ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1230 and consolidated cases

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

UNION OF CONCERNED SCIENTISTS, ET AL.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, ET AL.,

Respondents,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, ET AL.,

Respondent-Intervenors.

On Petitions for Review of Action by the National Highway Traffic Safety Administration and U.S. Environmental Protection Agency

PROOF BRIEF FOR INTERVENORS THE COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, THE AUTOMOTIVE REGULATORY COUNCIL, INC., AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS

Raymond B. Ludwiszewski
Counsel of Record
Rachel Levick Corley
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
RLudwiszewski@gibsondunn.com

Eric D. McArthur
Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com

Counsel for Respondent-Intervenors

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, Respondent-Intervenors the Coalition for Sustainable Automotive Regulation, the Automotive Regulatory Council, Inc., and American Fuel and Petrochemical Manufacturers (collectively, "Intervenors") respectfully submit this Certificate as to Parties, Rulings, and Related Cases:

A. Parties

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief of State and Local Government Petitioners and Public Interest Petitioners and the Brief of Respondents:

Amici: Urban Air Initiative, Inc.; Chamber of Commerce of the United States of America.

B. Rulings Under Review

Under review is the joint final action of the Environmental Protection Agency and the National Highway Traffic Safety Administration, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

C. Related Cases

Three consolidated cases in the U.S. District Court for the District of Columbia involve challenges to the same NHTSA regulation at issue here. *California v. Chao*, No. 1:19-cv-2826-KBJ (D.D.C.); *Envtl. Def. Fund v. Chao*, No. 1:19-cv-

2907-KBJ (D.D.C.); *S. Coast Air Quality Mgmt. Dist. v. Chao*, No. 1:19-cv-3436-KBJ (D.D.C.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, Intervenors respectfully submit the following corporate disclosure statement:

The Coalition for Sustainable Automotive Regulation (the "Coalition"), an unincorporated nonprofit association operating under the laws of the District of Columbia, states pursuant to Federal Rule of Appellate Procedure 26.1 that it is not a publicly held corporation, has no parents companies, and no companies have a 10% or greater ownership interest in the Coalition. The Coalition's members consist of FCA US LLC, General Motors LLC, Mazda Motor of America, Inc. d/b/a Mazda North American Operations, Mitsubishi Motors North America, Toyota Motor North America, Inc., the Automotive Regulatory Council, Inc., and the National Automobile Dealers Association.

The Automotive Regulatory Council, Inc. (the "Council"), a nonprofit corporation operating under the laws of Virginia, states pursuant to Federal Rule of Appellate Procedure 26.1 that it is not a publicly held corporation, has no parent companies, and no companies have a 10% or greater ownership interest in the Council. The Council's members consist of Hyundai Motor America, Kia Motors America, Inc., Nissan North America, Inc., Subaru of America, Inc., and Toyota Motor North America, Inc.

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association that represents American refining and petrochemical companies. AFPM has no parent corporation, and no publicly held corporation has a 10% or greater ownership in AFPM.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes

TABLE OF AUTHORITIES (continued)

Page(s)

Regulations and Federal Register Notices

Legislative History

TABLE OF AUTHORITIES (continued)

Page(s)

Dictionaries

Other Authorities

GLOSSARY

ACC	Advanced Clean Car
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy
CARB	California Air Resources Board
EISA	Energy Independence and Security Act of 2007
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
GHG	greenhouse gas
Industry Br.	Brief of petitioners National Coalition for Advanced Transportation, et al.
JA	Joint Appendix
MY	model year
NHTSA	National Highway Traffic Safety Administration
ONP	One National Program
Primary Br.	Brief of state and local government petitioners and public-interest petitioners
ZEV	zero emissions vehicle

INTRODUCTION

Under the Clean Air Act (CAA), the Environmental Protection Agency (EPA) measures the amount of carbon emitted from new motor vehicles and then, through a simple mathematical formula, calculates each vehicle's average fuel economy. 49 U.S.C. § 32904(c); 38 Fed. Reg. 10,868 (May 2, 1973). These procedures underscore the critical point in this case: there is a direct, scientific, and mathematical relationship between greenhouse gas (GHG) emissions and fuel economy. Indeed, the connection is so strong that EPA reports one by measuring the other. The unavoidable consequence of this fact is clear: the regulation of motor vehicle GHG tailpipe emissions is a *de facto* regulation of fuel economy.

Due to this relationship, the federal government has historically prescribed a single standard for motor vehicle fuel economy and GHG emissions. This approach is consistent with congressional intent, expressed most emphatically through the Energy Policy and Conservation Act's (EPCA) preemption of state and local "law[s] or regulation[s] related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). This unified, national framework redounds to the benefit of automakers and consumers alike, allowing manufacturers to produce safer, cleaner, more affordable, and more fuel-efficient vehicles. But California's recent attempts to circumvent EPCA preemption by implementing a package of GHG and zero emission vehicle (ZEV) regulations have upended this harmonized approach.

Through the final actions challenged by these Petitions, EPA and the National Highway Traffic Safety Administration (NHTSA) have restored Congress's intent to have one national standard by giving effect to some of the strongest preemption language contained in federal law. Safer Affordable Fuel-Efficient (SAFE) Vehicles Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (JA__-__) ("Final Rule"). The Final Rule clarifies that EPCA preempts state motor vehicle GHG and ZEV standards and withdraws a waiver previously granted to California authorizing such regulations. Manufacturers have sought clarity on these issues for nearly two decades—since California first attempted to impose its own GHG tailpipe regulations on industry. By denying these Petitions, this Court can end this legal uncertainty and uphold the national uniformity Congress mandated.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 U.S.C. § 7607(b)(1) and 49 U.S.C. § 32909.

STATEMENT OF THE ISSUES

1. Whether NHTSA lawfully determined that state regulations of motor vehicle GHG tailpipe emissions and ZEVs are preempted by EPCA.

2. Whether EPA lawfully withdrew the waiver previously granted to California under CAA Section 209(b) for California's motor vehicle GHG and ZEV regulations.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

All pertinent constitutional, statutory, and regulatory provisions are contained in the addenda to the Brief of State and Local Government Petitioners and Public Interest Petitioners and the Brief of Respondents.

STATEMENT OF THE CASE

"[T]ailpipe CO2 emissions standards are directly and inherently related to fuel economy standards." JA__[2018NPRM42987] (Aug. 24, 2018) ("2018 NPRM"). As a matter of physics, any change that allows a car to drive one mile on less gas (*i.e.*, greater fuel economy) will necessarily cause the car to emit fewer GHGs over the course of that mile. Indeed, the relationship is so strong that for decades, as stipulated by EPCA pursuant to congressional direction, EPA has calculated fuel economy by measuring a vehicle's carbon emissions and then converting that measurement into a fuel-economy metric. *See* 49 U.S.C. § 32904(c); 38 Fed. Reg. 10,868. This direct, mathematical relationship is well established and beyond scientific dispute.

Two federal statutes govern these standards: EPCA and the CAA. Properly interpreted, these statutes work together to provide a unified, national regulatory program for motor vehicle fuel economy and GHGs.

Congress passed EPCA in 1975 to establish a "single standard" for motor vehicle fuel economy. S. Rep. No. 93-526, at 59 (1973). EPCA authorizes NHTSA

to set national fuel-economy standards through the Corporate Average Fuel Economy (CAFE) program. Critically, Congress reinforced this national approach through an express preemption provision, providing that states "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). This provision embodies Congress's recognition that "the establishment of Federal standards for fuel economy … represents the best … approach for achieving a substantial improvement in fuel economy." S. Rep. No. 93-526, at 59.

Federal regulation of motor vehicle GHG emissions is a more recent development. EPA's authority to regulate these emissions derives from the CAA. 42 U.S.C. §§ 7401-7626. But this authority lay dormant until it was recognized by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The CAA, like EPCA, envisions a national regulatory approach, backed by its own preemption provision, 42 U.S.C. § 7543(a), that "prohibits states from adopting their own vehicle emissions standards." *California v. EPA*, 940 F.3d 1342, 1345 (D.C. Cir. 2019). The CAA authorizes EPA to depart from this unified regulatory framework under limited circumstances: Section 209(b) allows EPA to "waive application of" the express preemption provision for California *only if*, *inter alia*, it "need[s] such State standards to meet compelling and extraordinary conditions," 42 U.S.C. § 7543(b); and

Section 177 allows other states to "adopt and enforce" such California standards, *id.* § 7507.

"In view of '[t]he close relationship between emissions of CO2 … and fuel consumption,'" EPA and NHTSA have long worked together to promulgate a harmonized national regime, *California,* 940 F.3d at 1345 (brackets in original), one that provides sufficient regulatory certainty and lead time for the automotive industry to produce ever safer, cleaner, and more fuel-efficient vehicles.

