ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN *Respondents*.	Case No. 22-1081 (and consolidated cases)

MOTION OF NATIONAL COALITION FOR ADVANCED TRANSPORTATION TO INTERVENE AS A RESPONDENT

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the National Coalition for Advanced Transportation ("Transportation Coalition") respectfully moves to intervene in case 22-1081 and consolidated cases in support of Respondents, the United States Environmental Protection Agency ("EPA") and Michael S. Regan, Administrator. Under Clean Air Act Section 209(b), EPA generally must grant California a waiver of preemption for the adoption of new motor vehicle emission standards if California's standards are "at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). The Clean Air Act also allows other states to adopt motor vehicle emissions standards for which California has obtained a waiver. 42 U.S.C. § 7507.

In 2013, following California's request for a waiver of preemption for its low emission vehicle greenhouse gas standards and zero emission vehicle standards, EPA determined California met all the necessary criteria for a waiver and granted California's request, thereby fulfilling its statutory obligations as EPA had consistently done for many decades. 78 Fed. Reg. 2112 (Jan. 9, 2013). However, in an unprecedented action, EPA partially withdrew California's waiver in 2019, and litigation followed. EPA has now reversed that unlawful 2019 action, reinstating California's waiver, consistent with EPA's statutory obligations. 87 Fed. Reg. 14,332, 14,333 (Mar. 14, 2022).

The petitions in these consolidated cases challenge EPA's 2022 reinstatement of California's waiver. Movant Intervenor Transportation Coalition participated in the proceedings leading to the actions challenged in this case, including by filing comments on EPA's proposed reconsideration of its previous withdrawal of California's waiver. And the Transportation Coalition has an unambiguous interest in defending EPA's reinstatement of California's waiver. The Transportation Coalition is a group of companies and non-profit organizations that support electric vehicle and other advanced transportation technologies and related infrastructure.[1] The Transportation Coalition's members include electric vehicle manufacturers, power companies, and electric vehicle charging infrastructure companies. Several of the Transportation Coalition members are directly subject to the state regulations at issue in EPA's reinstatement of California's waiver. The Transportation Coalition's members collectively have invested and committed to investing hundreds of millions of dollars to build infrastructure to support increased electric

[1] The Transportation Coalitions' membership currently includes Constellation Energy Corporation, Edison International, EVgo, Exelon Corporation and its affiliate operating companies (Atlantic City Electric, Baltimore Gas & Electric, Commonwealth Edison Company, Delmarva Power, PECO, and PEPCO), Lucid USA, Inc. ("Lucid"), Pacific Gas and Electric Company, Plug In America, Portland General Electric, Rivian Automotive ("Rivian"), Sacramento Municipal Utility District, and Tesla, Inc. ("Tesla"). Transportation Coalition member Center for Climate and Energy Solutions is not participating in this litigation as this organization does not participate in litigation as a matter of general practice.

vehicle deployment and are engaged in proceedings for integrating electric vehicle load to the electric grid. For all these reasons, the Transportation Coalition has a direct and immediate interest in this matter and satisfies every factor for intervention as of right under Rule 15(d) and this Circuit's precedents. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316, 320 (D.C. Cir. 2015) (addressing factors for "intervention as of right"). The Transportation Coalition thus seeks to intervene as of right to defend EPA's reinstatement of California's waiver. Alternatively, the Transportation Coalition meets the requirements for permissive intervention.

Counsel for the Transportation Coalition has conferred with counsel for Respondents and Petitioners. Respondents do not oppose the motion. The Petitioners in Case No. 22-1081 do not object to the motion. Petitioners in Case Nos. 22-1083, 22-1084 and 22-1085 take no position on the motion.

BACKGROUND

Clean Air Act Section 209(b) directs EPA to grant California a waiver of preemption to Section 209(a), which otherwise preempts states from adopting emission control standards for new motor vehicles. 42 U.S.C. § 7543. EPA may only deny California a waiver if EPA finds that (A): California's determination is arbitrary and capricious; (B) California does not need the standards "to meet compelling and extraordinary circumstances"; or (C) California's standards are

inconsistent with Clean Air Act Section 202(a), 42 U.S.C. § 7521(a)—requiring standards to be technologically feasible. *Id.*; 42 U.S.C. § 7543(b)(1).

