**ORAL ARGUMENT NOT YET SCHEDULED**

**Docket No. 09-1237**

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondents.

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On Petition for Review from a Decision of the
United States Environmental Protection Agency
74 Fed. Reg. 32,744 (July 8, 2009)

# INTERVENORS' FINAL BRIEF IN SUPPORT OF THE ENVIRONMENTAL PROTECTION AGENCY

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## INTERVENORS' CERTIFICATE OF COUNSEL

Counsel for Intervenor State of California submits this certificate as to parties, rulings, and related cases on behalf of itself, the South Coast Air Quality Management District, the States of New York, Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington, the Commonwealth of Massachusetts, the State of Florida Department of Environmental Protection, the Commonwealth of Pennsylvania Department of Environmental Protection, the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, and Environment California (collectively "Intervenors").

### A. Parties and Amici

All of the parties, intervenors, and amici curiae appearing before this Court are listed in Respondent Environmental Protection Agency (EPA)'s opening brief.

### B. Rulings Under Review

A statement of the rulings under review appears in Respondent EPA's opening brief.

## C. Related Cases

A statement of related cases appears in Respondent EPA's opening brief.

Respectfully submitted,

Dated: November 10, 2010

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## GLOSSARY

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|---|---|
| CARB | California Air Resources Board |
| EPA | United States Environmental Protection Agency |
| NADA | National Automobile Dealers Association |
| MY | Model year |

## STATEMENT OF THE CASE

Intervenors adopt the Statutory Background and Factual Background contained in the EPA brief at 2:1-11:11. Fed.R.App.P. 28(i); D.C.Cir.R. 28(d)(2).

## SUMMARY OF ARGUMENT

Petitioners U.S. Chamber of Commerce and the National Automobile Dealers Association seek to recast the Clean Air Act as leaving California only a tiny and marginal role in an otherwise exclusively federal approach to motor vehicle emission controls. But the Act's text, legislative history and administrative practice, and this Court's case law, paint a very different picture. From its inception, the Act recognized California's importance to a successful national motor vehicle emission control program, in part because California had already established itself as an innovator in remediating automobile pollution, and in part because Congress expected California to continue in that pioneering role.

The 1967 Air Quality Act recognized that California had already established itself as the principal innovator for remediating automobile pollution. The Act gave California's program a unique role alongside the federal emissions standards program, creating the

"two-car" regulatory system that continues today. A decade later, in the 1977 Clean Air Act amendments, Congress expanded California's discretion to develop its program and permitted other States to adopt California's standards.

This system has served the national interest for more than four decades by allowing California to develop its own emissions program, subject to a waiver process that defers to California's judgment about its program's content and that places the burden of proof on those who oppose California's waiver request. The Act's federal-California partnership has achieved striking results in protecting the nation's health from automotive pollution.

Under Section 209(b)(1)(B) , 42 U.S.C. § 7543(b)(1)(B), EPA must grant California a waiver allowing California to set its own emission standards unless, among other things, EPA finds that California does not need its standards "to meet compelling and extraordinary conditions." In this case, EPA found that waiver opponents had failed to meet their burden of proving that California does not need its separate emissions program. Petitioners challenge EPA's decision primarily on the ground that EPA misinterpreted section 209(b)(1)(B) to mean California's need for its entire emissions

program as opposed to its need for the particular standards for which it seeks a waiver.

Because that argument primarily concerns the statutory interpretation of section 209(b)(1)(B), it is resolved under the two-step analysis in *ChevronU.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Unless Petitioners under *Chevron* Step One can show that Congress unambiguously spoke to and resolved the specific statutory issue in their favor, EPA need only show under *Chevron* Step Two that its interpretation is a reasonable one. This is a deferential standard, and EPA more than surpasses it– its interpretation is not just plausible but the only one that accords with the Act's language, history, purpose and administrative practice.

First, the plain language of Section 209(b)(1)(B) requires that EPA evaluate California's need for "such State standards," a phrase that directly refers to California's "State standards . . . in the aggregate" in the immediately preceding sentence in section 209(b)(1). Even if EPA's interpretation were not compelled by the statute's language, it is easily a permissible reading of the statutory text.

Second, the Act's legislative history, this Court's rulings and EPA's long decisional history uniformly recognize that California must be afforded the "broadest possible discretion" to determine its own emission standards. EPA's interpretation is the only interpretation that promotes this important interest. Petitioners' interpretation that California must demonstrate its "need" for its individual standards, if accepted, would force EPA or the Court to oversee and reevaluate California's specific policy judgments. This contradicts the explicit Congressional intent to provide California broad discretion to pioneer innovations that will lead the nation's fight against air pollution.

Finally, EPA's interpretation has two separate strands of administrative history on its side that span decades of decision making. First, as it did here, EPA has interpreted section 209(b)(1)(B) to refer to California's need for its "program as a whole." In addition, EPA has rejected the arguments of numerous waiver opponents who, like Petitioners here, urged EPA to second-guess California's need for its particular standards.

Although Petitioners offer a number of alternative statutory interpretations, they are either mistaken or fraught with ambiguity. In

particular, Petitioners' claim that EPA should have applied a more stringent "need" test for greenhouse gas emissions than for other pollutants is unsupported by the Act's text and is contrary to the teachings of *Massachusetts v. EPA*, 549 U.S. 497 (2008) ("*Massachusetts*"). None of Petitioners' alternative interpretations undermines the reasonableness of EPA's interpretation.

The Court therefore should deny the petition because waiver opponents presented no evidence that California no longer needs its emissions program as a whole. 74 Fed.Reg. 32,744, 32,762-63 (July 8, 2009).

EPA also granted the waiver on the alternative ground that, even if it were appropriate to evaluate need under Section 209(b)(1)(B) for these particular standards, Petitioners had failed to carry their burden of proving that California did not need its greenhouse gas standards. Petitioners challenge this determination, disputing whether California's standards will help control ozone pollution (by lowering atmospheric temperatures) or reduce global warming impacts in California. Petitioners' arguments fail because (1) Petitioners cite little, if any, record evidence to meet their burden of proof, and (2) California produced ample evidence demonstrating

that its standards would provide both ozone pollution and global warming benefits.

The petition should be denied.