But recent actions by California have upended the status quo. In 2002, California became the first state to authorize the regulation of motor vehicle GHG emissions. The California Air Resources Board (CARB) approved such regulations in 2004, and 13 states eventually adopted California's standards via Section 177 pursuant to a CAA waiver that EPA initially denied but later granted on reconsideration, albeit without addressing EPCA preemption. *See* 74 Fed. Reg. 32,744, 32,783 (July 8, 2009) ("EPA takes no position regarding whether … California's GHG standards are preempted under EPCA.").

These developments led NHTSA to examine whether these state regulations are related to fuel-economy standards and thus preempted under EPCA. In a 2006 rulemaking, it determined that state GHG regulations are "expressly preempted" by EPCA because they have "the direct effect of regulating fuel consumption." 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006). California's actions also prompted a response

from industry, which argued in several lawsuits that California's regulations are preempted under EPCA. Two federal district courts held to the contrary. *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

While appeals from those decisions were pending, American automakers and EPA, NHTSA, and CARB reached the "One National Program" (ONP) agreement. Adopted in 2009, the ONP agreement committed EPA and NHTSA to issuing joint regulations while CARB agreed to deem automakers that complied with federal regulations as complying with state regulations. While leaving the underlying issue regarding California's authority to regulate in this space unresolved, the ONP agreement temporarily protected automakers from the higher costs and compliance burdens associated with separate California standards and provided much-needed certainty for a highly regulated, long lead-time industry.

EPA and NHTSA reaffirmed their commitment to unified national standards through a series of actions, including a 2012 rulemaking that set GHG standards for model years (MYs) 2017-2025 and CAFE standards for MYs 2017-2021. *See* 77 Fed. Reg. 62,624 (Oct. 15, 2012).[1] The rule also included a commitment by EPA to conduct a midterm evaluation to determine whether the GHG standards for MYs

[1] NHTSA cannot set CAFE standards more than five years into the future. 49 U.S.C. § 32902(b)(3)(B).

2022-2025 remained appropriate. Although the midterm evaluation was not "due" until April 2018, EPA rushed its determination barely a week before the presidential transition in January 2017 and, after a truncated comment period, found that the standards established in 2012 remained appropriate. Shortly thereafter, however, EPA announced that it would reconsider the January 2017 determination. *See* 82 Fed. Reg. 14,671 (Mar. 22, 2017).

EPA and NHTSA issued the 2018 NPRM on August 28, 2018. In addition to proposing new GHG and fuel-economy standards for MYs 2021-2026, EPA proposed to withdraw California's Section 209 waiver and NHTSA reaffirmed that EPCA preempts state regulation of motor vehicle GHG emissions. On November 13, 2018, while the rulemaking was pending and discussions between the parties were underway, California effectively withdrew itself and the Section 177 states from the ONP agreement by amending its GHG regulation to provide that the deemed-to-comply provision will no longer apply if the federal standards are amended. This action violated the conditions on which California's waiver was granted,[2] and California has not sought a waiver from EPA for its revised program—now without the deemed-to-comply provision—despite the requirement that it do so

[2] On April 30, 2020, EPA and NHTSA finalized new standards for fuel economy and GHG emissions for MYs 2021-2026 vehicles. *See* Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). Thus, California's deemed-to-comply provision is no longer in effect.

under CAA Section 209(b). And neither EPA nor NHTSA can waive preemption under EPCA.

The Final Rule, published on September 27, 2019, confirmed the legal determinations proposed in the 2018 NPRM. First, NHTSA "finaliz[ed] its proposal concerning preemption of State and local laws and regulations related to fuel economy standards," to "maintain the integrity" of the CAFE regime "established by Congress as a nationwide program." JA__[FinalRule51311]. Second, "EPA announce[d] its decision to withdraw [California's Section 209] waiver." JA__[FinalRule51310]. EPA's decision was based on its determination, first made thirteen years ago, that California "'does not need [GHG-related] standards to meet compelling and extraordinary conditions' within the meaning of CAA section 209(b)(1)(B)," as well as NHTSA's preemption determination, which NHTSA has held consistently for nearly fifteen years. JA__[FinalRule51328].

SUMMARY OF ARGUMENT

NHTSA lawfully exercised its authority to promulgate the preemption regulation. NHTSA has express congressional authority to "prescribe regulations to carry out" the CAFE program. 49 U.S.C. § 322(a). And affirming EPCA's preemptive effect is critical to carrying out NHTSA's mandate to establish uniform national fuel-economy standards at the "maximum feasible" level. *Id.* § 32902(a). Further-

more, the preemption regulation correctly concludes that state tailpipe GHG standards are preempted by EPCA: expressly, because they fall within EPCA's "related to" preemption provision, *id.* § 32919(a); and impliedly, because they disrupt the national framework established by Congress and effectively void NHTSA's determination as to the "maximum feasible" standard. State ZEV mandates are also preempted because they directly affect manufacturers' average fuel economy.

EPA's withdrawal of California's Section 209(b) waiver is likewise lawful. EPA has inherent authority to revisit prior decisions, including waiver decisions. So long as Congress has not limited EPA's default reconsideration authority—it has not—and no justifiable reliance interests preclude the exercise of that authority—they do not—EPA can withdraw California's waiver, and has done so appropriately here. Petitioners' arguments to the contrary overlook this well-settled rule and ignore EPA's careful explanation for why its power to reconsider was reasonably exercised here.

EPA's interpretation and application of Section 209(b)(1)(B) is also lawful. First, the term "such State standards" in that provision does not mandate an all-or-nothing determination, but permits EPA to evaluate proposed standards individually—waiving standards that satisfy Section 209(b)(1)(B) and rejecting standards that do not, including those targeting global, not local, pollution problems. Second,

EPA reasonably interpreted Section 209(b)(1)(B) to permit waiver only when California's standards would meaningfully address pollution problems specific to that state—a standard California cannot meet. Third, EPA rationally concluded that any criteria-pollution benefits from California's standards were too speculative to justify a separate regulatory framework, and in any event, were disavowed by California in its original waiver request. Finally, NHTSA's preemption regulation and California's own unilateral actions provide separate, valid grounds for EPA's waiver withdrawal.

ARGUMENT

I. NHTSA'S PREEMPTION REGULATION IS LAWFUL

In addition to arguing that this Court lacks jurisdiction to review NHTSA's preemption rule,[3] Petitioners claim that NHTSA exceeded its statutory authority and misconstrued EPCA's preemptive effect. Relying heavily on the legislative histories of EPCA, the CAA, and subsequently enacted statutes, Petitioners contend that whatever the plain meaning of EPCA's preemption clause, Congress did not intend to preempt state and local GHG and ZEV regulations for which EPA has granted a Section 209(b) waiver. These arguments, however, conflict with EPCA's express

[3] *See* Primary Br. 74-78. Intervenors incorporate by reference Respondents' position that this Court has jurisdiction over the NHTSA regulation pursuant to 49 U.S.C. § 32909. Gov't Br. 26-32. Intervenors also adopt by reference Respondents' position that NEPA does not apply here, *id.* at 59-63, as well as their positions with respect to Section 177 of the CAA, *id.* at 105-11.

terms and misread legislative history. NHTSA has authority to promulgate a regulation interpreting EPCA's preemption clause, and it lawfully determined that EPCA preempts state and local GHG and ZEV standards.

A. NHTSA Is Authorized to Issue the Preemption Regulation

NHTSA has clear authority to interpret its governing statute. Congress endowed the Secretary of Transportation with authority to "prescribe regulations to carry out the duties and powers" of the office. 49 U.S.C. § 322(a). Among the Secretary's congressionally authorized "duties and powers" is to prescribe national fuel-economy standards, *see id.* § 32902, that preempt any state standards "relat[ing] to" the federal standards, *id.* § 32919(a). "The Secretary has," in turn, "delegated this rulemaking authority to [NHTSA]." *California*, 940 F.3d at 1345 (citing 49 C.F.R. § 1.95(a)). NHTSA thus has express congressional authorization, by and through the Secretary of Transportation, to "prescribe regulations to carry out" the CAFE program.

That the preemption regulation "carries out" the CAFE regulations authorized under 49 U.S.C. §§ 32901-32903 is clear from the statutory text. To "carry out" means to "put into execution" or "make workable." *Viereck v. United States*, 130 F.2d 945, 951 (D.C. Cir. 1942), *rev'd on other grounds*, 318 U.S. 236 (1943); *Barbosa v. DHS*, 263 F. Supp. 3d 207, 220 (D.D.C. 2017), *aff'd*, 916 F.3d 1068 (D.C.

Cir. 2019). Section 32902 requires NHTSA to establish national standards and ensure that "each standard shall be the maximum feasible average fuel economy level." NHTSA cannot "carry out" this mandate if its regulations are superseded by more stringent, infeasible standards promulgated by the states. *See* JA__-__[FinalRule51316-17] (explaining that the preemption rule and the clarity it provides are "necessary to the effectiveness" of CAFE standards).