Although Section 209(a) generally preempts other states from receiving their own waivers, Section 177 permits other states to adopt and enforce California's standards for which EPA has already granted a waiver. ("Section 177 States"). 42 U.S.C. § 7507. Following Congress's enactment in 1977 of this statutory preemption exception for California, EPA for over forty years fulfilled its statutory obligations, granting California dozens of preemption waivers. 87 Fed. Reg. 14,332 (Mar. 14, 2022).

In 2013, EPA, after reviewing a robust and technical record, granted California a waiver of preemption for the State's Advanced Clean Car program, aimed at reducing vehicle pollutants and greenhouse gas emissions. 78 Fed. Reg. 2112 (Jan. 9, 2013). Between 2013 to 2019, twelve Section 177 States relied on EPA's grant of waiver by adopting some form of California's standards for their own emission reduction programs. 87 Fed. Reg. 14,332, 14,333 (Mar. 14, 2022).

Following the change in Administration in 2019, however, EPA issued a final action that partially withdrew California's waiver—the only time EPA has ever withdrawn an already granted waiver—and interpreted Clean Air Act to preclude Section 177 States from adopting California's standards. The Transportation Coalition, along with multiple groups of stakeholders—including States, air

districts, public interest organizations and other industry petitioners—challenged EPA's 2019 action as arbitrary and capricious, exceeding EPA's authority, and contravening Congressional intent, among other deficiencies. *See Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir.) (consolidated cases).

In March of 2022, following another Administration change, EPA announced its intent to reconsider its 2019 action and the consolidated cases were held in abeyance, pending the outcome of EPA's reconsideration. EPA issued a final action rescinding its 2019 action, stating its previous partial withdrawal of California's waiver was "improper," "flawed," and "misapplied the facts." 87 Fed. Reg. 14,332, 14,333 (Mar. 14, 2022). EPA's 2022 action reinstated California's 2013 waiver and allowed Section 177 States to continue to adopt and enforce California's standards under the waiver. *Id.*

LEGAL STANDARD

Federal Rule of Appellate Procedure 15(d) provides that a motion for leave to intervene "must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." Appellate courts refer to Federal Rule of Civil Procedure 24 when reviewing motions to intervene in administrative review petitions like this one. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 216-17 n.10 (1965) (Fed. R. Civ. P. 24

policies "may be applicable in appellate courts"); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same). An applicant is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) if it satisfies five conditions. First, the applicant must demonstrate that it has Article III standing. *See Crossroads*, 788 F.3d at 316. The Court then applies a four-factor test, requiring that: (1) the motion to intervene be timely; (2) the applicant claims a legally protected interest; (3) the action, as a practical matter, impairs or impedes that interest; and (4) the potential intervenor's interest cannot adequately be represented by another party to the action. *See id.* at 320. Alternatively, under Federal Rule of Civil Procedure 24(b)(1)(B), "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."

ARGUMENT

Because the Transportation Coalition satisfies all of the requirements for intervention, this motion should be granted.

I. THE TRANSPORTATION COALITION HAS ARTICLE III STANDING

"The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316 (citation omitted); *see also Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002). An association has constitutional standing on

behalf of its members if (1) at least one member would have standing in its own right, (2) "the interests the association seeks to protect are germane to its purpose," and (3) "neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Id.* at 898. As demonstrated below, the Transportation Coalition has standing to intervene as a respondent in this case.

At least one Transportation Coalition member has standing to be a party in its own right. Transportation Coalition members Tesla, Lucid, and Rivian manufacture all-electric vehicles sold throughout the United States and are, therefore, subject to California and Section 177 States' motor vehicle standards. Petitioners in these consolidated cases challenge EPA's reinstatement of California's waiver, therefore, directly impacting Transportation Coalition members Tesla, Lucid, and Rivian. The Transportation Coalition thus easily satisfies the injury-in-fact requirement. *See* Declaration of Joseph Mendelson, III ("Mendelson Decl.") ¶ 8; Declaration of O. Kevin Vincent ("Vincent Decl.") ¶ 7. If a party "is 'an object of the [agency] action (or forgone action) at issue'. . . there should be 'little question'" regarding standing. *Sierra Club*, 292 F.3d at 900 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Electric vehicle manufacturers, on the well-founded expectation that EPA would uphold the waiver it granted for California's standards and maintain Section 177 States' right to adopt and enforce those standards, have invested or are

