ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1081 and consolidated cases

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, *et al*.,
Respondents

On Petition for Review of Final Administrative Action by the U.S. Environmental Protection Agency

BRIEF OF AMICUS CURIAE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT IN SUPPORT OF RESPONDENTS

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Dated: January 20, 2023

CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for amicus curiae certify as follows:

A. Parties and Amici. Except for the following, all parties, intervenors, and amici in this court are listed in the Brief of State of Ohio, et al. (Doc. 1969895), and the Brief of Respondents (Doc. 1981480):

- California Climate Scientists David Dickinson Ackerly, Maximilian Auffhammer, Marshall Burke, Allen Goldstein, John Harte, Michael Mastrandrea, and LeRoy Westerling;
- The American Thoracic Society, American Medical Association, American Association for Respiratory Care, American College of Occupational and Environmental Medicine, American College of Physicians, American College of Chest Physicians, National League for Nursing, American Public Health Association, American Academy of Pediatrics, and Academic Pediatric Association;
- Senator Tom Carper and Representative Frank Pallone, Jr.;
- Administrative Law Professors Todd Aagaard, William Boyd, Alejandro E. Camacho, Robin Craig, Robert Glicksman, Bruce Huber, Sanne Knudsen, and David Owen;
- Professor Leah M. Litman.

B. Rulings under Review. The agency action under review is titled, "California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision," 87 Fed. Reg. 14,332 (Mar. 14, 2022).

C. Related Cases. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

Date: January 20, 2023 Respectfully submitted,

/s/ Brian Tomasovic
BRIAN TOMASOVIC

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EPA Br.	Brief of U.S. Environmental Protection Agency, Doc. 1981480
Fuel Br.	Brief of American Fuel & Petrochemical Manufacturers, et al., Doc. 1970360
State Br.	Brief of State of Ohio, et al., Doc. 1969895

AMICUS CURIAE'S STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The South Coast Air Quality Management District (South Coast District or District) is a political subdivision of California responsible for comprehensive air pollution control in the Los Angeles metropolitan area and parts of surrounding counties that make up the South Coast Air Basin. Cal. Health & Safety Code § 40410. Across a jurisdiction of 10,743 square miles, the South Coast District is vested with primary responsibility for the control of air pollution from all sources other than motor vehicles. *See* Cal. Health & Safety Code § 40000. The District's mandate is to protect public health and meet the Clean Air Act's National Ambient Air Quality Standards.

By the confluence of unique geography, weather conditions, and patterns of economic activity, Southern California has been the historical epicenter of health-harming photochemical pollution. Decades of innovative and strict regulation have brought measurable progress, even with an increasing population, yet levels of ozone and particulates in the region remain stubbornly high. Today, the District must secure ozone reductions for a populace that amounts to four-fifths of the nation's population living in areas designated serious, severe, or extreme nonattainment for the 8-Hour Ozone (2015) NAAQS. *See* EPA, Green Book, *8-Hour Ozone (2015) Designated Area/State Information with Design Values*,

https://www3.epa.gov/airquality/greenbook/jbtcw.html (last visited January 18, 2023). The continuing public health toll in Southern California equates to billions of dollars in annual economic damage. *See, e.g.,* Victor Brajer et al, *Valuing Health Effects: The Case of Ozone and Fine Particles in South California*, 29 Contemporary Economic Policy 524-535 (2011).

Automobile fumes were early identified, leading culprits of the acute and persistent smog conditions afflicting Southern California. And it remains so today. Mobile sources, including the ubiquitous passenger vehicles covered by the Advanced Clean Cars Program at issue in this case, emit 85% of smog-contributing nitrogen oxides pollution in the region. *See* South Coast District, 2022 Air Quality Management Plan, "Appendix III: Emission Inventory," at Table III-2-IA, http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2022-air-quality-management-plan/final-2022-aqmp/final-2022-aqmp.pdf?sfvrsn=10 (last visited January 18, 2023). Meeting state and federal health standards for ambient air is only attainable by reducing emissions from mobile sources, including reductions obtained from emission standards on new motor vehicles.