It does not matter that Congress did not expressly authorize rules concerning preemption. "A pre-emptive regulation's force does not depend on *express* congressional authorization to displace state law." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (emphasis added); *accord City of New York v. FCC*, 486 U.S. 57, 66-67 (1988) (upholding preemption regulation issued pursuant to general rulemaking authority). "[T]he *sine qua non* for agency preemption" is "a congressional delegation of authority either to preempt or to *regulate*." *Mozilla Corp. v. FCC*, 940 F.3d 1, 82 (D.C. Cir. 2019).[4] NHTSA's preemption rule falls comfortably within its delegated power to regulate fuel economy.

Moreover, that EPCA's preemption provision is "self-executing" does not defeat NHTSA's authority to clarify its scope through a rulemaking. *Contra* Primary

[4] Petitioners' argument to the contrary relies primarily on *Wyeth v. Levine*, 555 U.S. 555 (2009). But *Wyeth* involved neither an express preemption provision nor an agency rule. Rather, *Wyeth* pertained only to the degree of deference owed to an agency's preemption determination—not its authority to make the determination in the first place.

Br. 79. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court deferred to an agency regulation that implemented a "self-executing" preemption provision. There, as here, the agency's promulgation of the rule effectuated the statute's express preemption provision. *See id*. at 481-82 & n.5, 496. Likewise, that Congress has elsewhere used more explicit language to authorize agencies to preempt state laws does not mean that NHTSA lacks authority to implement EPCA's preemption provision. The negative inference Petitioners would draw cannot overcome EPCA's express delegation of rulemaking authority. *See City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) ("[A] general conferral of rulemaking authority … validate[s] rules for *all* the matters the agency is charged with administering.").

Finally, if there is any doubt, NHTSA's determination that it has authority to issue the regulation is entitled to deference. *See id.* at 302 (*Chevron* applies to agency interpretations concerning the scope of their authority, including whether it "extends to pre-empting conflicting state rules"). NHTSA "is the federal agency to which Congress has delegated its authority to implement" EPCA, and is "uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' … and, therefore, whether it should be pre-empted." *Medtronic*, 518 U.S. at 496 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

B. State Motor Vehicle GHG and ZEV Regulations Are Preempted by EPCA

It is "[a] fundamental principle of the Constitution … that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Here, NHTSA's preemption regulation is lawful because EPCA preempts state GHG and ZEV regulations both expressly and impliedly. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 346 (D.C. Cir. 2018).

1. EPCA Expressly Preempts State GHG Regulations

A critical objective of EPCA is to establish uniform national fuel-economy standards. The linchpin of this statutory scheme is EPCA's express preemption provision, which prohibits states from adopting "a law or regulation related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). NHTSA correctly interpreted this provision to preempt state laws "that relate to fuel economy standards by directly or substantially affecting corporate average fuel economy." JA__[FinalRule51313].[5] Although Petitioners attempt to reframe the Final Rule as preempting state laws that merely "have the effect of promoting or impeding fuel economy," Primary Br. 86, NHTSA's interpretation by definition excludes relationships that are "tenuous, remote, or peripheral," *Rowe v. N.H. Motor Transp. Ass'n*,

[5] At a minimum, this interpretation is reasonable. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); *see also Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009) (applying *Chevron* to interpretation of preemption clause).

552 U.S. 364, 375 (2008); *see* JA__[FinalRule51314] (state laws that have "only an insignificant effect" or an "incidental impact" on fuel economy are not preempted).

The validity of the preemption regulation can, and should, be resolved by reference to the "plain wording of [EPCA's preemption] clause." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Attention to the statutory language is particularly important when interpreting a preemption clause, as Congress chooses from an array of key phrases when drafting these clauses, all carrying various degrees of breadth. For example, Congress can preempt state laws "related to," "covered by," or "in addition to, or different than" a federal law or regulation. *See* Cong. Res. Serv., *Federal Preemption: A Legal Primer* 6-13 (July 23, 2019) (surveying language used in preemption clauses).

When drafting EPCA's preemption provision, Congress chose the broadest possible language: "related to." As the Supreme Court has noted, "related to" preemption provisions have a "broad scope," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (Airline Deregulation Act), are "deliberately expansive," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (ERISA), and are "conspicuous for [their] breadth," *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (ERISA); *accord Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) (concluding that a state law "relates to" a federal law if it "has a connection with or refers to" the subject of the federal law). The breadth of such provisions is owed to the term's plain meaning:

"related" means "[c]onnected in some way; having relationship to or with something else." *Related*, Black's Law Dictionary (11th ed. 2019).

Petitioners take issue with Congress's use of "related to" as too "broad" and "indeterminate," and they invite this Court to disregard its "literal[]" meaning in favor of something more "limit[ed]." Primary Br. 86. But one cannot "simply read[] the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385. "Had [EPCA] been designed to pre-empt state law in [the] limited fashion" described by Petitioners, Congress would have chosen different language. *Id.*[6] And whatever indeterminacy may exist at the outer reaches of "related to," it is not implicated by state laws that *directly* or *substantially* affect corporate average fuel economy. Under any reasonable reading of "related to," such laws lie at the preemption clause's core. Accordingly, this Court should reject Petitioners' redline to EPCA's preemption provision. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017) (courts must "apply, not amend, the work of the People's representatives").

EPCA plainly preempts state GHG standards. As described above, California's GHG standards are, to say the least, "connected in some way" to federal fuel-economy standards, given the direct relationship between CO2 emissions and fuel

[6] For example, if Congress had intended to preempt only state laws that expressly *prescribe* fuel-economy standards, it could easily have used language to that effect, as it did elsewhere in the Act, including in the preemption provision itself. *See* 49 U.S.C. § 32919(c) (allowing a state to "*prescribe* requirements for fuel economy for automobiles obtained for its own use") (emphasis added).

economy—a relationship Congress itself recognized in EPCA's methodology for measuring fuel economy. *See* 49 U.S.C. § 32904(c). Petitioners attempt to wave off this relationship by arguing that there is an "incomplete and transitory overlap" between fuel economy and GHG emissions, asserting that *most* but *not all* technologies automakers use to comply with GHG emission standards do so by improving fuel economy. Primary Br. 100. But this is both an understatement and mischaracterization of the relationship between the two. NHTSA and EPA agree that "[i]mproving fuel economy is the only feasible method of achieving full compliance" with the state standards. JA__[2018NPRM43236]; *see Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 157 (2d Cir. 2010) (EPCA preempts state rules that "make fuel economy standards essential to the operation of those rules"). And in any event, the fact that the relationship between fuel economy and GHG emissions may one day be viewed as only transitory does not preclude the agencies from adopting the Final Rule based on the world as it exists today.

2. EPCA Impliedly Preempts State GHG Regulations

Even if state tailpipe GHG emissions regulations were not expressly preempted under EPCA—and they are—such regulations are impliedly preempted because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in creating a national framework for fuel-economy regulation. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987)

(quoting *Hines*, 312 U.S. at 67). The obstacle is obvious: to the extent a state imposes more onerous standards than the federal government, it has effectively voided NHTSA's determination as to the "maximum feasible" standard and disrupted the program envisioned by Congress. 49 U.S.C. § 32902(a). "Since NHTSA should not, as a matter of sound public policy, and in fact may not as a matter of law, set standards above the level it determines to be the maximum feasible level, EPCA should not be interpreted as permitting the States to do so." 71 Fed. Reg. at 17,668.

This is a prototypical case of obstacle preemption. With EPCA, "Congress' intent [was] that there be a single, nationwide fuel economy standard" at the maximum feasible level. JA__[2018NPRM43238]. Indeed, nationwide fleet average is the cornerstone of the CAFE program, allowing manufacturers to tailor their vehicle offerings to the specific demands of local consumers. State GHG regulations, however, create a balkanized system of regulations, requiring manufacturers to balance their fleets separately in each state that has adopted them—an unworkable outcome for industry. State regulations of this nature clearly "stand[] as an obstacle" to a unified, national framework for fuel-economy regulation, *Int'l Paper*, 479 U.S. at 491-92, and are impliedly preempted under EPCA.

Petitioners assert that state GHG regulations do not conflict with EPCA because those standards prompt individual manufacturers to improve their fleet-average fuel economy, which furthers, rather than frustrates, EPCA's purpose. Primary

Br. 105. But EPCA's purpose is not so limited. Under the CAFE program, NHTSA must consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). And it must determine, in light of those factors, what level of fuel economy is the "maximum feasible." *Id.* § 32902(a). Congress's determination that fuel-economy standards should not be set above what NHTSA determines to be the maximum feasible is as much a part of EPCA's purpose as improving fuel economy. *See Kucana v. Holder*, 558 U.S. 233, 252 (2010) ("[N]o law pursues its purpose at all costs, and ... the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations.") (omission in original). Allowing California to make a different judgment than the federal agency Congress charged with weighing the statutory factors, based on considerations that differ from those Congress specified in the Act, plainly conflicts with the statutory scheme.