currently investing billions of dollars in manufacturing zero emission vehicles. *See* Mendelson Decl. ¶¶ 9-11. California and Section 177 States' continued ability to enforce their regulations, achieve emissions reductions, and foster these technological innovations depends upon the waiver. Petitioners' effort to invalidate EPA's reinstatement of California's waiver, directly threatens and undermines the substantial investments of manufacture and infrastructure companies. *See id.* ¶¶ 14-17; Declaration of Michael Backstrom ("Backstrom Decl.") ¶¶ 12-13; Vincent Decl. ¶ 8.

Petitioners' challenge to EPA's reinstatement of California's waiver of preemption is the cause of the potential harm to these Transportation Coalition members, and a decision in Respondents favor would redress the potential injury to the Transportation Coalition members. Because the Transportation Coalition members meet the injury-in-fact requirement, they necessarily meet the causation and redressability requirements for standing. Where a suit challenges an agency decision that was in the movant intervenor's favor, "it rationally follows [that] the injury is directly traceable to [plaintiff's] challenge." *Crossroads*, 788 F.3d at 316. In such cases, the causation and redressability requirements for standing are met. *Id.* The same is true here where Petitioners seek to vacate EPA's reinstatement of California's waiver, directly threatening the Transportation Coalition members' billions of dollars in investments in the electric transportation industry.

The interests the Transportation Coalition seeks to protect in this suit are germane to the organization's purpose of promoting policies to foster electric vehicle and other advanced transportation technologies and related infrastructure. Indeed, the Transportation Coalition and its members participated in the proceedings leading to the actions challenged in this case, including by filing comments with the agencies. *See* 87 Fed. Reg. at 14,332, 14,347 (citing Transportation Coalition comments on EPA's proposed action); Mendelson Decl. ¶¶ 13; Backstrom Decl. ¶ 10. The Transportation Coalition's members collectively have invested and committed to investing hundreds of millions of dollars to build infrastructure to support increased electric vehicle deployment, and members are engaged in proceedings to establish rate structures and programs to maximize the benefits and minimize the costs of integrating electric vehicle load to the electric grid. *See* Backstrom Decl. ¶¶ 5-9; Comments of the National Coalition for Advanced Transportation on the proposed Reconsideration of a Previous Withdrawal of a Waiver of Preemption, Docket No. EPA-HQ-OAR-2021-0257, at 17-18 (July 6, 2021), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0257-0131.

The Transportation Coalition would suffer economic injuries if Petitioners succeed in vacating EPA's reinstatement of California's waiver. California's waiver for its low and zero emission vehicle standards and Section 177 States' continued ability to adopt and enforce those standards incentivizes electric vehicle

manufacturing, spurs technology innovation, and promotes emissions reductions. *See* Mendelson Decl. ¶ 9. Vacatur of EPA's action reinstating California's waiver would undermine the regulatory drivers for vehicle electrification and threaten the benefits of the Transportation Coalition's investments. *See* Mendelson Decl. ¶¶ 16-17; Backstrom Decl. ¶¶ 12-13; Vincent Decl. ¶¶ 7-8. These types of economic injuries constitute cognizable harm sufficient to demonstrate constitutional standing. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant."). And the claims and relief requested do not require any individual member of the Transportation Coalition to participate in the litigation.

II. THIS MOTION IS TIMELY

Under Federal Rule of Appellate Procedure 15(d), the deadline for filing a motion to intervene in a proceeding for judicial review of an administrative agency action is 30 days after the petition is filed. This motion is timely.

III. THE TRANSPORTATION COALITION HAS PROTECTABLE INTERESTS AT ISSUE

This Court has held that the existence of constitutional standing suffices to show a legally protected interest for purposes of Rule 24. *See Crossroads*, 788 F.3d at 320 ("[S]ince [the proposed defendant-intervenor] has constitutional standing, it *a fortiori* has 'an interest relating to the property or transaction which is the subject of the action." (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C.