## STANDARD OF REVIEW

EPA's construction of the Clean Air Act waiver provision is governed by the two-step framework of *Chevron.* First, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43. In determining the intent of Congress, the Court employs traditional statutory construction tools, looking to the statute's language, design and, where appropriate, legislative history. *See Public Citizen v. Nuclear Regulatory Comm'n,* 901 F.2d 147, 152 (D.C. Cir. 1990).

Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see, e.g., Bluewater Network v. EPA,* 372 F.3d 404, 411 (D.C. Cir. 2004). The agency's view "governs if it is a reasonable interpretation of the statute –not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by

the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

## ARGUMENT

### I. PETITIONERS' ACTION IS BARRED BY BOTH THE STANDING AND MOOTNESS DOCTRINES

Although standing itself is assessed at the time of suit, the Court's jurisdictional inquiry continues:

> An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. Thus, even where litigation poses a live controversy when filed, the mootness doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.

*Columbia Rope Co. v. West*, 142 F.3d 1313, 1316 (D.C. Cir. 1998) (internal quotation marks, brackets, and citations omitted).

As EPA demonstrates, Petitioners lack Article III standing, and Intervenors adopt EPA's arguments. See EPA Br. at 16:15-22:8. The following additional reasons demonstrate why the car and truck dealers have failed to show that they will be injured by EPA's decision for model years (MY) 2009 through 2016.

MY 2009 and 2010. MY 2009 is completed, and MY 2010 will be completed by the time this case is decided. The manufacturers

already have provided the dealers with their cars and trucks for those model years. Thus, this case is moot as to MY 2009, and will become so with regard to MY 2010.

MY 2011. Petitioners have not provided any information specific to MY 2011. The evidence shows that manufacturers will have earned credits during MY 2009 and 2010 that can be applied in MY 2011. Joint Appendix ("JA") at 3330. Due to those credits, manufacturers will not have to significantly alter the mix of vehicles they offer dealers in MY 2011. Thus, Petitioners have not provided evidence of a particularized, concrete injury regarding MY 2011. *See in re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008).

MY 2012 through 2016. Petitioners have two problems with MY 2012 through 2016. First, California has adopted amendments allowing manufacturers to comply by satisfying the new federal standards. Those amendments are within the scope of the waiver challenged here. 75 Fed.Reg. 44,948 (July 30, 2010). Other States must conform their regulations to those new amendments. 42 U.S.C. § 7507 (requiring standards "identical" to California's). Thus, as a matter of law, manufacturers will not have to alter the mix of vehicles

they provide to dealers to comply with the California regulation for these model years.

Second, even if California had not adopted its recent amendments, Petitioners have not provided any concrete evidence to show the differences between the original California regulation and the new federal regulations. Petitioners just say that "*if* the new standards force Ford to "alter[] the mix of vehicles," it will be more difficult to provide customers the right vehicles. Pet. Br. at 24 (emphasis added); see Pleau Decl. ¶ 8 "[I]t is my understanding that . . . the new standards *could* limit Ford's ability to deliver certain models to California dealers, or may force Ford to 'compensate' for delivering high-emitting vehicles . . ." (emphasis added). But there is no evidence that manufacturers actually will change their behavior and alter their vehicle mix due to these regulations, or are likely to do so. Nor is there evidence about manufacturers' costs of "reporting, enforcement, and compliance obligations" or whether they will pass them to dealers. Petitioners have not connected the regulations and their own members' activities in a particularized, concrete way.

Because petitioners lack standing, and there is no live controversy, the petition should be dismissed.

## II. CALIFORNIA HAS ALWAYS SERVED A CENTRAL ROLE IN THE CLEAN AIR ACT'S REGULATION OF MOTOR VEHICLE EMISSIONS

Petitioners' presentation depends upon an incomplete and inaccurate portrayal of the legislative and administrative history of the Clean Air Act's waiver provisions. They argue that Congress intended to provide for solely federal regulation of new motor vehicles emissions. Pet. Br. at 1, 17 ("Congress made a deliberate and plainly expressed choice: to make new vehicle emissions the subject of federal, not state, regulation.") Petitioners argue that the Act provides a slender exception only if California can justify its need for the particular emission standards for which it seeks a waiver. *See id.* at 1, 18-19.

Far from an afterthought, California's role in the setting of motor vehicle emissions standards is central to the Act's design and success. An understanding of California's role provides the necessary background to analyze the reasonableness of EPA's statutory interpretation.

### A. The Clean Air Act Gave California a Prominent Role Because Congress Concluded That the Entire Nation Would Benefit From California's Pioneering Regulatory Innovation.

Petitioners' view of the Clean Air Act's history is culled from a few isolated passages selected from the Act's massive legislative history. *See Engine Mfrs. Ass'n v. EPA,* 88 F.3d at 1075, 1087 (D.C. Cir. 1996) (criticizing this approach). This Court's own recital of the Act's history in cases such as *Motor & Equipment Mfrs. Ass'n. v. Environmental Protection Agency*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA"*), *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1294 (D.C. Cir. 1979) ("*Ford*") and *EMA*, provides a more accurate portrayal.

#### 1. From the Act's inception, Congress utilized California's expertise in the development of motor vehicle emission controls.

California's interest in motor vehicle pollution control dates to 1946, and its comprehensive statewide efforts began in 1957. *MEMA*, 627 F.2d at 1109. The Senate report on the 1965 Motor Vehicle Air Pollution Control Act observed that California "leads in the establishment of standards for regulation of automotive pollutant emissions." *Id.*, n. 26 (citing S.Rep. No. 192, 89th Cong., 1st Sess. 5 (1965)).

The 1965 Act did not preempt state laws, but the preemption issue arose during the debate on the 1967 Air Quality Act because a number of states beyond California were preparing to establish their own emission control programs. Although the motor vehicle industry was "adamant" in opposing anything but a single federal standard, that view did not prevail. *MEMA*, 627 F.2d at 1109. The Senate bill generally preempted state programs, but at the urging of Senator Murphy of California, the bill included a preemption waiver for California because of that state's "unique problems" and in recognition of its "pioneering efforts." *Id.*(citing S.Rep. No. 403, 90th Cong., 1st Sess. 33 (1967). The waiver provision would benefit the entire nation by using California's special expertise in pollution control as a "testing area" for more stringent policies. 113 Cong.Rec. 30,941 (1967) (remarks of Rep. Smith); *see id.* at 32,478 ("the United States as a whole will benefit by allowing California to continue setting its own more advanced standards") (remarks of Sen. Murphy).