3. ZEV Mandates Are Also Preempted by EPCA

ZEV mandates are expressly preempted by EPCA because they "requir[e] manufacturers to eliminate fossil fuel use in a portion of their fleet," JA__[FinalRule51314], and thus directly and substantially affect manufacturers' average fuel economy, *see* 49 U.S.C. §§ 32904(a)(2), 32905 (providing for inclusion

of ZEVs' "fuel economy" in calculating corporate average fuel economy).[7] Where, as here, federal law preempts state regulation "related to" a particular field and where a state nevertheless regulates within that field, the state regulation is preempted. *See, e.g.*, *Rowe*, 552 U.S. at 367; *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001).

ZEV mandates are also impliedly preempted because they conflict with Congress's determination that the "maximum feasible" fuel-economy standard should be set without regard to ZEVs. *See* 49 U.S.C. § 32902(h)(1). Congress relied on incentives rather than mandates for ZEVs, which "involve[] [the] implementation of some of the most expensive and advanced technologies in the automotive industry." JA__[2018NPRM43239]. Allowing states to countermand that determination by mandating ZEVs—on top of the "maximum feasible" fuel-economy standards set by NHTSA—necessarily "interfere[s] with NHTSA's balancing of statutory factors in establishing maximum feasible fuel economy standards." *Id*. Simply put, state ZEV mandates require manufactures to apply and sell the *most expensive* fuel-reducing technologies first, thus frustrating the economic practicability consideration assessed by NHTSA in its determination of "maximum feasible" standards.

[7] EPCA does not only preempt states from adopting fuel-economy standards expressed in miles per gallon. Congress intended EPCA's preemption provision to have a broad application, irrespective of the metric used to express fuel economy. *See* S. Rep. No. 93-526, at 66 ("State or local fuel economy standards would be preempted, regardless of whether they were in terms of miles per gallon or some other parameter such as horsepower or weight.").

C. Petitioners' Arguments Based on Extra-Textual Sources Are Unavailing

Lacking textual support in the statute, Petitioners turn instead to the legislative histories of EPCA, the CAA, and amendments to those laws. *See* Primary Br. 84-98. The upshot of these sources, Petitioners claim, is that despite the plain meaning of EPCA's preemption clause, Congress did not intend to "preempt emissions standards applicable by reason of Section 209(b)" of the CAA. *Id.* at 86-87. This is wrong on the face of the statute: EPCA preempts *all* state laws that relate to fuel economy. *See* 49 U.S.C. § 32919. And because Congress did *not* provide an exception for state GHG emission standards, despite expressly including two other limited exceptions, *see id.* § 32919(b), (c), Petitioners are effectively asking this Court to amend EPCA's preemption clause by adding a third exception. This Court should decline to do so. Petitioners' arguments distort the statutory history and, in any event, cannot change the clear command of EPCA's preemption clause. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest.").

First, Petitioners argue that EPCA has always recognized and prioritized state emission standards over federal fuel-economy standards, pointing to the fact that Congress gave individual manufacturers the ability to petition NHTSA to relax federal fuel-economy standards, and that Congress included California's "emissions standards applicable by reason of section 209(b)" of the CAA within the definition

of "Federal standards." Primary Br. 87-93; 15 U.S.C. § 2002(d)(3)(D)(i) (1976). But this narrow provision cannot carry the weight Petitioners place on it. First, the provision has no current effect. It pertained only to the fuel-economy standards promulgated for MYs 1978-1980 and was dropped from the statute in 1994 when Congress recodified EPCA. *See* Primary Br. 90 (recognizing that the provision was "time-limited"). Moreover, even when operative, the definition of "Federal Standards" never had any application outside that subsection. *See* 15 U.S.C. § 2002(d)(3)(D)(i) (1976) (defining "Federal standards" only "[f]or the purposes of this subsection"). It thus has no application to the matter at hand.

Second, Petitioners argue that EPCA's requirement for NHTSA to consider "other standards" in setting its CAFE standards reveals Congress's intent not to preempt state standards. *See* Primary Br. 90-93. But even assuming that California's state regulations fall within the meaning of "federal motor vehicle standards" (now, "other motor vehicle standards of the Government"), NHTSA's interpretation does not entail that *all* California emission standards are preempted, only those that directly or substantially affect fuel-economy standards. There is thus no "statutory contradiction." *Id.* at 88. At most, the "other standards" provision "direct[s] NHTSA to consider those State standards that can otherwise be validly adopted and enforced under State and Federal law." 71 Fed. Reg. at 17,669. It neither exempts

any state laws from preemption nor requires NHTSA to consider state standards that are preempted.

Third, Petitioners argue that several statutes enacted after EPCA—specifically, the 1990 CAA Amendments and Section 141 of EISA—manifest Congress's intent to preserve California's authority to regulate motor vehicle GHG emissions. *See* Primary Br. 94-98. But nothing in this post-enactment history even comes close to meeting the high bar for an implied repeal of EPCA's preemption provision. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) (noting the "stringent" standard for, and "rarity" of, implied repeals); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("[Absent] some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress.") (citation omitted). If Congress had intended, as Petitioners argue, to "la[y] to rest any doubt about California's authority to set its own greenhouse gas emission standards," Primary Br. 94, it would have amended EPCA's preemption clause. It did not.

Finally, Petitioners assert that California's emissions regulations are equivalent to federal standards by virtue of receiving a Section 209(b) waiver. *Id.* at 93. But avoiding preemption under one federal law has no bearing on another federal

law's preemptive effect. And the language of the CAA dispels any notion that a California standard with a Section 209(b) waiver has the status of a federal law for purposes of EPCA. Section 209(b) provides that a waiver exempts a California regulation from preemption only under "*this section*," and that "compliance with such State standards shall be treated as compliance with applicable Federal standards *for purposes of this subchapter*." 42 U.S.C. § 7543(b)(1), (b)(3) (emphases added). These standards do not somehow become federal law, and thus immune from preemption under EPCA, once EPA grants a waiver under the CAA.

Regardless, EPA has now revoked the waiver of Section 209 preemption for California's Advanced Clean Car (ACC) program. JA__[FinalRule51328]. So even if EPCA did not preempt state GHG regulations which have been given a waiver by EPA—and it does—California's regulations do not presently have a waiver and are thus preempted by EPCA in any event. Moreover, even if EPA had not withdrawn California's waiver, California has abrogated its waiver by unilaterally revoking the deemed-to-comply provision from its regulations.

Accordingly, NHTSA's preemption regulation is a lawful exercise of the agency's authority.

II. EPA'S WAIVER DETERMINATION IS LAWFUL

Petitioners attack EPA's waiver determination as without statutory authority and lacking any lawful justification. Petitioners are wrong. Not only does EPA have

inherent authority to reconsider prior waiver decisions, including *this* waiver decision, but its interpretations of Section 209(b)(1)(B) are fully consistent with that provision's text, structure, history, and purpose. At a minimum, they are sufficiently rational to warrant this Court's deference. That EPA may have changed course from earlier understandings, and reverted to its original views, does not make EPA's interpretations unlawful when it has otherwise engaged in reasoned decisionmaking. The APA does not demand more.

At any rate, NHTSA's preemption determination—which it has consistently held across three presidential administrations—and California's own actions provide separate grounds for EPA's waiver withdrawal. Petitioners' attempt to minimize these actions as irrelevant to EPA's Section 209(b)(1) authority cannot mask the fact that California has openly breached the terms of its waiver, as that waiver was understood and bargained for by all parties to the ONP agreement.

A. EPA Has Authority to Withdraw California's Preemption Waiver

Like every other administrative agency, EPA enjoys implicit or "inherent" authority to reconsider prior decisions, including a decision to grant a preemption waiver under Section 209(b)(1). The circumstances of this case do not compel a different conclusion. Although Petitioners insist that reliance interests have attached to EPA's 2013 waiver grant, Petitioners could not reasonably expect that the standards approved in that waiver would remain untouched, especially since EPA and

CARB expressly committed to a mid-term review of those standards. In short, Petitioners were on ample notice that the standards around which they built their long-term plans could change, and they cannot now point to "reliance interests" to excuse their failure to anticipate that possibility.

1. EPA Has Inherent Authority to Reconsider Prior Waiver Decisions

EPA has inherent authority to revisit an earlier determination. *See New Jersey v. EPA*, 517 F.3d 574, 582-83 (D.C. Cir. 2008). This rule holds even where there is no "express provision granting [the agency] authority to reconsider," because "the 'power to reconsider is inherent in the power to decide.'" *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (quoting *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). Here, the CAA authorizes EPA to grant or deny California's waiver requests after "notice and opportunity for public hearing" and careful analysis by the Administrator. 42 U.S.C. § 7543(b)(1). Because EPA has this "power to decide," it also has the "power to reconsider" an earlier waiver decision if that decision was inconsistent with Section 209(b)(1) or otherwise inappropriate.

