ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1237

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

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

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Petitioners' Opening Brief.

B. Rulings Under Review

References to the rulings at issue appear in the Petitioners' Opening Brief.

C. Related Cases

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

DATED: July 1, 2010.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and this Court's scheduling order, Pacific Legal Foundation (PLF) respectfully submits this brief *amicus curiae* in support of the petition for review.

IDENTITY AND INTEREST OF AMICUS

PLF is a nonprofit legal advocacy organization that litigates in state and federal courts throughout the country in favor of the principles of limited government and economic freedom. PLF has a keen interest in ensuring that the crisis of global climate change not be used as a pretext to violate individuals' property rights and other constitutionally protected liberties. PLF therefore is concerned with the adjudication of this petition for review, which raises important public interest questions about the country's response to global climate change, and specifically how the Clean Air Act should be interpreted to address global climate change.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Petitioners' Opening Brief.

SUMMARY OF ARGUMENT

Under Section 209(a) of the Clean Air Act, the states are prohibited from adopting or enforcing any standard relating to emissions from new motor vehicles. 42 U.S.C. § 7543(a). Section 209(b) allows the Environmental Protection Agency (EPA) to waive Section 209(a)'s prohibition as applied to California, if EPA

determines that California needs its own emission standards to meet compelling and extraordinary circumstances. *See id.* § 7543(b)(1)(B).

EPA's decision to waive Section 209(a) for California's greenhouse gas emission standards, 74 Fed. Reg. 32,744 (July 8, 2009), is contrary to law. California does not need its greenhouse gas emission standards to meet the chief danger—increased global temperatures—that purportedly contributes to the state's existing compelling and extraordinary circumstances relating to air pollution. California's greenhouse gas emission standards will not remedy, to any degree, the global-warming-related danger that allegedly justifies the emissions standards. For this reason, California does not need special standards, and the state is not entitled to EPA's waiver. Moreover, EPA may not feign the existence of any need by reliance on hyper-deference to California's waiver-related decisionmaking.

Accordingly, the petition for review should be granted.

I

THE WAIVER IS CONTRARY TO LAW BECAUSE CALIFORNIA DOES NOT NEED GREENHOUSE GAS EMISSION STANDARDS TO MEET COMPELLING AND EXTRAORDINARY CIRCUMSTANCES

A. The "Need" Analysis Requires That EPA Determine Whether the California Greenhouse Gas Emission Standards, If Implemented, Would Have Some Meaningful Impact on Climate-Change Trends

In its waiver decision, EPA concludes that, even considering the greenhouse gas emission standards in isolation from the rest of the state's motor vehicle pollution regulations, California needs its greenhouse gas emission standards to meet compelling and extraordinary circumstances.[1] *See* 74 Fed. Reg. at 32,763-67. EPA makes several specific arguments: (1) California need only show a rational connection between the regulation it promulgated and the problem it seeks to address. *Id*. at 32,766. (2) California need only show that its regulation will result in a reduction in greenhouse gas levels, without demonstrating that such a reduction will have any meaningful impact on reducing global-warming-related harms. *Id*. (3) California need only show that its regulation will result in an amelioration of

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[1] EPA also considered whether California "needs" its motor vehicle emissions program as a whole to meet compelling and extraordinary circumstances. *See* 74 Fed. Reg. at 32,761-62.

existing, non-global-warming-related harms (such as ozone concentrations). *Id.* None of these arguments can be reconciled with Subsection (b)(1)(B)'s text.

1. The Plain Meaning of Section 209(b)(1)(B) Requires a Showing That California's Greenhouse Gas Emission Standards Will Have Some Meaningful Impact on Climate-Change Trends

Under the first two EPA interpretations above, California is not required to show that its proposed emission standards will have a meaningful effect on reducing or ameliorating any of the global-warming-caused dangers that supposedly are exacerbated by existing compelling and extraordinary circumstances. Rather, California's standards are "needed," according to EPA, so long as they are *related to* the cited dangers, or to harms that may be exacerbated by such dangers. *See* 74 Fed. Reg. at 32,766. But such an interpretation that reads the need for a meaningful impact out of the analysis cannot be squared with Subsection (b)(1)(B)'s plain meaning.