Congress expressly intended that California could set standards that were "more stringent than, or applicable to emissions or substances not covered by, the national standards." H.R. Rep. No. 90-728 (1967), reprinted at 1967 U.S.C.C.A.N. 1938, 1958. "Congress

intended [California] to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program." *MEMA*, 627 F.2d at 1110-11; *see Motor and Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998).

### 2. In 1977 Congress strengthened California's authority to create and enforce its own regulatory program.

Under the 1967 waiver provision, the California standard for each pollutant had to be "more stringent" than the corresponding federal standard. In the 1970's, however, California found it necessary to strengthen its nitrogen oxides standard even though available technology increased emissions of another pollutant, carbon monoxide. *MEMA*, 627 F.2d at 1110. Because existing emission control devices could not meet both the California nitrogen oxides standard and the federal carbon monoxide standard, Congress in 1977 amended the waiver provision to provide for waivers as long as California's standards "in the aggregate" are at least as protective as applicable federal standards, even if a particular state standard is less strict. *Id.*; *see Ford*, 606 F.2d at 1294.

By adding the "in the aggregate" language, the 1977 amendments expanded California's flexibility to adopt its emissions control program. *MEMA*, 627 F.2d at 1108, 1110. This Court found that the "broad thrust" of 1977 amendments was to increase deference to California. *Ford*, 606 F.2d at 1303; *see MEMA*, 627 F.2d at 1110 (House report was "barren of an indication that Congress intended to confine California's discretion . . ."). "Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight." *American Trucking Ass'ns, Inc., v. EPA*, 600 F.3d 624, 629 (D.C. Cir. 2010) ("*ATA*"), quoting *Ford*, 606 F.2d at 1297.

The 1977 amendments also added section 177, 42 U.S.C. §7507, which expanded and solidified the importance of California's role. Section 177 allowed other states to adopt and enforce their own standards for motor vehicle emissions as long as those standards were identical to the California standards for which a waiver had been granted. *See EMA*, 88 F.3d at 1080. As of 2009, thirteen states and the District of Columbia–representing over half of the national automobile market–have adopted California's vehicle emissions regulations, including its greenhouse gas standards. 74 Fed.Reg. at 32,754 & n.59.

### 3. Congress, EPA and this Court have deferred to California's policy judgments about California's standards.

Congress' decision to give broad scope to California's judgment is embodied in the Act's text and legislative history and recognized in EPA's administrative practice and this Court's decisions.

Under section 209(b), once California determines that its standards in the aggregate are as protective as applicable federal standards, the EPA Administrator "shall" waive application of the preemption clause in section 209(a) unless the Administrator makes one of three findings described in section 209(b). 42 U.S.C. §7543(b). Section 209(b) thus assumes that the waiver shall be granted unless the Administrator makes contrary findings. The Act's history "makes clear that the burden of proof lies with the parties favoring denial of the waiver." *MEMA*, 627 F.2d at 1122.

Congress reemphasized its deference to California's policy judgment when it expanded California's authority in 1977:

> The Committee amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e. to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare. . . . The

> Administrator, thus, is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State.

H.Rep. No. 95-294 at 301-302, reprinted in 1977 U.S.C.C.A.N. 1077, 1380-81; *see* 40 Fed.Reg. 23,102, 23,103 (May 28, 1975) (describing legislative history).

Other than in its short-lived 2008 waiver decision, EPA has "consistently adhered" to this deferential approach when reviewing California's waiver requests. *MEMA*, 627 F.2d at 1122. "Congress has made it abundantly clear that the manufacturers would face a heavy burden in attempting to show 'compelling and extraordinary conditions' no longer exist." 49 Fed.Reg. 18,887, 18,890 (May 5, 1984); *see, e.g.* ,61 Fed.Reg. 52,271 (Oct. 11, 1996); 59 Fed.Reg. 46,978 (Sept. 13,1994); 58 Fed.Reg. 4166 (Jan. 13, 1993); 51 Fed.Reg. 2430 (Jan.16, 1986); *see also infra* at 31-35.

This Court has recognized California's broad discretion to create its own emissions program. California standards "are presumed to satisfy the waiver requirement and that the burden of proving otherwise is on whoever attacks them." *MEMA*, 627 F.2d at 1121. The section 209(b) criteria are "deferential standards" requiring only a "cursory review" for deciding whether to grant California a

waiver. *Ford*, 606 F.2d at 1302. And just a few months ago, this Court rejected an attack on California's "need" for a non-road engine standard under section 209 (e)(2)(A)(ii) and deferred to EPA's assessment that the standard was within California's policy judgment. *ATA*, 600 F.3d 624 (denying challenge to EPA decision granting waiver under nearly identical waiver provisions for in-use, non-road emission standards).

#### 4. California's role in the Clean Air Act's regulation of automotive pollution has been integral to the Act's national success.

The Clean Air Act conferred a distinct status on California because the State's pioneering role in regulating automobile-related emissions would allow it to serve as a "laboratory for innovation." *Supra* at 12-13. Congress's decision has been vindicated repeatedly.

This Court recognized this early on: "Since the inception of the federal government's emissions control program [Congress] has drawn heavily on the California experience to fashion and to improve the national efforts at emissions control." *MEMA*, 627 F.2d at 1110-11. The first federal emission standards were largely borrowed from California, and the 1977 standards drew heavily on the California

experience in the ten years after the first waiver provision's enactment. *Id*. at 1111 n.34.

California's leadership grew over the years as "California continued to outpace" the federal government's own efforts. See *State and Federal Standards for Mobile Source Emissions*, National Academy of Sciences Report (2006), JA at 1851. The NAS Report discusses California's technological leadership in detail, showing how California devised solutions that the federal government did not typically adopt until a few years later. JA at 1849-57 and table 3-4 at 1854-56.

In summary, Petitioners' efforts to minimize California's role is misguided. Congress consistently valued California's expertise and authorized California to create a separate emissions program, subject only to the highly deferential review of EPA. California has responded with solutions that have inspired the federal government's own efforts to address motor vehicle pollution. The Act's success depends on maintaining the integral role that Congress staked out for California; this statutory purpose underlies the reasonableness of EPA's statutory interpretation, as follows.