Petitioners ignore this well-settled rule. They argue that because EPA is "a creature of statute," it must identify "explicit withdrawal authority" within the text of the CAA. Primary Br. 28. But this Court has never required that a statute confer "explicit" reconsideration authority—quite the opposite. The default presumption is that "an agency retains authority to reconsider and correct an earlier decision,"

unless Congress has "displace[d]" that authority by prescribing a separate process "to rectify the agency's mistakes." *Ivy Sports*, 767 F.3d at 86, 93; *cf. Am. Methyl Corp. v. EPA*, 749 F.2d 826, 834-35 (D.C. Cir. 1984) (rejecting EPA's reconsideration authority because a separate CAA provision "provided a mechanism for correcting" the error in that case).

Congress has not done so here. While Petitioners are adamant that "EPA's assertion of 'inherent' authority … is incompatible with [CAA's] regulatory regime," Primary Br. 32, they do not—and cannot—point to any separate statutory authority that would enable EPA to rectify a mistaken waiver decision. Nor can they show that Congress has otherwise withheld EPA's usual power to reconsider, instead citing to a hodgepodge of provisions that say nothing about EPA's authority under Section 209(b). *See* Primary Br. 28-33. Notwithstanding that Congress has provided *other* review processes in *other* provisions dealing with *other* types of decisions, absent a "mechanism capable of rectifying" EPA's waiver decisions, EPA retains authority to reevaluate and reverse its waiver determinations. *Ivy Sports*, 767 F.3d at 87.

Petitioners admit there is no such "mechanism" here. Instead, Petitioners take the extreme position that EPA has no authority at all, implicit or explicit, to reconsider waivers on its own initiative, *see* Primary Br. 29; Industry Br. 4-5—notwithstanding that some waivers, including this one, approve GHG and ZEV standards

for MYs over a decade away. To suggest that EPA can at no point reexamine whether California's standards are appropriate not only contravenes this Court's inherent-authority caselaw, but renders Section 209(b)(1) toothless—leaving EPA without any means to ensure the continued propriety of, or compliance with, a granted waiver until California submits its next waiver request years later. Surely Congress did not intend for EPA to abdicate its "continuing" statutory obligation on this front, *Chevron*, 467 U.S. at 863-64, nor for regulated parties to suffer under mistaken decisions made years ago without any avenue for recourse.

Equally extreme is Petitioners' argument that if EPA has reconsideration authority at all, it must be limited to waiver denials, because "reconsideration of a waiver denial implicates none of the reliance interests implicated by withdrawal of a granted waiver." Industry Br. 8 & n.5; *see* Letter from Mary Nichols, Chairman, CARB, to Lisa Jackson, Adm'r, EPA 1 (Jan. 21, 2009) (urging EPA to exercise its "inherent authority to reconsider" the 2008 waiver denial). There is no basis in the CAA, nor any other cogent reason, to view EPA's reconsideration power as a one-way ratchet. Whatever "reliance interests" are disturbed when EPA reverses a waiver grant are no more real, and no more serious for the parties involved, than the reliance interests upended by reversal of a waiver denial—including the reliance interests of Intervenors, who incur real, considerable costs when EPA changes direction. At any rate, almost all agency decisions create reliance interests. If that were

sufficient to defeat reconsideration authority, then such authority would be the exception, not the "normal[]" rule. *New Jersey*, 517 F.3d at 582-83.

The understanding that EPA has implicit authority to revisit prior waiver decisions accords not only with EPA's traditional view, *see, e.g.*, 74 Fed. Reg. at 32,752 (reconsidering the 2008 waiver denial), but also with congressional intent. The Senate Committee Report to Section 209 "makes clear that Congress considered section 209(b) as including the authority for EPA to withdraw a waiver if circumstances occur in the future that would make this appropriate," including future changes to federal or California standards that would "bring th[e] [waiver] determination into question." *Id.* The Report itself states that "[i]mplicit in [Section 209(b)] is the right of the [Administrator] to withdraw the waiver at any time [if] … he finds that the State of California no longer complies with the conditions of the waiver." S. Rep. No. 90-403, at 33-34 (1967).

Petitioners seek to discredit this evidence as outdated. *See* Primary Br. 35. But even if the single substantive amendment to Section 209(b) since 1967 "strengthened the waiver provision," *id.*, it did not call into doubt EPA's "power to decide" the waiver question in the first place. This failure is especially revealing given that in a subsequent amendment, Congress chose *not* to confer on EPA the

same "power to decide" with respect to California's fuel controls, allowing California to set those standards without any waiver from EPA. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

2. EPA Reasonably Exercised Its Inherent Reconsideration Authority Here

EPA's inherent authority to reconsider prior waiver decisions applies with equal force here. While Petitioners complain that "serious reliance interests" have accrued since EPA granted California's waiver, Primary Br. 29, those reliance interests—as EPA reasonably explained, *see* JA__-__[FinalRule51334-36]—were never justified. As part of the 2013 waiver decision, EPA and CARB committed to a 2018 mid-term evaluation of the federal standards for MYs 2022-2025. *See* 78 Fed. Reg. 2112, 2137 (Jan. 9, 2013). Because California's deemed-to-comply provision linked those standards to compliance with its own state program, any change in federal standards from the mid-term review would have required an equal overhaul of California's emissions program for those future MYs, *see* 77 Fed. Reg. at 62,785; 78 Fed. Reg. at 2132 n.99—the same program Petitioners now suggest was carved in stone in 2013, *see* Primary Br. 29-32, 36-37. What's more, California pledged to conduct a 2016 "mid-term review" of its own *state* standards for MYs 2022-2025,

separate from EPA and CARB's mid-term evaluation of *federal* standards for those same years.[8]

Petitioners thus had ample notice that California's emissions program would be revisited (and likely revised) several years after California obtained the waiver to enforce that program. To the extent Petitioners rooted their long-term plans in the expectation that California's standards for MYs 2022-2025 would not change, knowing that the emissions program would be reexamined in 2016 (by CARB) and in 2018 (by EPA), they did so at their own peril: the possibility of change was baked into the waiver. *Cf. Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1205 (D.C. Cir. 1996) ("In 1990, the Commission announced its plan to conduct a performance review in 1994 to assess how well the price cap system had worked. Petitioners made all of their … elections with that in mind. Petitioners could not have reasonably assumed that the price cap index would not be altered.") (citation omitted). Plainly, these "reliance interests"—stemming from Petitioners' own misplaced assumption that California's emissions program would remain intact even after the anticipated mid-term reviews—cannot defeat EPA's reconsideration authority here. *See Solenex LLC v. Bernhardt*, 962 F.3d 520, 529 (D.C. Cir. 2020) ("[R]eliance interests [can]not

[8] *See* CARB Res. 12-11 (Jan. 26, 2012), https://tinyurl.com/y679m95m; CARB, 2017 Midterm Review Report, https://tinyurl.com/yxt6qaoh (last visited Sept. 21, 2020).

… undo agency action … [unless they are] specifically identified, reasonably incurred, and causally tied to the delay.").

Petitioners' argument that EPA's waiver withdrawal was unreasonably delayed fails by the same token. Because "'[d]elay alone is not enough' to strip the agency of its ability to act," a party must show "harmful consequences emanating from th[e] delay that were not reasonably taken into account by the agency." *Id.* at 527-28 (first alteration in original; citation omitted). But as just explained, Petitioners can identify no legitimate reliance interests upended by a decision that all parties in 2013 should have predicted as a result of EPA's planned mid-term review. And EPA did not "ignore[]" those interests as Petitioners protest, Primary Br. 37-39; Industry Br. 7, but fully considered whether they were sufficient to preclude a waiver withdrawal and reasonably explained why they were not, *see* JA__, __-__[FinalRule51331,51334-35]; *cf. DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020) (finding agency action unlawful because DHS did not consider, and declared that it did not need to consider, reliance interests *at all*). Petitioners' timeliness objection falls short. *See Solenex*, 962 F.3d at 527-29.

Finally, Petitioners argue that EPA's exercise of reconsideration authority was inappropriate here because EPA did not correct an inadvertent error, but rather made a substantive reconsideration decision based on alleged "policy changes." Primary Br. 36; *see* Industry Br. 7. EPA's authority, however, is not limited to correcting

clerical mistakes, and reconsideration determinations do not become "policy" decisions simply because they address substantive errors, even those based on prior legal interpretations or applications. *See, e.g.*, *Ivy Sports*, 767 F.3d at 86 (amending classification of a medical device); *New Jersey*, 517 F.3d at 582-83 (removing electric utility steam generating units from a list of CAA-regulated sources); *Am. Methyl*, 749 F.2d at 835-36 (revoking corporation's Section 211 waiver to market new methyl-gasoline brand). To the contrary, EPA has the authority—and duty—to revise its interpretations "on a continuing basis" when the agency concludes they do not represent the best reading of the statutes it administers. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005); *cf.* 42 U.S.C. § 7521(a) (directing EPA to revise emission standards "from time to time").