Petitioners press claims that would undermine the established implementation of Title II of the Clean Air Act on "Emissions Standards for Moving Sources." These extreme positions should not distract from the striking

backdrop: No petitioners question that compliance with California's Advanced Clean Cars program from 2012 is achievable. For amicus South Coast District and the millions of Americans living in the South Coast Air Basin, the stakes are not harm-free. The South Coast District has the assigned "duty to represent the citizens of the basin" where decisions "might have an adverse impact on air quality in the basin." *See* Cal. Health & Safety Code § 40412. Consistent with this, the District submitted comments supporting EPA's action here, and it has filed briefs both as a party and amicus in previous cases to specifically oppose any weakening of EPA or California's established authorities to address pollution from vehicles. *See, e.g., California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019).

On November 15, 2022, the South Coast District provided notice to the Court (Doc. 1973823) that all parties consented to its participation as amicus. This separate amicus brief is permitted under the Circuit Rule 29(d) provision for a filing by a governmental entity, and the District alternatively certifies that a separate brief is necessary because no other amici share the District's unique focus on adverse impacts on the South Coast Air Basin.

No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

Congress made an undeniably valid legislative judgment when it wrote section 209(b) of the Clean Air Act. This Court should decline all invitations by the Petitioners to throw the ordinary workings of the Act into chaos or bring disarray to preemption statutes more broadly. Over the decades, California's ability to seek waivers of preemption has proved valuable and needed. This is not merely the view of this Amicus, but the confirmed understanding of Congress in its recurrent oversight and appropriations.

What is more, Petitioners fail to acknowledge that California's smog problem remains acute today and without parallel, just as it was in the 1960s and 1970s. Section 209(b) is not an obsolete vestige, particularly as the Clean Air Act's mandates for safe air have grown stricter with new science dictating tighter health standards. And while there has been improving air quality in the South Coast Air Basin, this is not to say the region is approaching anything like parity with areas impacted by air pollution outside of California. If anything, California's extraordinary challenge has come into sharper relief. Air quality planners at the South Coast District today face near intractable disadvantages; the singular challenge is no less stark in the 21st century. Myriad appearances by the District in this Circuit in rules relating to ozone pollution attest to this. Petitioners now argue for the annihilation of Section 209(b) without any sound appreciation for this

objective setting. California has needed and still needs reductions of ozone-forming pollution far beyond what is required to meet health standards elsewhere in the nation.

To meet the Clean Air Act's health standards, the South Coast Air Basin specifically needs greater adoption and use of zero-emission technologies. This is not so much a policy preference as a legal necessity driven, objectively, by the numbers in the inventory of ozone-forming emissions from all polluting sources in the region. Southern California must have an increasing share of new and replacement mobile sources utilizing zero-emission technologies. Law and logic affirm that California has authority to establish motor vehicle emission standards to spur sales of zero-emission vehicles. Petitioners fail to grapple with how existing case law already resolves their claims against them.

I. Congress Validly Takes Account of Existing State Laws and Programs when it Legislates and Makes Judgments on Federal Preemption.

Where Petitioners argue that Congress cannot preempt "on a selective basis" to recognize differences among States, State Br. 21, Respondents correctly answer that this is an invented theory that is both impractical and unadministrable. EPA Br. 20. Beyond Clean Air Act Section 209, California's air pollution control program is recognized in multiple parts of the Clean Air Act. *See* 42 U.S.C. § 7583(4) (conditionally directing EPA to adopt certain definitions and methods used in California Air Resources Board regulations); 42 U.S.C. §§ 7583(e)-(f), 7589

("California pilot test program"). For Congress to take account of existing State regulatory programs or unique needs when legislating is rational, appropriate, and practical. Naturally, Congress should be studied in the need for its legislation and its impacts on States, regulated entities, and other laws. This may include state-specific considerations. For example, when Congress wrote its Clean Air Act provisions for ozone-polluted "extreme areas," it recognized the heavy costs and implementation burdens would fall on California, not other states. *See, e.g.,* Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 Envtl. L 1721, n. 159 (1991) ("Los Angeles, the nation's one extreme area, must develop new technologies to continue to achieve the required three percent per year reduction in emissions."). State Petitioners already effectively admit federal laws can constitutionally give "States authority over matters of unique concern," State Br. 27, which should end their case here, but even this invented dividing line hardly goes far enough. Indeed, Congress would be irrational if it ignored existing State programs, resourcing, and enforcement prerogatives in deciding about preemption. In this proper context, Petitioners quite wrongly imagine Section 209(b) to be a problem of Congress "pick[ing] favorites," State Br. 21, and affording "favorable treatment." *Id.* at 26.

