the waiver, confirmed on the eve of the next briefing with the Administrator that "[t]he clearest and most defensible option is to grant the waiver." Attachment to e-mail from Karl Simon to Karen Orehowsky, at 32 (Sept. 11, 2007; 8:18 a.m.).

As multiple EPA staff members have testified, at either this briefing or the next one on September 20, Administrator Johnson asked staff members in the room for their opinions on the waiver. Not one staffer recommended denying the waiver, and all legal staff, including General Counsel Martella, emphasized the significant legal risk associated with denying the waiver. *Hearing before the H.*

*Comm. on Oversight and Gov't Reform*, 110th Cong. 14, 22 (2008) (statement of Jason Burnett, Assoc. Dep. Admin. of the EPA). As Associate Deputy Administrator Jason Burnett explained to Congress,"all EPA recommendations that I am aware of, whether they be staff or me . . . were to grant the waiver." *Id.* at 129.

When Administrator Johnson requested another briefing in October to explore the legal defensibility of various denial options, staff again reiterated its recommendation that approval was the most defensible option. Staff's presentation slides explained that "California exhibits a number of specific features that are somewhat unique and may be considered compelling and extraordinary," and that if the Administrator denied the waiver, "EPA's litigation risks [would be] significantly higher than if a waiver [were] granted." EPA, *Briefing for the Administrator: California' s GHG Waiver Request: Follow-Up on Additional Questions* (Oct. 30, 2007). Indeed, the EPA division director Karl Simon made it clear to Administrator Johnson that denial was "legally defensible" only in the sense that it might "get you past rule 11 sanctions." Staff of H. Comm. on Oversight and Gov't Reform, 110th Cong., Report on EPA's Denial of the California Waiver Summary of Findings 15 (2008).

Despite the overwhelming and nearly unanimous advice of his legal, policy

and technical staff, Administrator Johnson denied the waiver, breaking with EPA's longstanding policy and practice under Section 209(b) and undercutting the primary justification for judicial deference to agency expertise – the idea that government agencies have the capacity to make complicated decisions more effectively and expertly than the courts. *See, e.g.*, James Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 Stan. L. Rev. 1041, 1057 (1975) (noting that courts typically focus on the reasonableness of a challenged agency action and "credit the rest . . . to administrative expertise.) Whatever drove Administrator Johnson to deny the waiver, it was not EPA custom, practice or policy expertise. Administrator Jackson's subsequent decision to reverse course and grant the waiver simply returned EPA to its historic and imminently reasonable interpretation of the cooperative federalism model embodied in Section 209(b).

## CONCLUSION

Greenhouse gas emissions pose an unprecedented challenge to local, state and federal regulators. Enormous innovation will be necessary to meet that challenge. As Congress intended, California has taken some of the first real steps in that direction with GHG emission standards that will cover millions of new motor vehicles over the next few years. Those standards, which have already spread to several other states and then the national stage, will in turn drive a much-needed shift in the new car market. Consistent with EPA's long-standing and

legally defensible statutory interpretation, Administrator Jackson properly granted a Section 209(b) waiver for those standards, allowing California once again to function as a laboratory for technological and policy innovation. This Court should, therefore, affirm EPA's decision in its entirety.

Dated: September 16, 2010

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: /s/ *Deborah A. Sivas*
Deborah A. Sivas
Collin Wedel

Counsel for *Amici Curiae* William K. Reilly and Russel E. Train

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local D.C. Circuit Rule 32-1, I certify that the attached Brief of *Amici Curiae* is proportionately spaced, has a typeface of 14 points, and contains 3,927 words, exclusive of tables and cover sheet, based on the word count for the WordPerfect program on which it was produced.