B. EPA's Section 209(b)(1)(B) Determination Is Not Arbitrary and Capricious

EPA did not err in withdrawing California's preemption waiver. Its conclusion that California does not "need" state GHG and ZEV standards to meet "extraordinary" circumstances is not only reasonable, but it faithfully implements the text, history, structure, and purpose of Section 209(b)(1)(B). At a minimum, it is not "so implausible" as to be unworthy of this Court's deference. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Petitioners' arguments

to the contrary ignore that agencies can revise their interpretations over time, provided those interpretations—as they are here—are a permissible construction of the statute.

1. EPA's Individual-Standard Approach to Section 209(b)(1)(B) Is Reasonable

EPA has rationally concluded that Section 209(b)(1)(B) requires an evaluation of California's need for GHG and ZEV standards separate from its need for criteria-pollutant standards. *See* JA__ n.261, __[FinalRule51341n.261,51344]. This conclusion departs from EPA's approach in 2009 and 2013, when EPA examined whether California's GHG, ZEV, and criteria-pollutant standards, taken together, were "need[ed]" to meet "extraordinary" state conditions. *See* JA__[FinalRule51339]. Now, Petitioners insist this "depart[ure]" is unreasonable because it rejects ("with one exception") a historical interpretation that largely predates the arrival of state GHG-related standards, Primary Br. 40-41, and is contrary to a prior decision by this Court upholding EPA's whole-program approach, *see id.* at 45-46.

But EPA is not reflexively limited to its prior practice. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). Nor is it "preclud[ed] … from revising … judicial constructions of ambiguous statutes." *Brand X*, 545 U.S. at 983. So long as "EPA's understanding of … [the] statute is a sufficiently rational one," it

is entitled to deference. *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1084 (D.C. Cir. 1996) (quotation marks omitted).

To begin with, the phrase "such State standards," reading back to "the State standards" in Section 209(b)(1), does nothing to identify *which* standards California must need. If Congress had intended to limit the inquiry to whether California needs its motor vehicle program as a whole—as Petitioners insist, *see* Primary Br. 40-47—it could have used language to that effect, requiring denial of a waiver only when California "does not need *any* State standards" or "does not need its own emissions *program*." Congress, plainly, did not do so.

Nor did Congress resolve the ambiguity by "us[ing] the plural 'standards' in [Section 209(b)(1)(B)] while using the singular 'standard' elsewhere." Primary Br. 42. For one, almost all waivers, including the one revoked here, involve a set of standards, rather than a single standard. For another, nothing in the context of Section 209(b) rebuts the presumption that the plural includes the singular, and vice-versa. *See* 1 U.S.C. § 1. Finally, Petitioners do not dispute that "such State standards" in Section 209(b)(1)*(C)* permits EPA to evaluate those standards' consistency with Section 202(a) on an individual basis. *See* Primary Br. 45 n.16. There is no reason to reach a different conclusion as to Section 209(b)(1)*(B)*.

By the same token, the fact that Congress included the phrase "in the aggregate" in Section 209(b)(1)—but not in Section 209(b)(1)(B)—does not show that

Congress required an aggregate determination in the latter provision. Quite the contrary. If Congress had meant for Section 209(b)(1)(B)'s "need" inquiry to mirror Section 209(b)(1)'s "protectiveness" inquiry, as Petitioners suggest, *see* Primary Br. 42, one might presume it would have replicated the same text. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acts intentionally[.]") (brackets omitted). It did not.

Finally, Petitioners argue that because Congress has amended the CAA several times "without disturbing EPA's [program-level] interpretation," it has acquiesced to the whole-program approach that Petitioners now press. Primary Br. 43-44. But even assuming "congressional acquiescence" has much (if any) interpretive value—and it does not, *see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994)—the legislation Petitioners cite says nothing about Congress's intent with respect to GHG-related standards. That legislation was enacted long before EPA ever considered whether or how to apply Section 209(b) to GHG and ZEV standards, a context entirely new from traditional criteria-pollutant standards. To thus argue that the various CAA amendments—none of which mentions the whole-program approach, let alone GHG emissions—prove that Congress silently ratified that same approach is, at best, to "walk on quicksand." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

In any case, courts "will generally uphold the agency's construction of the statute so long as it is a 'reasonable interpretation.'" *Merck & Co. v. HHS*, 962 F.3d 531, 535-36 (D.C. Cir. 2020) (quoting *City of Arlington*, 569 U.S. at 296). Here, EPA has interpreted "such State standards" as permitting the individual consideration of California's proposed standards, rather than requiring a binary, all-or-nothing determination that would "limit EPA's ability to … act on standards" that are fundamentally different from the criteria-pollutant standards granted in prior waivers. JA__[FinalRule51341]. This construction is undoubtedly reasonable "[f]or purposes of [this Court's] deferential … review." *Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 628 (D.C. Cir. 2010). Indeed, the opposite interpretation would lead to an intolerable, if not absurd, result: once having decided that California "needs" its own motor vehicle program to address criteria pollution, EPA would be forced to grant a waiver for *any* later standards that California proposes—even if the standards are different in kind from those previously approved, and even if they are not the sort of localized standards that Congress has authorized California to adopt. *See* JA__-__, __[FinalRule51346-47,51349].

Petitioners' remaining argument on this score similarly fails to persuade. They insist that EPA's interpretation must be unreasonable because "such State standards" cannot mean two different things for GHG-related standards and non-GHG-related standards. *See* Primary Br. 41-42. But by addressing proposed GHG

and ZEV standards separately from the standards in the rest of California's program, EPA is not "assigning different meanings to the same statutory text." *Id.* at 41. Rather, EPA's interpretation remains consistent: "such State standards" means whatever standards are submitted as part of California's waiver-request package. In this case, EPA has determined that criteria-pollutant standards satisfy Section 209(b)(1)(B), whereas GHG-related standards do not because they bear no relation to the "extraordinary" conditions justifying a California-specific preemption waiver. *See* JA__[FinalRule51347]; *see also* JA__, __[FinalRule51343,51346].

Ultimately, Petitioners may prefer a different outcome, but that does not make EPA's interpretation unlawful. *Chevron*, 467 U.S. at 843. Nor is it unlawful simply because it departs from EPA's earlier whole-program approach. *See Fox*, 556 U.S. at 514. Reasonableness is the only requirement, and EPA amply meets that requirement here.

2. EPA's Determination That California's Standards Are Not "Need[ed]" to Meet "Extraordinary" Conditions Is Lawful

EPA has reasonably concluded that California does not "need" its own GHG and ZEV standards to meet "compelling and extraordinary" conditions. This conclusion is based on EPA's interpretation of Section 209(b)(1)(B) as requiring both a "causal link between California vehicles' GHG emissions and climate effects felt in California," and a finding that the proposed standards would "meaningfully address" those local effects. JA__-__[FinalRule51345-47].

This interpretation is legally and factually correct. It is, at least, a sufficiently reasonable construction of EPA's own enabling statute "to preclude a court from substituting its judgment for that of EPA." *Engine Mfrs. Ass'n*, 88 F.3d at 1084 (quoting *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985)).

a. EPA's Interpretation of "Extraordinary" Is Reasonable

EPA has determined that to satisfy the "compelling and extraordinary" inquiry under Section 209(b)(1)(B), it must find particularized facts to suggest that local emissions, local pollution concentrations, and local geography contribute to California's pollution problems in a way that disproportionately impacts California. *See* JA__-__[FinalRule51345-47]. This is a permissible reading of "compelling and extraordinary," which is precisely the sort of open-textured term that agencies are authorized to interpret under *Chevron*. *See Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 474 (D.C. Cir. 1998) ("[W]here Congress leaves a statutory term undefined, it makes an implicit 'delegation of authority to the agency to elucidate … [that term]' through reasonable interpretation.") (quoting *Chevron*, 467 U.S. at 843).

For starters, it gives concrete expression to Congress's use of the word "extraordinary," which presupposes that the problems California seeks to address are atypical in some way—not the sort of "usual, regular, [or] common" problems from a global pollutant that other regions, and our nation as a whole, are currently grappling with. *Extraordinary*, Webster's New International Dictionary (3d ed. 1961).