## III. EPA PROPERLY DETERMINED THAT WAIVER OPPONENTS FAILED TO DEMONSTRATE THAT CALIFORNIA DID NOT NEED ITS SEPARATE EMISSIONS PROGRAM

EPA determined in its 2009 decision that the waiver opponents had not met their burden of proving under section 209(b)(1)(B) that California did not need its separate emissions program. 74 Fed.Reg. at 32,762-63. The central issue raised here is whether EPA erred in interpreting section 209(b)(1)(B) to mean California's need for its entire emissions program as opposed to its need for the particular standards for which it seeks a waiver.

### A. The Clean Air Act's Text, Legislative History and Purpose, and EPA's Long Administrative Practice Establish the Reasonableness of EPA's Interpretation That Section 209(b)(1)(B) Refers to California's Need for Its Entire Emissions Program

#### 1. The statutory text confirms EPA's interpretation.

To obtain a waiver, California first must determine under section 209(b)(1) that "the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1); see Statutory Addendum. Once California has made this "protectiveness" determination, EPA must grant the waiver unless it makes one of three findings. 42 U.S.C. § 7543(b)(1)(A)-(C). Petitioners challenge EPA's refusal to find under

section 209(b)(1)(B) that "such State does not need such State standards to meet compelling and extraordinary conditions." They do not challenge EPA's waiver grant under the other criteria.

The Act's text shows that section 209(b)(1)(B) requires EPA to consider California's need for its entire program and not the particular standards for which a waiver is sought. First, the term "such State standards" in section 209(b)(1)(B) refers to those "State standards . . . in the aggregate" mentioned in the immediately preceding sentence. The term "State standards . . . in the aggregate," in turn, refers to California's entire emissions standards program because California must determine whether its standards in the aggregate–that is, its entire program–are as protective as applicable federal standards. *See MEMA*, 627 F.2d at 1110 & n.32.

Linking the term "such State standards" in section 209(b)(1)(B) to "State standards . . . in the aggregate" is routine statutory construction. The word "such" typically refers back to the phrase's immediately preceding use. *Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 769, n.4 (D.C. Cir. 1984), *citing Florida Power & Light Co. v. FERC*, 617 F.2d 809, 819 n. 2(D.C. Cir. 1980) ("[a]s a matter of commonsensical construction, 'any such new schedule' in § 205(e)

refers to the immediately preceding 'new schedules' in § 205(d)") rather than to the more general and more distant 'schedules' in § 205(c)"); *see United States v. Bowen*, 100 U.S. 508, 512-13 (1879) (construing "such pensioners" to mean those pensioners referred to in the "immediately preceding sentence in the same section" and insisting that "no sound canon of construction will authorize us to disregard" the term "such"); *but cf. North Broward Hosp. Dist. v. Shalala*, 172 F.3d 90 (D.C. Cir. 1999) (finding use of "such" ambiguous and deferring to agency's statutory interpretation).

This interpretation also conforms to the Act's structure. As the Administrator pointed out in 1984, a determination that section 209(b)(1)(B) only applies to individual standards would conflict with the 1977 amendment allowing California to have standards less protective than a corresponding federal standard: "Congress could not have given this flexibility to California" and at the same time required that California demonstrate that it "needed" a particular standard that was less stringent than a corresponding federal standard. 49 Fed.Reg. at 18,890 n. 24.

### 2. Petitioners' textual arguments are mistaken and raise ambiguities that defeat their *Chevron* Step One argument.

Petitioners offer several textual counterarguments. These arguments are mistaken and at best raise questions of textual ambiguity, an approach that defeats their *Chevron* Step One argument. First, they argue that EPA's interpretation is mistaken because Congress in 1977 did not simultaneously add the "in the aggregate" language to section 209(b)(1)(B) when it amended section 209(b)(1). Pet Br. at 44-45. But "*such* State standards" in section 209(b)(1)(B) refers back to "State standards . . . in the aggregate" in section 209(b)(1). This cross-reference has the same meaning as if Congress repeated the phrase "State Standards … in the aggregate" in section 209(b)(1)(B) itself. Moreover, the 1977 amendments did more than just add the "in the aggregate" language to section 209(b)(1). They also added the word "such" to "State standards" in 209(b)(1)(B), thereby directly connecting (b)(1) and (b)(1)(B).

Next, Petitioners argue that Congress added the words "in the aggregate" to section 209(b)(1) in 1977 solely to address California's nitrogen oxides/carbon monoxide dilemma, *supra* at 12-13 , and that those provisions have no bearing on whether the "need" inquiry goes

to California's entire program. Pet.Br. at 43-44. Although this regulatory dilemma might have prompted Congress to act, Congress adopted broad language in section 209(b)(1) that went well beyond this particular problem and that allowed California considerably more flexibility to make regulatory choices. EPA's interpretation of this language as referring to California's standards in the aggregate is certainly not unreasonable.

In addition, petitioners improperly assume that EPA did not assess California's need on the basis of its entire program before the 1977 amendments. EPA's pre-1977 decisions did not focus on individual standards in evaluating this waiver criterion (former section 208(b)); they looked at whether there had been any change in California's "compelling and extraordinary conditions," which is the functional equivalent of evaluating whether California still needed its program as a whole. *See* 37 Fed.Reg. 8128 (Apr. 25, 1972) ("The State of California requires standards more stringent than applicable Federal Standards to meet compelling and extraordinary conditions"); 36 Fed.Reg. 8172 (Apr. 30, 1971) (same); 40 Fed.Reg. 23,102, 23,104 (May 28,1975). Consequently, EPA's pre-1977 interpretation is consistent with EPA's current interpretation. In any event, the issue is

what section 209(b)(1)(B) means now, following the significant 1977 amendments, and the Act's current language directly supports EPA's interpretation.

Petitioners also argue that the phrase "such State standards" in section 209(b)(1)(C) refers to individual standards, not California's entire program, and therefore "such State standards" in section 209(b)(1)(B) must mean the same thing. Pet Br. at 43-44. Petitioners ignore that "*such* State standards" in both subsections (b)(1)(B) and (b)(1)(C) must have an antecedent, and that the pertinent antecedent is "State standards … in the aggregate" in 209(b)(1). At best, Petitioners have raised an ambiguity about whether these subsections meant to refer to California's entire program of standards, or just the standards for which the waiver is being sought. But creating an ambiguity invalidates Petitioners' *Chevron* Step One argument.