Cir. 2003))); *see also Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1017, 1018-19 (D.C. Cir. 2003). As explained in Section I, the Transportation Coalition has protectable interests: EPA's reinstatement of California's waiver, which Petitioners challenge in these consolidated cases, directly impacts Transportation Coalition members as Transportation Coalition members are subject to the standards at issue in the waiver and the Transportation Coalition members have financial interests in EPA's reinstatement of the waiver. *See Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014) (permitting industry group to intervene where relief would result in expenses for members of the group); *N.Y. Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 351-52 (2d Cir. 1975) (finding pharmacists' financial stake in upholding a regulation was sufficient to support intervention as of right). For all of these reasons, the Transportation Coalition satisfies the significant protectable interest requirement.

IV. THE RELIEF SOUGHT WOULD IMPAIR THE TRANSPORTATION COALITION'S ABILITY TO PROTECT ITS INTERESTS

To satisfy the third part of the Rule 24(a)(2) test, the Transportation Coalition need only show that an unfavorable disposition of this action "may as a practical matter impair or impede [its] ability to protect its interests." Fed. R. Civ. P. 24(a)(2).

Petitioners' requested relief—that this Court vacate EPA's action reinstating California's waiver of preemption—substantially endangers the Transportation Coalition's interests. As explained in Section I, California's and Section 177 States'

ability to adopt and enforce their motor vehicle standards directly impacts Transportation Coalition members that are subject to those standards and have significant financial interests and investments tied to EPA's grant of California's waiver. The Transportation Coalition's Interests Are Not Adequately Represented by the Existing Parties.

As this Court has explained, "a movant 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation.'" *Crossroads*, 788 F.3d at 321 (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)). This requirement is "not onerous" and represents a "low" threshold. *Id.* (quoting *Fund for Animals*, 322 F.3d at 735, 736 n.7).

The Transportation Coalition's interests in this action are not adequately represented by EPA. The Transportation Coalition has a significant interest in protecting its financial interests in EPA's reinstatement of California's waiver. *See supra* Section I. EPA's "general interest" in seeing its decision upheld "does not mean [the parties'] particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). To the contrary, EPA's interests, as a regulatory agency, differ from those of regulated private parties. *See, e.g.*, *Crossroads*, 788 F.3d at 321 ("[W]e look skeptically on government entities serving as adequate advocates for private parties.").

This Court has long recognized that the government does not adequately represent the specific, narrower economic and other interests of private parties that may be affected by the litigation. *See, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 n.41 (D.C. Cir. 1977). That is particularly true when a private-party intervenor asserts a "financial stake in the outcome" of the action. *Dimond*, 792 F.2d at 192. While the government has a duty to represent the interests of the public at large, private parties "seek[] to protect a more narrow and 'parochial' financial interest not shared" by the general public. *Id.* at 193; *see also Fund for Animals*, 322 F.3d at 736-37 & n.9 (collecting cases recognizing that "governmental entities do not adequately represent the interests of aspiring intervenors").

Nor can states, other public interest groups, or other industry movant intervenors represent the Transportation Coalition's unique interests in the litigation. The Transportation Coalition represents the interests of private sector businesses in promoting electric vehicles and related infrastructure development and deployment. The Transportation Coalition's interests are therefore distinct and different from the interests of state and local governments, public interest group and other movant-intervenors. *See WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 17-18 (D.D.C. 2010) (permitting intervention where other industry parties did not represent particular interests of proposed intervenor).

V. THE TRANSPORTATION COALITION ALSO SATISFIES THE STANDARDS FOR PERMISSIVE INTERVENTION

"On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). An applicant for permissive intervention should present the Court with "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citation omitted). The Transportation Coalition also satisfies this standard for permissive intervention.

First, this Court has an independent basis for subject matter jurisdiction over the defenses that the Transportation Coalition will advance. Because Petitioner's claims arise under the laws of the United States—the Clean Air Act and the Administrative Procedure Act—and the Transportation Coalition has Article III standing, *see supra* Section I, this Court has original jurisdiction. *Second*, as explained above, this motion is timely. *See supra* Section II. Intervention at this early stage of litigation will not delay the proceeding, and the Transportation Coalition is prepared to meet any schedule set by this Court. *Third*, because the Transportation Coalition will raise defenses directly responsive to Petitioner's claims, it necessarily will assert a claim or defense in common with the main action and satisfies the "common question of law or fact" requirement.