California retains and exercises its authority because it is in a decidedly *unfavorable* position. Contrast this with Petitioner States who speak of their

"indestructible" authority, State Br. 22, while failing to mention that many of them have ceded or constrained their own authority even when the Clean Air Act expressly preserves it. 42 U.S.C. § 7416 ("Retention of State Authority"); *see, e.g.,* Ohio Rev. Code Ann. § 121.39 (requiring added documentation when a proposed regulation is "more stringent than its federal counterpart"); Miss. Code Ann. § 49-17-34(2) ("All rules…relating to air quality…shall not exceed the requirements of federal statutes and federal regulations"); Ky. Rev. Stat. Ann. § 13A.120(1)(a) ("…administrative regulations shall be no more stringent than the federal law or regulations"). Respondents have rightly questioned Petitioners' standing, but relatedly, State Petitioners have evident complications and credibility problems in their rhetoric that "States ***have not*** surrendered their entitlements to sovereign equality." State Br. 25.

II. Congressional Oversight on Section 209(b) has Repeatedly Confirmed its Appropriateness and Continuing Value.

Section 209(b) has been in place for over 50 years, and it continues to reflect the chosen approach of the Congress. Congress has affirmed and reaffirmed its position across multiple Clean Air Act amendments, and other related statutes. Congress has also exercised oversight by commissioning independent studies that have vindicated the original wisdom of the provision.

First, the Clean Air Act Amendments of 1977 established the National Commission on Air Quality. That Commission's report completed in March 1981

concluded that California's vehicle standards "while serving to meet California's specific problems, have also provided a testing ground for many of the new pollution control technologies and regulatory approaches that have later been adopted nationally." U.S. National Commission on Air Quality, *To Breathe Clean Air* 197 (1980). The Commission further noted that "California emissions standards have generally led the rest of the country by from 2 to 5 years." *Id*. In other words, Section 209 was then observed to be an unmitigated working success.

In 2003, a Senate omnibus bill included a provision directing EPA to submit a report on State practices regarding vehicular emission standards. This was later modified to have EPA contract for the report's preparation with the National Academy of Sciences. This study also affirmed the continuing utility of Section 209(b): "The original reasons for which Congress authorized California to have a separate set of standards remain valid…experience to date indicates that the California program has been beneficial overall for air quality by improving mobile-source emissions control." National Research Council, *State and Federal Standards for Mobile-Source Emissions* 4 (2006). The report is also proof positive that Congress has long been aware zero-emission vehicle mandates are recognized as vehicle emission standards under Section 209. *See id* at 77.

In 2007, Congress adopted a policy regarding minimum standards for federal fleet procurement and required EPA to consider and account for "the most

stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers for vehicles sold anywhere in the United States," which not only acknowledged California's more stringent standards, but sought to take advantage of their success in federal procurement. *See* 42 U.S.C. § 13212(f)(3)(B).

And just this past year, through the Inflation Reduction Act, Congress again reaffirmed the value of California's zero-emission vehicle and greenhouse gas standards by appropriating funds specifically to support other states adopting those standards under Clean Air Act Section 177. Pub. L. No. 117-169, tit. VI, Subtitle A, § 60105(g), 136 Stat. 1818, 2068-69 (2022).

Contrasted against this history, Petitioners have essentially asked this Court to intervene where Congress would not and break a working provision—a paragon of cooperative federalism—that needs no fixing. Justice Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., *dissenting*). Congress has made the informed continuing, judgment to let this experiment run, and it has inured to the benefit of the rest of the country.