Petitioners' *Chevron* Step One argument has another major problem. First, Petitioners' reliance on EPA's 2008 decision–they cite it favorably 16 times–fatally undermines their argument. To distinguish its past interpretation, EPA stated in its 2008 decision that section 209(b)(1)(B) was "ambiguous." 73 Fed.Reg. 12,156, 12,160

(Mar. 6, 2008) ("The text of section 209(b)(1)(B) does not limit EPA to its previous practice as the language of the statute is ambiguous on this point.") EPA apparently hoped to gain the benefit of *Chevron* Step Two deference. But EPA's concession defeats Petitioners' *Chevron* Step One argument, which compels them to demonstrate that Congress spoke *unambiguously* to section 209(b)(1)(B)'s meaning.

EPA's 2008 decision upon which Petitioners rely contains another fatal flaw. The 2008 decision conceded that EPA previously interpreted section 209(b)(1)(B) to mean California's need for its entire program. 73 Fed.Reg. at 12,160. Having essentially conceded that before 2008 the term "such State standards" referred to California's "program as a whole," EPA then (and the Petitioners now) cannot reasonably interpret that same term to mean the particular standards for which a waiver is sought. The meaning of particular words in a statute cannot change depending on their application. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 378 (2005).

### 3. The Act's legislative history and overall design confirms the reasonableness of EPA's interpretation.

The Act's legislative history and overall design also supports EPA's interpretation that section 209(b)(1)(B) requires evaluating

California's need for its separate program. The primary debate in 1967 concerned whether California needed a separate program, not whether California should or should not regulate particular pollutants or adopt particular control measures. S.Rep. No. 403, 90th Cong., 1st Sess. 33 (1967); see *EMA*, 88 F.3d at 1080 (discussing compromise). A broad program review is a reasonable approach because it provides an ongoing check on whether California still needs its separate program, while leaving the choice of specific regulations up to California.

EPA's interpretation also is consistent with Congress' judgment to accord California the "broadest possible discretion" to determine the content of its standards. Petitioners' view would force EPA to second-guess the wisdom and effectiveness of California's proposed standards to determine whether California truly "needed" them, regardless of the pollution source and even for small program changes. But neither the Act, EPA nor this Court have imposed these exacting requirements. They instead have deferred to California's policy judgments in creating new standards that lead the nation's fight against motor vehicle pollution. *Supra* at 12-13; *infra* at 31-35.

Petitioners contend, however, that Congress could not have intended an "episodic, broad-brush assessment" of California's overall need for its program. Pet.Br. at 42. They argue that EPA's interpretation makes section 209(b)(1)(B) "meaningless" because it is unlikely that California's characteristics will change, thereby allowing California to adopt any emissions controls that it wants. Pet.Br. at 47. Petitioners' concerns are misplaced.

EPA's interpretation makes sense in light of the Act's text and history. As noted, the congressional debate was over California's need for a separate program, not over particular standards, and EPA's interpretation is consistent with the compromise to create a two-car system. Nor does EPA's interpretation give California a blank check to adopt any standards that it wants. California still must satisfy section 209(b)(1)'s other waiver criteria such as consistency with section 202's feasibility, cost and lead-time requirements. 42 U.S.C. 7543(b). And, as this Court pointed out, California remains subject to a state law action if it acts arbitrarily or capriciously. *MEMA*, 627 F.2d at 1105.

Finally, and ironically, EPA's interpretation is the one that best comports with Petitioners' professed interest in regulatory uniformity.

Under EPA's interpretation, there is the possibility that there will no longer be a need for a separate California program, and the motor vehicle industry will need comply with only one standard. Under Petitioners' interpretation that looks to individual standards, there will always remain a two-car system even if EPA denied a waiver for individual standards.

In short, the Act's legislative history and purpose underscore the reasonableness of EPA's "program as a whole" interpretation and further negates Petitioners' claim that Congress unambiguously adopted their interpretation.

#### 4. Two separate strands of longstanding administrative practice demonstrate the reasonableness of EPA's interpretation.

In determining whether to defer to an agency's interpretation under *Chevron* Step Two, courts accord great weight to a longstanding statutory interpretation by an agency charged with its administration. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6-8 (D.C. Cir. 2003)(according "particular deference" to 25-year-old agency interpretation). EPA's administrative practice demonstrates the reasonableness of its current interpretation in two ways.

### a. Under its decades-long interpretation of section 209(b)(1)(B), EPA evaluates whether California needs its separate program.

Since the Act's inception, EPA has evaluated whether California continued to have "compelling and extraordinary conditions" that warranted California having a separate program. *Supra* at 23. For example, in 1979 EPA said:

> [M]y review of California's action under section 209(b)(1)(B) is not based upon whether California has demonstrated a need for the particular regulations, but upon whether California needs standards to meet compelling and extraordinary conditions. 44 Fed.Reg. 38,660, 38,661 (July 2, 1979).

EPA provided its most thorough discussion of section 209(b)(1)(B ) in a 1984 waiver decision. There EPA examined the Act's text, purpose and legislative history, and concluded that its section 209(b)(1)(B) analysis was confined to whether California needed its own program, not a particular standard. 49 Fed.Reg. 18,887. EPA has reaffirmed its "program-as-a-whole" interpretation in numerous waiver decisions since. See, e.g., 51 Fed.Reg. 31,173 (Sept.2, 1986); 52 Fed.Reg. 20,777 (June 3, 1987); 53 Fed.Reg. 7021 (Mar.4, 1988); 53 Fed.Reg. 7022 (Mar.7, 1988); 54 Fed.Reg. 6447 (Feb.10, 1989); 55 Fed.Reg. 43,028 (Oct. 25, 1990); 57 Fed.Reg. 24,788 (June 6, 1992); 58 Fed.Reg. 4166 (Jan.13, 1993); 59 Fed.Reg.

48,625 (Sept. 13, 1994) ; 69 Fed.Reg. 60,995 (Oct.14, 2004); 70 Fed.Reg. 50322, 50323 (August 26, 2005); 71 Fed.Reg. 78,190, 78,192 (Dec. 28, 2006).

The only aberration was EPA's 2008 decision denying the waiver to these same standards. That inconsistent position was rejected when EPA reconsidered and reversed the 2008 decision in its 2009 decision, after notice and full consideration of public comments, and with a well-reasoned explanation for its change of position. The now-abandoned 2008 decision does not undermine the deference that should be given to EPA's longstanding interpretation. *See Alabama Education Assoc. v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006).