To argue otherwise is to read "extraordinary" out of the statute entirely. *See Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1003 (D.C. Cir. 2016) ("[W]hen construing a statute courts 'give effect, if possible, to every clause and word.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

More to the point, EPA's interpretation captures the historical and contextual backdrop against which Section 209(b) was enacted. Congress did not give California special treatment so that it could address problems that are national or global rather than local in nature—just the opposite. Congress sought to empower California to deal with "circumstances sufficiently different from the nation as a whole." S. Rep. No. 90-403, at 32; *see also Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979) ("[T]he intent of the Act … [was to] focus on *local* air quality problems that may differ substantially from those in other parts of the nation.") (emphasis added). Only these sort of "unique problems … as a result of [California's] climate and topography," H.R. Rep. No. 90-728, at 22 (1967), could "justify standards on automobile emissions … more stringent than national standards," S. Rep. No. 90-403, at 32. EPA's interpretation reflects these objectives. It does not read "extraordinary conditions" as stagnant from the time of enactment, *contra* Primary Br. 51, but rather appropriately limits that term to the *type* of conditions that Congress, in 1967, found justified a special exemption from an otherwise uniform scheme of national regulation: conditions resulting from local emissions and local

pollution concentrations interacting with California's peculiar topographical or other features. *See* JA__, __[FinalRule51339,51342].[9]

Petitioners, for their part, make several arguments for why EPA's reading of "extraordinary" is unreasonable. None of them persuades. First, Petitioners repeat that EPA's interpretation cannot be sustained because it "departs sharply … [from] the agency's traditional approach." Primary Br. 47. But as explained, the fact that an agency's interpretation shifts away from past understanding provides no basis to strike it down when the interpretation is otherwise reasonable.

Second, Petitioners argue that because other CAA provisions "differentiate among pollutants" while Section 209(b) does not, there is no basis for distinguishing between "local" and "global" pollutants here. *Id.* at 48. This argument is irrelevant. Section 209 does not use the term "pollutant" at all. And EPA's interpretation flows not from "pollutant," but from "extraordinary conditions"—which does not appear in other CAA provisions—and from the structural, historical, and contextual considerations specific to Section 209(b).

[9] EPA's interpretation also avoids the serious equal-sovereignty problem with granting California regulatory authority denied to other states and forcing consumers in other states, who are not represented in California's political process, to pay higher vehicle prices to subsidize California's program. JA__-__[EPA-HQ-OAR-2018-0283-5698.17-18].

Third, Petitioners insist that EPA's interpretation conflicts with Section 177, because "[i]f Section 209(b) applies only to pollution problems specific to California, then [Section 177] … serves no purpose." Primary Br. 48-49. But other states need not experience the same "extraordinary" circumstances that exist in California to benefit from more stringent emissions standards. And by enacting Section 177, Congress did not silently amend Section 209(b)(1) to require that EPA—in evaluating whether to grant *California* a waiver—consider whether *other states* also "need" California's standards. That choice is for the states themselves, which can elect the California program if they determine it is a better fit than its federal counterpart. The "purpose" behind Section 177 is served by the choice itself.

Finally, Petitioners argue that EPA's interpretation "creates structural conflict within Section 209," on the theory that California's GHG emission regulations must be "subject to waiver" under Section 209(b) since they are preempted under Section 209(a). Primary Br. 50. But Petitioners' premise is faulty. Not everything that is preempted under Section 209(a) is necessarily subject to waiver under Section 209(b)—including state vehicle emission standards that are not "need[ed]" to meet "compelling and extraordinary conditions" (however one defines those terms), which are clearly preempted but unable to be waived.[10]

[10] Nor does *Motor & Equipment Manufacturers Ass'n, Inc. v. EPA* (*MEMA I*), 627 F.2d 1095 (D.C. Cir. 1979), dictate the outcome here. *Contra* Primary Br. 50. In

b. EPA's Interpretation of "Need" Is Reasonable

EPA has concluded that the "need" inquiry under Section 209(b)(1)(B) requires a finding that "the State standards at issue will meaningfully redress" local pollution problems. JA__[FinalRule51345]. This interpretation is reasonable because it operationalizes the commonsense meaning of "need": California cannot "need" separate state standards if they do nothing to address the "extraordinary" conditions California has identified. Here, EPA found—and Petitioners do not dispute—that California's standards would leave global climate-change conditions almost entirely unchanged, and would likely result in "no change" at all to climate-change conditions "in California." JA__[FinalRule51341]. Consistent with this finding, EPA reasonably determined that California does not "need" its own standards.

Petitioners argue that this interpretation of "need" conflicts not only with EPA's past position on this score, *see* Primary Br. 53-54, but also with the Supreme Court's valuation of incremental progress, *see Massachusetts*, 549 U.S. at 524. But EPA did not withdraw California's waiver on the ground that California's GHG and

---

MEMA I, the Court held that EPA's waiver authority under Section 209 was not constricted by another provision of the CAA (Section 207). *See* 627 F.2d at 1106. It did not address the very different question at issue here: whether standards preempted by Section 209(a) may be ineligible for waiver under Section 209(b)(1)(B) because they are not needed to meet compelling and extraordinary conditions. On this question, *MEMA I*'s loose language regarding the interplay between Sections 209(a) and 209(b) is neither persuasive nor controlling.

ZEV standards would make only marginal improvements to California's pollution problems. Rather, EPA found those standards would likely result in "*no change* in temperatures or physical impacts resulting from anthropogenic climate change *in California*." JA__[FinalRule51341] (emphases added). Put differently, even if EPA disagreed with Petitioners on the value of incremental progress, and even if this sort of intellectual disagreement were enough to render a decision "unreasonable," that is not what happened here. EPA found *no impact at all* from separate state standards in California.

EPA's interpretation of "need" is also supported by sound practical considerations. If federal and state standards achieve exactly the same goal to exactly the same degree, there is no point demanding that industry members shoulder the burden of complying with two distinct and often conflicting regulatory frameworks. EPA is not wrong, let alone unreasonable, to interpret "need" as requiring more progress than none at all to justify a separate emissions program, and all the costs to industry and consumers that come with it.

c. EPA's Conclusion That California's Climate-Change Problems Do Not Justify Separate Standards Is Reasonable

EPA reasonably concluded that California does not "need" its own GHG and ZEV programs to meet "compelling and extraordinary" conditions. To begin with, Petitioners do not identify how California's climate-change problems or resulting

health and welfare effects are "extraordinary," instead spending several pages chronicling that state's "record-setting fires, deadly heat waves, destructive storm surges, sea-level rise, water supply shortages, and extreme heat." Primary Br. 55-58. But these problems do not result in a particularized way from local vehicle emissions, local pollution, or local climate and topography, *see* JA__-__[FinalRule51348-49]—nor do Petitioners claim that they do, *see* Primary Br. 58. This alone is enough to reject Petitioners' arguments on this score, as EPA has permissibly construed Section 209(b)(1)(B) to preclude waivers for standards aimed at global climate-change problems, regardless of California's purportedly "particular" vulnerability to those problems.[11]

Even assuming the circumstances Petitioners identify are "extraordinary"—and they are not, *see* JA__[FinalRule51348]—California does not "need" its proposed standards because they fail to meaningfully address these issues. EPA has calculated that "even standards much more stringent than either the 2012 Federal standards or California's ACC program would only reduce global temperature by 0.02 degrees Celsius in 2100." JA__[FinalRule51340]. More to the point, "the

[11] Even so, Petitioners cannot show how California's climate-change problems—while undoubtedly serious—are "out of the ordinary" compared with the rest of the country. Primary Br. 55; *see* JA__[FinalRule51348]. Other states, and our county as a whole, face fires, heatwaves, storm surges, sea-level rise, and water shortages. These phenomena are not, in other words, "extraordinary," even under Petitioners' definition of that word.

waiver would result in … likely *no change* in temperatures or physical impacts resulting from anthropogenic climate change *in California*." *Id.* (emphases added). California's lack of "need" is further underscored by the fact that, until recently, California endorsed the deemed-to-comply option, allowing compliance with EPA's GHG standards in lieu of CARB's standards. This option is a frank admission that federal standards are equally equipped to combat California's climate-change problems.[12]

Unhappy with EPA's factual findings, Petitioners finally argue that EPA failed to adequately address the record evidence. *See* Primary Br. 57. But EPA dedicated a half-dozen pages in the Federal Register addressing exactly the issue Petitioners claim was ignored: the "geographic, climatic, and economic factors" that determine whether California faces "extraordinary" pollution problems. *See* JA__[FinalRule51347-49], JA__[2018NPRM43248-49]. In short, EPA has "examine[d] the relevant data and articulate[d] … a 'rational connection between the facts

[12] The same could be said of the reduced emissions standards at the center of California's July 2019 agreement with certain automakers, permitting them to meet those less-stringent standards on a nationwide basis if they refrained from challenging California's regulatory authority. *See* Press Release, Office of Gov. Newsom, *California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards* (July 25, 2019), https://tinyurl.com/yxp4q57d ("Framework Agreement Press Release"). This "framework" agreement all but concedes that climate change is a national problem that can only be met with a national solution.

found and the choices made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). No more is required.