III. The Extraordinary Nature of California's Air Pollution Challenge Has Not Diminished in the Decades Following Enactment of Section 209(b).

State Petitioners appear to have concertedly avoided any discussion of smog, ozone, pollutants, and air pollution throughout their brief. They do take pause to offer the strangely euphemistic possibility of a "state-specific concern with respect to clean air." State Br. 30. State Petitioners are more comfortable in conceding that Congress could hypothetically allow one State with a particular mineral present only in that State the power to regulate the mineral's extraction, State Br. 27, but they fail to recognize that this applies as a perfectly fine metaphor for California's position. California has long been singularly burdened with its own "particular mineral" in the form of its extreme air pollution setting. Take EPA's latest ozone standard and observe that California is home to 22 of the 49 nonattainment areas, including the only nonattainment areas that are classified serious, severe, or extreme. *See* EPA, Green Book, 8-Hour Ozone (2015) Designated Area/State Information, https://www3.epa.gov/airquality/greenbook/jbtc.html (last visited January 18, 2023). Among these, the South Coast Air Basin stands out for its extreme nonattainment classification, with this ozone pollution burden falling on 5% of the nation's population.

Private Petitioners, in contrast, at least acknowledge the problem of "smog in Los Angeles," Fuel Br. 21, though they appear reluctant to concede that extraordinary conditions of pollution persist now, well after the 1960s. *See* Fuel Br.

2, 23 (offering only that Los Angeles smog "might make California's problems extraordinary"), 46 ("Just because California needs a…standard for say, smog…"). While high ozone levels in other States require action and their unhealthfulness is nothing to downplay, those challenges are nothing comparable to California's challenges in the South Coast Air Basin. California pollution levels have improved from what was faced in the 1960s and 1970s, but this is no situation in which the South Coast Air Basin could fairly keep pace with air quality improvements in other States. Looking at EPA's 1979 ozone standard, the design value (a statistical description of air quality status) for the South Coast Air Basin in 1987-1989 was "0.330," and the highest design value outside of California was "0.220." 1-Hour Ozone (1979) Designated Area/State Information with Designed Values-NAAQS Revoked, https://www3.epa.gov/airquality/greenbook/obtcw.html (last visited January 18, 2023). Under the same 1979 ozone standard, South Coast Air Basin's latest design value, 2019-2021, is "0.167," a great improvement, yet the highest outside-of-California design value today is just "0.121." *Id*. Running this same comparative exercise with data from EPA's newer ozone standards would show that outside-of-California areas are characteristically able to make progress in reducing their design values, even achieving health standards, faster and easier than California areas. For example, with the 2008 ozone standard, 0 of the 18 nonattainment areas in California have been redesignated as maintenance areas, but

13 of the 29 outside-of-California areas can claim that distinction. *See* EPA, Green Book, *8-Hour Ozone (2008) Designated Area/State Information with Design Values*, https://www3.epa.gov/airquality/greenbook/hbtcw.html (last accessed January 18, 2023).

To the extent Petitioners attempt to carve out greenhouse gas standards as different in kind from other standards eligible for waiver, they are wrong on both the science and the law. Petitioners assert that California's greenhouse gas standards are aimed only at "global" challenges of climate change, Fuel Br. 31, but this misstates the record and the acute pollution challenges faced in California. California needs standards that address climate change to meet the compelling and extraordinary challenges of the State's ozone pollution problems. Petitioners apparently concede that California's and the South Coast Air Basin's "smog problem" is a compelling and extraordinary condition that warrants separate and more stringent standards. Fuel Br. 18. But Petitioners do not well heed the undisputed evidence that climate change exacerbates the very conditions that create ground level ozone in the South Coast Air Basin. Among the effects of climate change is the worsening of conditions, like heat, that catalyze ozone formation. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496, 66525 (December 15, 2009). In fact, as EPA correctly found here, a changing climate will