In conjunction with its support in the Act's text, history and purpose, EPA's long administrative practice conclusively establishes the reasonableness of its interpretation that section 209(b)(1)(B) refers to California's need for a separate emissions program. That this Court characterized section 209(b)(1)(B) in the same way as EPA makes this conclusion even more emphatic. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d at 453 (referring to section 209(b)(1)(B) as requiring a showing that "California does not need *separate* state

standards to meet 'compelling and extraordinary conditions'" (emphasis added) (dicta)).

**b. Since the Act's inception, EPA has refused to consider the need for a particular California standard because that is outside EPA's congressionally assigned role.**

In arguing that section 209(b)(1)(B) requires an assessment of whether California needs particular standards, Petitioners argue for a searching inquiry into the wisdom and effectiveness of California's standards. For example, Petitioners and their amicus contend that California does not "need" its greenhouse gas standards because they are not "meaningful" and do not have measurable benefits.

Petitioners' argument is an old one. Throughout the Act's history, the motor vehicle industry has made similar claims about California's "need" for a particular regulation, and EPA has refused to entertain them because the Act gives California discretion to make those judgments. The examples are plentiful, and their parallels with this case are uncanny:

- "Arguments concerning the wisdom" of California's motor cycle standards, their "marginal improvements in air quality," and whether California needs them "all fall within the broad

area of public policy. The EPA practice of leaving the decision . . . to California's judgment is entirely consistent with the Congressional intent behind the California waiver provision." 41 Fed.Reg. 44,209, 44,210 (Oct. 7, 1976).

- Argument that standards "would not result in significant improvements in California air quality all fall within the EPA practice of leaving the decision on controversial matters . . . to California's judgment." 42 Fed.Reg. 31,639, 31,641 (June 22, 1977).
- Contentions that the number of vehicles subject to a California standard "was too insignificant to mitigate any compelling and extraordinary conditions in California" and that regulations would not reduce air pollution "all fall within the EPA practice of leaving . . . matters of public policy to California's judgment." 42 Fed.Reg. 25,755, 25,757 (May 18, 1977).
- Automakers' contentions that California did not need particular standards and that "the standards might not have a net beneficial health effect" fall within EPA practice of leaving controversial public policy decisions to California's judgment. 43 Fed.Reg. 15,490, 15,493 (April 13, 1978).

- "[M]anufacturers questioned the need for these standards and the wisdom of California's emission control strategy. These arguments, however, are not grounds for denying California a waiver." 43 Fed.Reg. 25,729, 25,736 (June 14, 1978).
- "[O]bjections pertaining to the wisdom of California's judgment on various public policy matters are beyond my scope of review." 43 Fed.Reg. 32,182, 32,184 (July 25, 1978).
- Industry argument "that air quality cannot be influenced to a significant degree by one per cent of the vehicle population" concerns "the wisdom of California's action and the marginal improvements in air quality" and falls into public policy area left to California's judgment. 44 Fed.Reg. 7807, 7808 (Feb. 7, 1979).
- Arguments that California "did not need these regulations and had not demonstrated an associated air quality benefit" are outside section 209(b)(1)(B). 44 Fed.Reg. 38,660, 38661 (July 2, 1979).
- Whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its costs "is not legally pertinent to my decision under

> section 209 . . . It is not necessary for CARB to quantify the exact emissions benefits its new standards will create when it is clear that its standards are significantly more stringent" than the corresponding federal standards. 49 Fed.Reg. at 18,887 (May 5, 1984); see 57 Fed.Reg. 38,502, 38,503 (Aug. 25, 1992); 59 Fed.Reg. at 46979.

- "[A]s California has noted correctly, '[T]he extent to which a given set of California standards will reduce air pollution in California is not pertinent to the need question.'" 58 Fed.Reg. 4166 (Jan. 13, 1993).
- "[B]ecause California was intended by Congress to have broad discretion in choosing its air pollution control strategies, the extent of benefits that will be produced by the California LEV program is not pertinent to EPA's decision." 63 Fed.Reg. 6173, 6174 (Feb. 6, 1998).

EPA's historic refusal to evaluate the merits of California's individual standards is consistent with, and compelled by, Congress's decision to accord California the broadest possible discretion to develop its own emissions program. *Supra* at 12-14. It demonstrates once again why

EPA reasonably limits consideration of "need" in section 209(b)(1)(B) to California's general need for a separate emissions program.

That California is regulating greenhouse gas emissions does not change the analysis. *Infra* at 35-39. The Act treats greenhouse gases as a pollutant, *Massachusetts*, and California has determined that its greenhouse gas regulations will protect its citizens and their air quality. Debate about the merits of these particular regulations is outside the scope of EPA's and the Court's inquiry.

**5. Petitioners' distinction between "local" and "global" pollutants is meritless.**

In a last attempt to demonstrate that EPA's interpretation was erroneous, Petitioners argue that, under section 209(b)(1)(B), California may only regulate "local and regional" pollution sources, not "global" ones, because it was only "local and regional" pollution that caused Congress to find that California's conditions were compelling and extraordinary. *E.g.*, Pet Br. at 18-19. This distinction is meritless and does nothing to call the reasonableness of EPA's interpretation into question.

First, the text of the waiver provisions does not distinguish between local pollutants and global pollutants. Implicitly conceding this, Petitioners base their local/global distinction on a misuse of

legislative history. Petitioners cite a morsel or two of legislative history that discuss California's "local" pollution problems, and from this extrapolate a negative implication that Congress forbade California from regulating pollutants that did not have impacts specific to California. See Pet. Br. at 30. This Court in *MEMA*, 627 F.2d at 1108, rejected this approach: "[L]egislative history is not required to cover every aspect of a statute's application," especially where "there are overwhelming indications in the legislative history that Congress intended California to enjoy the broadest possible discretion in selecting a complete program of emissions control"; *see EMA*, 88 F.3d at 1087 ("this isolated pair of sentences out of a mass of legislative history is insufficient to bar the EPA's interpretation").