Subsection (b)(1)(B) precludes a California waiver if the "State does not *need* such State standards." (Emphasis added.) Because one needs *X* only if *X* is "necessary," Webster's Third New International Dictionary 1512 (1993); 2 Oxford English Dictionary 1903 (6th ed. 2007), case law interpreting the Constitution's Necessary and Proper Clause is helpful to understand what the Clean Air Act waiver process demands. To determine whether California "need[s]" its own standards, one must first identify the end that motivates the adoption of those standards. *Cf.*

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (a law is "necessary and proper" to executing the federal government's powers if, *inter alia*, the law's "end be legitimate" and the law be "plainly adapted to that end"). Next, one must determine whether the emission standards are rationally related to that end, *i.e.*, whether those standards will achieve, to a materially measurable extent, the cited end. *Cf. Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (a law is "necessary and proper" "[i]f it can be seen that the means adopted are really calculated to attain the end"), *quoted in United States v. Comstock*, 130 S. Ct. 1949, 2010 U.S. LEXIS 3879, at *16-*17 (2010).

In the context of Subsection (b)(1)(B), California can only be said to "need" its greenhouse gas emission standards if those standards eliminate or reduce the dangers that supposedly are exacerbated by existing compelling and extraordinary circumstances. But the danger of primary focus—sustained increases in global temperatures—will not be meaningfully affected by adoption of California's greenhouse gas emission standards. Indeed, neither EPA nor California contends that the state's greenhouse gas standards on their own would have any meaningful impact on global temperatures. Hence, California cannot be said to need such emission standards to address global-warming-related harms.

2. An Incremental Reduction in Emissions *Without* a Meaningful Impact on Climate-Change Trends Cannot Satisfy Section 209(b)(1)(B)'s Mandate

Relying on *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), EPA also argues that California "needs" its emissions standards, even though "no single regulation could on its own reduce [greenhouse gas] emissions to the levels necessary to reduce all concerns." 74 Fed. Reg. at 32,766. This approach fares no better, for several reasons.

It is undisputed that California's standards, if enacted, will to some extent reduce greenhouse gas emissions. Yet, if mere incremental reduction in emissions were the only criterion for establishing a Subsection (b)(1)(B) "need," then any set of effective emission standards would *always* be "needed," because they would always to some extent limit or purify emissions beyond the status quo without those standards. California could then establish its "need" for regulation by the mere desire to regulate. Such a regulatory-bootstrapping interpretation of Subsection (b)(1)(B) would render Subsection (b)(1)(B) a nullity, which is impermissible. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). The far better interpretation, consistent with the statutory text of Subsection (b)(1)(B), is: emission standards are "needed" if their implementation would have some meaningful effect on mitigating the *dangers* that supposedly justify the adoption of the emission standards in the first place. On its own terms, EPA's incremental-impact interpretation fails that test.

Massachusetts's use of the "incremental injury" theory for establishing standing has no application in this context. In that case, the Supreme Court, exercising a "special solicitude" for the sovereign interests of the Commonwealth of Massachusetts, *see* 549 U.S. at 520, held that, for purposes of the redressability analysis required under Article III of the Constitution, it was enough for the Commonwealth to show that, should EPA respond favorably to its petition for rulemaking under Section 202 of the Clean Air Act, "[t]he risk of catastrophic harm [from global warming] . . . would be reduced to some extent," *id.* at 526. *Massachusetts*'s use of the incremental injury theory in the standing context precludes that case's application to Section 209(b)(1)(B). Under Article III, a plaintiff need only show a nominal injury to be redressed, *see Common Cause v. Dep't of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983), as opposed to Subsection (b)(1)(B)'s much more demanding "compelling and extraordinary circumstances" standard. Second, standing issues are considered separately from merits issues. *See* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531, at 6 (3d. ed. 2008). Using relaxed notions of redressability to allow the Court to adjudicate the merits of a Clean Air Act challenge is quite different from *importing* those same relaxed redressability standards into the consideration of the merits of the challenge itself. And such

importation here is insupportable, given that it would conflict with the statute's plain requirement that California establish a true need for its own emission standards.