As such, the criteria for permissive intervention likewise support the Transportation Coalition's motion to intervene.

CONCLUSION

For the foregoing reasons, the Transportation Coalition respectfully requests that this Court grant its motion to intervene.

Dated: June 13, 2022

Respectfully submitted,

/s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem (D.C. Bar # 988144)
LATHAM & WATKINS LLP
555 11th Street NW, Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201
Email: stacey.vanbelleghem@lw.com

Counsel for the National Coalition for Advanced Transportation

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 27(a)(2)(b) and 32, this document contains 3,108 words, as determined by the word-count function of Microsoft Word.

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

Dated: June 13, 2022

/s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem

Counsel for the National Coalition for Advanced Transportation

CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), I certify that the parties—including intervenors and amici curiae—are set forth below.

Petitioners: The States of Ohio, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah and West Virginia (Case No. 22-1081); Iowa Soybean Association, The Minnesota Soybean Growers Association, South Dakota Soybean Association, and Diamond Alternative Energy, LLC, (Case No. 22-1083); American Fuel & Petrochemical Manufacturers, Domestic Energy Producers Alliance, Energy Marketers of America, and National Association of Convenience Stores (Case No. 22-1084); Clean Fuels Development Coalition, ICM, Inc., Illinois Corn Growers Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Missouri Corn Growers Association, and Valero Renewable Fuels Company, LLC, (Case No. 22-1085).

Respondents: United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency.

Proposed Intervenors: The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the Commonwealths of Massachusetts and

Pennsylvania, the District of Columbia, and the Cities of Los Angeles and New York; Center for Biological Diversity, Clean Air Council, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Defense Council, Public Citizen, Sierra Club, and Union of Concerned Scientists; and Volvo Car USA LLC, American Honda Motor Co., Inc., BMW of North America, LLC, Volkswagen Group of America, Inc. and Ford Motor Company.

Amici Curiae: There are no amici curiae at the time of this filing.

Dated: June 13, 2022

Respectfully submitted,

/s/ Stacey L. VanBelleghem

Stacey L. VanBelleghem (D.C. Bar # 988144)
LATHAM & WATKINS
555 11th Street NW, Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201
Email: stacey.vanbelleghem@lw.com

Counsel for the National Coalition for Advanced Transportation

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner National Coalition for Advanced Transportation (the "Transportation Coalition") states as follows:

The Transportation Coalition is a coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation technologies and related infrastructure, including business leaders engaged in energy supply, transmission and distribution; vehicle and component design and manufacturing; and charging infrastructure production and implementation, among other activities. The Transportation Coalition is an unincorporated association and does not have a parent corporation. No publicly-held entity owns 10% or more of the Transportation Coalition.

The Transportation Coalition currently has the following members[1]:

- Atlantic City Electric
- Baltimore Gas and Electric Company
- Commonwealth Edison Company
- Constellation Energy Corporation
- Delmarva Power

[1] NCAT member Center for Climate and Energy Solutions is not participating in this litigation as it does not participate in litigation as a matter of general practice.

- Edison International
- EVgo
- Exelon Corporation
- Lucid USA, Inc.
- Pacific Gas and Electric Company
- PECO
- PEPCO
- Plug In America
- Portland General Electric
- Rivian Automotive
- Sacramento Municipal Utility District
- Tesla, Inc.

Dated: June 13, 2022

Respectfully submitted,

/s/ Stacey L. VanBelleghem

Stacey L. VanBelleghem (D.C. Bar # 988144)
LATHAM & WATKINS
555 11th Street NW, Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201
Email: stacey.vanbelleghem@lw.com

Counsel for the National Coalition for Advanced Transportation

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2022, I caused the foregoing Motion to be electronically filed with the Clerk of the Court via the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

Dated: June 13, 2022

/s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem

Counsel for the National Coalition for Advanced Transportation