Second, Petitioners' attempt to limit California's authority to local or regional pollution sources conflicts with the holding in *Massachusetts*. The Supreme Court determined that greenhouse gases are "air pollutant[ s]" under the Act, and thus may be regulated under section 202(a), 42 U.S.C. § 7521(a). *Id.* at 528. Section 209(b)(1)(c), 42 U.S.C. § 7543(b)(1)(C), authorizes California to regulate any pollutant that EPA is authorized to regulate under section 202(a). *See also EMA*, 88 F.3d at 1090 (referring to the

"Congressional history of permitting California to enjoy coordinate regulatory authority over mobile sources with the EPA"). The Act therefore authorizes California to regulate greenhouse gas emissions.

Moreover, the *Massachusetts* Court directly rejected the local/global distinction. In *Massachusetts,* EPA argued that "Congress designed the original Clean Air Act to address local air pollutants rather than a substance that 'is fairly consistent in its concentration throughout the world's atmosphere.'" *Massachusetts,* 549 U.S. at 512. Petitioners from this case advocate the same local/global distinction in *Massachusetts*. Brief for Respondent CO[2] Litigation Group (including Petitioner Chamber of Commerce), 2006 U.S. S. Ct. Briefs LEXIS 1111 at **35, 38, 64; Brief for Respondent Alliance of Automobile Manufacturers, (including Petitioner NADA), 2006 U.S. S. Ct. Briefs LEXIS 1099, at **38-39, 50-52. But the *Massachusetts* Court found that "the statutory text foreclose[d]" the argument that Congress did not intend EPA to regulate substances that contribute to "climate change." *Id.* at 528.

Petitioners' effort to retool this argument to impute the same distinction to section 209(b)(1)(B) is even less persuasive. Now that the *Massachusetts* Court has found that Congress intended to broadly

define pollutants and that the Act regulates greenhouse gases, it would be unreasonable to think that Congress silently intended to preclude California from regulating those same greenhouse gases. What the Court said in *Massachusetts* applies here:

> While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. . . "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."

*Massachusetts*, 549 U.S. at 531-32, *quoting Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).

As scientific knowledge has advanced over the more than four decades since Congress enacted the waiver provision, what we know about the effects of air pollutants has grown considerably. For example, scientists today do not see any bright line between "traditional" and "global" pollutants, which makes Petitioners' contrived distinction scientifically arbitrary, as well as legally arbitrary. See Comment of James Goldstene, CARB Executive Officer, JA at 3434-35; JA at 2960-74. Recognizing the need for

adaptation and innovation, Congress charged California with unprecedented responsibility to help lead the nation's fight against automotive pollution. It would make no sense that Congress would have excluded its "trailblazer" from helping to solve this insidious form of pollution. Moreover, if Congress truly wanted to exclude California, it likely would have said so directly, rather than employing Petitioners' circuitous interpretation of section 209(b)(1)(B) to achieve that result.

Particularly given *Massachusetts'* rejection of a distinction between "local" and "global" pollutants, EPA reasonably interpreted section 209(b)(1)(B) in a manner that allowed California to adopt the challenged regulations. Indeed, California's leadership in this case strongly vindicates Congress's judgment to grant California this broad discretion.

### B. EPA Properly Found That Waiver Opponents Failed to Meet Their Burden of Showing That California Did Not Need Its Program as a Whole.

Because EPA's interpretation of section 209(b)(1)(B) is lawful, resolution of this petition is simple: Petitioners do not dispute California's need for its separate program to address the "compelling and extraordinary conditions" that led Congress to create California's

waiver exemption. 74 Fed.Reg. at 32,762-63. California still has that unique blend of geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems. 49 Fed.Reg. at 18,890. As recently as 2006, EPA found that these compelling and extraordinary conditions existed, 71 Fed.Reg. 78,190, 78,192 (December 28, 2006), and nothing has changed since then to diminish California's need for its separate program. See *ATA*, 600 F.3d at 628 (upholding EPA waiver decision under waiver criterion nearly identical to section 209(b)(1)(B) because California continues to suffer from "some of the worst air quality in the nation").

## IV. SHOULD IT REACH THE ISSUE, THE COURT SHOULD UPHOLD EPA'S ALTERNATIVE RATIONALE FOR GRANTING THE WAIVER

If the Court agrees that EPA properly found that Petitioners failed to meet their burden of showing that California does not need its separate program, then it may stop there and deny the petition. If the Court accepts Petitioners' position that EPA must address the need for the particular standards covered by the current waiver request, then the Court must consider EPA's alternative reason for granting the

waiver: that waiver opponents failed to meet their burden of showing that California did not need these particular standards.

The Court may reject Petitioners' challenge to EPA's alternative reason for a simple reason: Petitioners have the burden of demonstrating that EPA erred in its factual evaluations, *supra* at 15-16, but Petitioners cite little if any scientific evidence to show that EPA made any factual errors. Petitioners' factual "showing" consists almost exclusively of out-of-context statements made by CARB (addressed below) and legal conclusions lifted from EPA's 2008 decision. See Pet Br. at 49-57. It was not arbitrary and capricious for EPA to find that Petitioners had not met their burden of showing that California did not need its standards when Petitioners fail to marshal any significant supporting evidence from this massive record.

Intervenors nevertheless demonstrate, with supporting evidence, that EPA properly denied Petitioners' challenge to EPA's alternative rationale.

### A. EPA's Alternative Analysis Is Rational and Supported by the Evidence.

#### 1. EPA properly found that greenhouse gas emissions were linked to California's smog problem.

In its alternative analysis, EPA evaluated the need for these particular standards on two bases.

First, EPA found that greenhouse gas emissions were linked to California's smog problem because they exacerbate ozone formation by raising atmospheric temperatures. *See, e.g.*, 74 Fed.Reg. at 32,763 (noting that California "has made a case that its greenhouse gas standards are linked to amelioration of California's smog problems" and that "[r]educing ozone levels in California cities and agricultural areas is expected to become harder with advancing climate change"); *id.* at n.112 (discussing studies on impacts of climate change on ozone pollution); *see also id.* at 32,765.

EPA's conclusion was well-supported by evidence in the record. E.g., California Climate Change Center Report, JA at 2167 (a warming climate is "expected to increase the frequency, duration, and intensity of conditions conducive to air pollution formation," including formation of ozone in Los Angeles and the San Joaquin Valley); Dr. Jacobson Comments, JA at 2944-2959 (CO2 exacerbates

ozone pollution more in areas with already severe ozone problem); Environmental Defense Comments, JA at 2929 (citing multiple experts and noting that "the challenge of reducing ozone levels in California cities and agricultural areas is expected to become harder with advancing climate change") . Intervenors also adopt EPA's defense of these findings. EPA Br. at 34:1-45:13.