3. EPA Reasonably Concluded That the Waiver Could Not Be Justified by Any Criteria-Pollution Benefits

EPA reasonably concluded that California's GHG and ZEV program is not justified by any criteria-pollution benefits that might accrue from that program. For starters, any "benefits" achieved from "reducing temperature increases," Primary Br. 62, are too far removed from the purported effect of California's GHG and ZEV standards, and entirely speculative to boot. As EPA reasonably explained, *see* JA__[FinalRule51340], the multi-link causal chain between California's standards and ground-level criteria pollution is too attenuated to allow California to smuggle in its standards under the guise that they address local, as well as global, pollution problems. And this causal chain assumes that California's standards would reduce air temperatures in the first place—an assumption that EPA has found to be, and Petitioners do not dispute is, false. *See* JA__[FinalRule51341]. This may be why not even Petitioners claim that California's GHG and ZEV standards would meaningfully reduce criteria pollution on top of what California's other, criteria-pollution-specific programs are anticipated to achieve.

What's more, whatever criteria-pollution "co-benefits" might also be attained by California's standards were properly excluded from EPA's analysis because California did not rely on these co-benefits in its 2012 waiver request. *See* JA__ &

n.213, __ & n.252, __ n.284[FinalRule51330n.213,51337n.252,51349n.284]. Petitioners cite no authority for their argument that an agency must consider new justifications when it reconsiders a decision, suggesting instead that EPA necessarily "opened the door to new data" by issuing the 2018 NPRM. Primary Br. 64. But EPA is not required to reopen the administrative record when it revisits prior decisions, *see Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974), nor did it do so here. Rather, EPA permissibly confined its review to the justifications offered to support the original decision—including California's candid admission in its 2012 waiver application (which Petitioners now disavow, *see* Primary Br. 62-63) that "[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle … emissions. The LEV III criteria pollutant fleet standard is responsible for those emission reductions in the fleet; the fleet would become cleaner regardless of the ZEV regulation[.]" JA__[EPA-HQ-OAR-2012-0562-0004.15-16].

C. EPA's Reliance on EPCA Preemption to Withdraw California's Waiver Is Lawful

EPA permissibly relied on EPCA's preemption clause, as validly interpreted by NHTSA, as a separate ground for withdrawing California's waiver. Nothing in the text or history of Section 209(b)(1) requires EPA to close its eyes to the fact that California's standards are unconstitutional under the Supremacy Clause. *See MEMA I*, 627 F.2d at 1115 ("[S]ection 209 [does not] … forbid[] the Administrator from

listening to constitutionally-based challenges.").[13] Petitioners' only argument to the contrary—yet again—is that EPA's current understanding represents an "abrupt reversal" from its past position. Primary Br. 66. But so long as EPA has "display[ed] awareness that it [was] changing position"—it has, *see* JA__[FinalRule51324]—and has "show[n] that there are good reasons for the new policy"—there are, *see* JA__[FinalRule51338]—EPA is free to change course. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *Fox*, 556 U.S. at 515).

EPA adequately justified its change in position here.[14] Unlike in any previous waiver proceeding, NHTSA has now promulgated a binding legislative rule removing any doubt that EPCA preempts California's standards. EPA is not required to ignore this action of its sister agency, under which California's standards are void and unenforceable regardless of any CAA waiver. *Cf. Massachusetts*, 549 U.S. at 532. Nor can EPA ignore the impact that contradictory actions by EPA and NHTSA

[13] In any event, EPA's reliance on EPCA preemption is fully compatible with Section 209(b), even under Petitioners' own theory. Because preempted—and thus unenforceable—standards cannot help California "meet" any pollution conditions, California cannot be said to "need" those standards.

[14] While EPA's current view departs from its 2013 position, it by no means represents a sea change. In its 2008 waiver denial, EPA acknowledged that a preemption determination under EPCA *could* affect EPA's waiver consideration, but declined to rely on EPCA there. *See* 73 Fed. Reg. 12,156, 12,159 (Mar. 6, 2008). Moreover, in its 2009 waiver grant, EPA expressly reserved authority to withdraw a waiver if "California no longer complies with the conditions of the waiver," 74 Fed. Reg. at 32,752—notwithstanding that compliance *vel non* is not a listed criterion under Section 209(b)(1). *Contra* Primary Br. 66.

would have on the regulated industry. If EPA could "resurrect a State provision" that NHTSA "has concluded … [is] expressly preempted," JA__[FinalRule51338], industry members—including Intervenors—would be forced between the hammer and the anvil, risking sanctions, litigation, and immeasurable other costs either way.

In any event, EPA's waiver decision does not rest exclusively on NHTSA's preemption rule. That decision is independently supported within the criteria of Section 209(b)(1)(B). *See Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 939 (D.C. Cir. 2011) ("[W]hen an agency relies on multiple grounds for its decision, some of which are invalid, we may nonetheless sustain the decision as long as one is valid[.]") (citation omitted).

D. California's Unilateral Actions Provide an Independent Basis for Withdrawing California's Waiver

Finally, California's own actions provide a separate basis for EPA's waiver withdrawal. First, in response to the 2018 NPRM, California unilaterally revoked its deemed-to-comply regulation, which was incorporated into California's 2012 waiver request and was a vital component of EPA's decision to grant California's waiver. 78 Fed. Reg. at 2115, 2121, 2136. By revoking this regulation, California not only moved the goalposts for automakers, but it also violated a condition of its waiver. *See id.* at 2113 ("If California acts to amend a previously waived standard or *accompanying enforcement procedure*, the amendment may be considered within

the scope of a previously granted waiver[,] provided that it … *raises no new issues* affecting EPA's previous waiver decisions.") (emphases added).

Moreover, in July 2019, California announced a "framework" agreement with certain automakers establishing an emissions program entirely different from the one approved by EPA in 2013, *see* Framework Agreement Press Release, *supra* n.12—again failing to seek any within-the-scope determination. 78 Fed. Reg. at 2113; *see also* CARB Res. 18-35, at 12 (Sept. 28, 2018), https://tinyurl.com/y55xslh4 (acknowledging that CARB "shall … forward the regulations to [EPA] with a request for a waiver or confirmation that the regulations are within the scope of an existing waiver").[15] California's own actions thus abrogate the validity of the waiver as it was granted in 2013, and provide yet another basis for EPA's decision to withdraw that waiver.

For their part, Petitioners do not deny that California's actions *could* provide a basis for EPA's waiver withdrawal, but claim they cannot justify the withdrawal here because EPA did not rely on them when making its decision. *See* Primary Br. 35 n.9. But Petitioners misunderstand EPA's statements. Although "EPA does not

[15] In addition, after the "framework" agreement was reached—and after Intervenors sought to join this action—California announced its ban on state purchases of vehicles from automakers that had not recognized CARB's authority to set GHG and ZEV standards—namely, Intervenors' member companies. *See* Press Release, Cal. Dep't Gen. Servs., *State Announces New Purchasing Policies to Reduce Greenhouse Gas Emissions from the State's Vehicle Fleet* (Nov. 15, 2019), https://tinyurl.com/yxnvwbof.

view [California's actions] as necessary predicates" for its waiver decision, EPA made clear that they "provide further support for [its] action." JA__[FinalRule51334]. Indeed, EPA believed it should not "ignore these recent actions and announcements on the State's part," which "confirm this action is appropriate." JA__[FinalRule51329].

At a minimum, these statements show that California's actions breaching the conditions of its waiver factored into EPA's withdrawal decision. That EPA did not rely exclusively on this reasoning is irrelevant, given that agencies can—and frequently do—offer multiple grounds for a decision. *See Bally's Park Place*, 646 F.3d at 939.

CONCLUSION

For these reasons, the Petitions should be denied.

Dated: September 22, 2020

Respectfully submitted,

/s/ *Raymond B. Ludwiszewski*

Raymond B. Ludwiszewski
Counsel of Record
Rachel Levick Corley
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
RLudwiszewski@gibsondunn.com

Eric D. McArthur
Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com

Counsel for Respondent-Intervenors

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 11,812 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: September 22, 2020

Respectfully submitted,

/s/ *Raymond B. Ludwiszewski*

Raymond B. Ludwiszewski
Counsel of Record
Rachel Levick Corley
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
RLudwiszewski@gibsondunn.com

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of September, 2020, I electronically filed the foregoing Brief for Respondent-Intervenors with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users. I further certify that service will be accomplished via email for the following participants:

Margaret E. Peloso
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, D.C. 20037
mpeloso@velaw.com

William F. Cooper
STATE OF HAWAII
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
bill.f.cooper@hawaii.gov

Michael Alan McCrory Wilson
STATE OF SOUTH CAROLINA
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
esmith@scag.gov

/s/ *Raymond B. Ludwiszewski*
Raymond B. Ludwiszewski
Counsel of Record
Rachel Levick Corley
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
RLudwiszewski@gibsondunn.com

Counsel for Respondent-Intervenors