EPA's purported "meaningfulness" evidence is nothing of the sort, but is only consistent with its discredited incremental-impact interpretation of Section 209(b)(1)(B). For example, EPA contends that California greenhouse gas standards have "a rational relationship to contributing to amelioration of the air pollution problems in California." 74 Fed. Reg. at 32,766. Yet it is not enough for EPA, following California's waiver request, to determine that California's greenhouse gas standards would produce some improvement in the state's ozone or particulate matter levels, or reduce the global-warming-exacerbated harms caused ultimately by ozone or particulate matter levels. *Cf. id.* Under Subsection (b)(1)(A), California is offering its standards as *greenhouse-gas-ameliorating* measures. *See id.* at 32,754 (comparing "an absence of EPA greenhouse gas emission standards to the enacted set of California greenhouse gas emission standards"). EPA and California cannot have it both ways; they cannot claim the advantage of a greenhouse gas limitation for purposes of Subsection (b)(1)(A), but then claim the advantage of incidental ozone and other pollution benefits for purposes of Subsection (b)(1)(B). As another example, EPA cites to hearing testimony provided by industry groups *opposing* the waiver that California greenhouse gas emission standards might achieve some local temperature reduction. *See* 74 Fed. Reg. at 32,766 n.123. But this testimony merely

shows that such standards could achieve a 1/100 degree reduction over the course of a century, too small to provide any measurable relief. *See* EPA-HQ-OAR-2006-0173-0421 at 71ff, *cited in* 74 Fed. Reg. at 32,766 n.123. Such evidence does not meet any true meaningfulness standard.

3. The Legislative and Regulatory History of Section 209(b)(1)(B) Is Consistent with Requiring a Showing of a Meaningful Impact on Climate-Change Trends

Throughout the waiver decision, EPA relies upon Section 209's legislative history, as well as past waiver decisions, to support what amounts to hyper-deference to California's "at least as protective" determination, as well as EPA's own determinations under Section 209(b)(1)(A)-(C). Upon closer analysis, none of these materials supports EPA's approach.

For example, the Senate Report accompanying the Air Quality Act of 1967, which added Section 209, merely noted that, in balancing the interests of industry in having a single national standard, and the interests of California in having its owing emission standards, California was entitled to "continue to be the testing area for such lower standards." S. Rep. No. 403, at 33 (July 15, 1967). Given the serious concern the Committee gave to industry's interests in dealing with more than one standard, it would be strange if the Committee had intended that California could implement ineffectual standards and still maintain its entitlement to waiver. *Cf. id.* at 34

("Implicit in this provision is the right of the Secretary to withdraw the waiver at any time . . . [if] he finds that the State of California no longer complies with the conditions of that waiver."). The House Report accompanying the same Act showed similar solicitude for manufacturing interests, *see* H. Rep. No. 728, at 21-22 (Oct. 3, 1967), and underscored that a waiver could be obtained only "upon a showing by California that it *requires* more stringent standards than the nationwide standards otherwise applicable," *id*. at 22 (emphasis added).