### 2. EPA properly found that the impacts of global warming were significantly different in California than the rest of the country.

Second, relying on extensive studies documenting the likely impacts on California, EPA found that the impacts of global warming in California were significant enough and different enough from impacts in the rest of the country to establish that California needed these standards to meet compelling and extraordinary conditions. *Id.* at 32,765; *see id.* (quoting Stanford University climatologist Stephen Schneider that that "no other state faces the combination of ozone exacerbation, wildfire emission's contributions, water system and coast system impacts and other impacts faced by California").

EPA's explanation was not arbitrary and capricious, and Intervenors adopt EPA's argument on this point. EPA Br. at 41:9-43:18; for additional supporting evidence *see, e.g.,* Goldstene

Comment Letter, JA at 3445-48; Schneider Comment, JA at 2579-601; Jacobsen Comment, JA at 3337-39; Goldstene Comment, JA at 2975-79.

### B. California's Standards Are "Meaningful" and Will Contribute to a Global Warming Solution.

Failing to challenge the factual basis of EPA's finding, Petitioners and their amicus argue that reducing greenhouse emissions in California will not be meaningful because those reductions will have no "identifiable" effect on reducing global warming. E.g., Pet. Br. at 52. This phrase, taken out of context from a California regulatory document, was meant to convey that a reduction in climate change associated with an individual regulatory action could not be measured. CARB Final Statement, JA at 1671. But it did not mean that decreases in carbon dioxide levels or global temperature cannot be quantified using computer modeling. *Id.* Nor did it mean that California's regulations will not contribute to a global warming solution. E.g., Witherspoon Comment, JA at 2890-93; Witherspoon Comment, Item 140 (Dr. Hansen Testimony), JA at 2482-578; *Id.*, Item 146 (Dr. Hansen Report) JA at 2122-23, 2128; Cackette Comment, Item 159 (IPCC Climate Change Report), JA at 2479-80.

That reductions in global temperatures attributable to particular regulatory actions are difficult to measure, and that remediating global warming will require significant concerted action just demonstrates the difficulties addressing this severe problem. See *MEMA*, 627 F.2d at 1114 ("The difficulty, if not the impossibility, of quantifying the benefit of ambient air conditions, further militates against the imposition of such an imperative on the agency.") The Supreme Court understood this: "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." *Massachusetts*, 549 U.S. at 524. "[R]educing domestic automobile emissions is hardly a tentative step" in addressing global warming. *Id*. "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Id.* at 526. "The risk of catastrophic harm, though remote, is nevertheless real" and "[t]hat risk would be reduced to some extent if" greenhouse gas regulations existed. *Id.*

As noted, California, together with the thirteen States and the District of Columbia that have adopted California's greenhouse gas standards, represent over half of the new motor vehicle market in the United States. If the *Massachusetts* Court thought EPA regulation

would have a legally sufficient impact on reducing emissions, even at an unknown stringency, the California standards would have an impact that easily meets or exceeds that legal threshold. *See also* EPA Br. at 36-37 (addressing Petitioners' identifiable impact argument).

Finally, and to reiterate, whether California's standard will be effective is a policy judgment reserved to California and not open to debate in a waiver proceeding. *Supra* at 31-35.

### C. California's Willingness to Accept Compliance With Federal Standards Does Not Diminish Its Need for Its Own Standards.

Petitioners also argue that California does not "need" its greenhouse gas regulations because it agreed to accept automakers' compliance with new federal standards as compliance with California's. Pet. Br. at 14-15, 50. In other words, Petitioners chastise California for supporting an outcome that addresses what Petitioners profess to be most concerned about–promoting uniformity and minimizing regulatory complexity.

EPA provides three compelling reasons why the possibility of similar federal standards did not diminish California's need for its own standards, and Intervenors adopt those arguments. EPA Br. at 45:14-46:13.

Petitioners also repeatedly imply that federal emission standards were imminent when EPA was considering California's waiver request, as if to insinuate that there was no need for California's regulations. E.g., Pet.Br. at 50. This distorts history. When California adopted its regulations in 2005, EPA's position was that it had no authority over greenhouse gas emissions and that it would not act even if it had such authority. Federal standards were proposed only in 2009, and established only in 2010.

### D. EPA's Decision Was Not Invalid on the Ground That It Permitted California to "Enforce" Its Regulations.

Petitioners argue that EPA's decision should be invalidated because EPA implicitly overrode claims that California's regulations were preempted by another federal law. Pet.Br. at 59-61. This claim is meritless. Intervenors adopt EPA's discussion on this point. EPA Br. at 47:3-48:17.

### E. California Exercised a Leadership Role in Adopting Its Greenhouse Gas Emission Standards.

Finally, Petitioners claim that "California's primary motivation was to exercise influence over the federal process." Pet.Br. at 50; *id.* at 21. Actually, California's "motivation" was to reduce greenhouse gas emissions that endanger the health of the State's citizens and their

environment. 2002 Cal. Stat. ch. 200, §l(a), (c). That the federal government chose to adopt similar regulations demonstrates once again that California has provided innovative national leadership for combating the harmful effects of pollution from motor vehicles. This is the Clean Air Act working at its best.

## CONCLUSION

The petition should be dismissed or, if the Court concludes that petitioners have standing, denied.

Dated: November 10, 2010

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached INTERVENORS' FINAL BRIEF IN SUPPORT OF THE ENVIRONMENTAL PROTECTION AGENCY uses a 14 point Times New Roman font and contains 8,695 words.

Dated: November 10, 2010

EDMUND G. BROWN JR.
Attorney General of California

/s/ Marc N. Melnick

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# STATUTORY ADDENDUM

§ 7543(a)-(b). State standards

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of

public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521 (a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

## CERTIFICATE OF SERVICE

Case Name: **Chamber of Commerce v. U.S. Environmental Protection Agency, et al.**
No. **09-1237**

I hereby certify that on November 10, 2010, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**INTERVENORS' FINAL BRIEF IN SUPPORT OF ENVIRONMENTAL PROTECTION AGENCY**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. On November 10, 2010, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 10, 2010, at Oakland, California.

| Marc N. Melnick | /S/ |
| --- | --- |
| Declarant | Signature |