Date: Sept. 16, 2010 /s/ *Deborah A. Sivas*
Deborah A. Sivas

## CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2010, the following parties were served by receipt of electronic notification through the Court's CM/ECF system:

Matthew Goodwin Paulson
Baker Botts LLP
98 San Jacinto Boulevard, Suite 1500
Austin, Texas 78701-4039

Jeffrey Alan Lamken
MoloLamken LLP
The Watergate
600 New Hampshire Ave., NW
Washington, DC 20037

Marc N. Melnick
Deputy Attorney General
Office of the Attorney General
State of California
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, California 94612

Michael Myers
Office of the Attorney General
The Capitol
Albany, New York 12224-0341

Sean H. Donahue
Law Office of Sean Donahue
2000 L Street, NW
Suite 808
Washington, DC 20036

Robin S. Conrad
Amar D. Sawal
National Chamber Litigation Center
Suite 230
1615 H Street, NW
Washington, DC 20062

Alexandra Margaret Walsh
Baker Botts LLP
1299 Pennsylvania Avenue, NW
The Warner, Suite 1300 West
Washington, DC 20004-2400

Barbara Beth Baird
Kurt R. Wiese
South Coast Air Quality Management District
21865 E. Copley Drive
Diamond Bar, California 91765

Leslie Riley Seffern
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504

Terence J. Tierney
Office of the Attorney General
150 South Main Street
Providence, Rhode Island 02903

Kathleen A. Kenealy
Deputy Attorney General
Office of the Attorney General
State of California
300 South Spring Street, Suite 1702
Los Angeles, California 90013

John W. Busterud
Pacific Gas & Electric Co.
P.O. Box 7442
San Francisco, California 9412-7442

Gerald T. Karr
Senior Assistant Attorney General
Attorney General of the State of Illinois
100 West Randolph Street
Chicago, Illinois 60601

David Doniger
Natural Resources Defense Council
1200 New York Avenue
Washington, D.C. 20005

Damien Michael Schiff
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95384

Stephen R. Farris
Assistant Attorney General
Attorney General of the State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504

Barney J. Chisolm, Jr.
Deputy General Counsel
State of Florida
Dept. of Environmental Protection
3900 Commonwealth Blvd.
- MS 35
Tallahassee, Florida 32399

Matthew F. Pawa
Law Offices of Mathew F. Pawa, PC
1280 Centre Street, Suite 230
Newton Centre, Massachusetts 02459

Roberta Rose James
Attorney General of the State of Maryland
1800 Washington Blvd.
Baltimore, Maryland 21230

Helen Kang
536 Mission Street
Golden Gate University School of Law
San Francisco, California

Frederick D. Augenstern
Assistant Attorney General
Attorney General of the Commonwealth of Massachusetts
Environmental Protection Division
1 Ashburton Place, 18th Floor
Boston, Massachusetts 02108

Beverly Marie Conerton
Minnesota Attorney General's Office
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127

Vickie Lynn Patton
Environmental Defense Fund
2334 N. Broadway
Boulder, Colorado 80304

Attorney General of the State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625

Kristen Campfield Furlan
Commonwealth of Pennsylvania,
Department of Environmental Protection
Rachel Carson State Office Bldg,
9th Fl.
400 Market Street
Harrisburg, Pennsylvania 17105

Kevin P. Auerbacher
David R. Sheridan
Assistant Attorney General
State of Iowa
Environmental Law Division
Lucas State Office Building
321 E. 12th Street, Grnd. Floor
Des Moines, Iowa 50319

David Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002

Paul S. Logan
Oregon Department of Justice
1515 SW Fifth Ave., Suite 410
Portland, Oregon 97201

In addition, I certify that the following parties were served by first class mail, postage prepaid:

Andrew D. Koblenz
Douglas I. Greenhaus
National Automobile Dealers Association
8400 Westpark Drive
McLean, Virginia 22102

Joseph Mikitish
Assistant Attorney General
Attorney General of the State of Arizona
1275 W. Washington
Phoenix, Arizona 85007

Kimberly Massicotte
Assistant Attorney General
Attorney General of the State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06160

Gerald D. Reid
Assistant Attorney General
Chief Natural Resources Division
Department of the Attorney General
6 State House Station
Augusta, Maine 04333

William H. Sorrell
Assistant Attorney General
Attorney General fo the State of Vermont
109 State Street
Montpelier, Vermont 05609

Valerie Melissa Satterfield
Deputy Attorney General
Attorney General of the State of Delaware
102 West Water Street
Dover, Delaware 19904

/s/ *Deborah A. Sivas*
Deborah A. Sivas