The same attitude is reflected in the floor debate on the Act. Representative Sisk of California, referencing the waiver provision, stated that "[a]ll the State of California seeks, or wants, is the right to maintain the momentum it has gained in working out means for its own salvation." 11 Cong. Rec. 30,940 (Nov. 2, 1967). Obviously, that attitude would be inconsistent with the position that a waiver would be merited even if California's emission standards could not help to achieve the state's "own salvation." Mr. Smith of California urged support of the waiver provision, observing that "Federal smog legislation is badly needed, but not legislation that will impede California's progress." *Id*. at 30,941. Preventing California from enforcing ineffectual regulations would not, of course, impede California's progress toward cleaner air. The other members' comments were of the same tenor. *See id*. at 30,944 (Rep. Talcott of California) (waiver provision necessary to allow California to "protect[] its citizens from death, disability, discomfort, or damage"); *id*. at 30,946

(Rep. Hanna of California) (waiver provision needed in recognition of California's "significant attempt to control air pollution"). None of these statements is inconsistent with an interpretation of Subsection (b)(1)(B) requiring some showing of meaningful impact.

EPA contends that its past waiver decisions support hyper-deference to California. *See* 74 Fed. Reg. at 32,748. But at most these decisions stand for the proposition that EPA cannot deny a waiver on the grounds of a cost-benefit analysis, or some other reason related to regulatory "return on investment" concerns. None of these prior waivers supports EPA's current view that Section 209(b)(1)(B) can be met without a showing of meaningfulness. *See, e.g.*, 36 Fed. Reg. 17,458, 17,458 (Aug. 31, 1971) ("[W]hether a proposed California requirement is likely to result in only *marginal improvement* in California air quality *not commensurate with its cost* . . . is not legally pertinent to my decision under section 209 . . . .") (emphasis added); 40 Fed. Reg. 23,102, 23,104 (May 28, 1975) ("Since *a balancing of these risks and costs* against the potential benefits from reduced emissions is a central policy decision for any regulatory agency, . . . I am required to give very substantial deference to California's judgment on this score.") (emphasis added).

In sum, EPA's interpretation of Subsection (b)(1)(B) as requiring no showing of meaningful impact is not supported by Section 209's legislative or regulatory history.

4. EPA May Not Use Hyper-Deference to California's Decisionmaking To Justify a Determination That California Needs Its Greenhouse Gas Emission Standards To Meet Compelling and Extraordinary Circumstances

EPA contends that its review of California's standards is limited by the substantial deference owing to the state's determinations. *See, e.g.*, 74 Fed. Reg. at 32,748. In the context of Section 209(b)(1)(B)'s "need" analysis, this hyper-deference is misplaced, for two reasons.

First, EPA cannot use its deference theory to get around fundamental principles of administrative law. As this Court noted in *Motor & Equipment Manufacturers Association, Inc. (MEMA) v. Environmental Protection Agency*, 627 F.2d 1095 (D.C. Cir. 1979), judicial review of EPA's waiver decisions is governed by Section 706 of the Administrative Procedure Act. *See id*. at 1105. Under that standard, any finding subsumed within the waiver process must be supported by substantial evidence, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *Cf.* 5 U.S.C. § 706(2)(E). And as demonstrated in previous sections, a reasonable mind could not conclude that enforcement of California's greenhouse gas emission standards would have any effect on the progress of global climate change and its related harms.

Second, EPA's reliance on *MEMA* for hyper-deference to California, *see* 74 Fed. Reg. at 32,748, is misplaced. *MEMA*'s discussion of the deference owed to

California in a waiver proceeding, *see* 627 F.2d at 1122, has no bearing on Subsection (b)(1)(B)'s interpretation. *MEMA* concerned challenges to Section 209(b)(1) and 209(b)(1)(C) determinations, *not* a Subsection (b)(1)(B) determination. *See MEMA*, 627 F.2d at 1123-24. Moreover, the standard of "meaningfulness" that Subsection (b)(1)(B) imposes is a *legal* question concerning the interpretation of a federal statute, one for which California has no expertise. *Cf. Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

CONCLUSION

For the foregoing reasons, the petition for review should be granted and EPA's waiver vacated.

DATED: July 1, 2010.

Respectfully submitted,

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FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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