undermine the regulatory efforts of agencies like the South Coast District and the California Air Resources Board to reduce ground level ozone in the future "as meteorological conditions become increasingly conducive to forming ozone." 87 Fed. Reg. 14,350 n. 165. This effect is often labelled a "climate penalty" because it increases ozone and particulate matter pollution, "despite the reductions achieved by successful programs targeting smog-forming emissions[.]" *Id.* And this relationship between climate change and California's ground level ozone problems is neither new nor limited to the standards Petitioners challenge here. *See e.g. California State Motor Vehicle Pollution Control Standards; Heavy-Duty Tractor-Trailer Greenhouse Gas Regulations; Notice of Decision,* 79 Fed. Reg. 46256, 46257 (August 7, 2014) (approval of California's 2013 waiver request for GHG regulations on heavy-duty trucks, noting the standards would, in addition to reducing CO_2 emissions, "reduce [NOx] emissions in California by 3.1 tons per day in 2014, thereby helping California meet national ambient air quality standards for particulate matter and ozone.") Indeed, EPA approved the Zero-Emission Vehicle standard at issue here into California's State Implementation Plan, finding them "necessary and appropriate" because the California Air Resources Board and South Coast District rely upon these standards "to provide emission reductions" to meet those standards. *Approval and Promulgation of Implementation Plans;*

California; California Mobile Source Regulations, 81 Fed. Reg. 39424, 39429 (June 16, 2016).

By mountains of objective measures, California has compelling and extraordinary circumstances within the meaning of Section 209(b). Moreover, as the South Coast District has regulated to reduce stationary source pollution, mobile sources have become relatively greater contributors to ozone production. *See* South Coast District, 2022 Air Quality Management Plan, "Chapter 4: Control Strategy and Implementation," 4-2, http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2022-air-quality-management-plan/final-2022-aqmp/final-2022-aqmp.pdf?sfvrsn=10. Thus, in the 21st century, Section 209(b) is not only not obsolete, it stands out to be increasingly crucial for the South Coast Air Basin.

IV. Clean Air Act Requirements for the South Coast Air Basin Necessitate More Zero-Emission Technology from Mobile Sources, and Existing Law Resolves that California Vehicles Standards May Mandate It.

The South Coast District has studied all options for a comprehensive emission control strategy to meet EPA's 2015 ozone standard and concluded only the deployment of advanced technologies can work. As the District's plan for the 2015 ozone standard states: "The only viable pathway to achieve the standard requires a transformation to zero emissions technology where feasible across all sectors." *Id*. Petitioners cannot dispute this insight or even claim it is recent, since

much the same dynamics were in play when EPA granted California a waiver to enforce a zero-emission vehicle standard over thirty ago. *See California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision,* 58 Fed. Reg. 4166 (January 13, 1993). Beyond Petitioner's mistimed hostility for the technology Southern California needs for attainment of health standards, these petitions must fail for ignoring several glaring and clarifying points of law. At least three cases dispense with their challenges, only one of them is directly cited by Petitioners.

First, in *Motor and Equipment Mfrs. Ass'n Inc. v. EPA*, this Court had stated, "The plain meaning of the statute indicates that Congress intended to make the waiver power coextensive with the preemption provision." 627 F.2d 1095, 1107 (D.C. Cir. 1979) ("*MEMA I*"). Thus, to whatever extent Petitioners would urge that Section 209(a) should work to preempt zero-emission vehicle mandates, it is equally clear that California can pursue zero-emission vehicle mandates, as it has since 1990, provided their enforceability is enabled with an EPA waiver under Section 209(b). That it should work this way poses no major question at all. *See* Fuel Br. 22. No Petitioners have asked to overturn *MEMA I*, which held "that the only relevant preemption provision is the express terms" of Section 209(a) and that "whatever is preempted therein is subject to waiver under subsection (b)." *MEMA I*, at 1106. By logic, California can seek a motor vehicle waiver for zero-emission

vehicle requirements and address any recognized air pollutant from motor vehicle engines.

Second, Petitioners ignore the implications of *Massachusetts v. EPA*, 549 U.S. 497 (2007). There, the Court held "that EPA has the statutory authority to regulate the emission of [greenhouse gases] from new motor vehicles," *id*. at 532, while pointedly emphasizing EPA's duty to protect health and welfare as assigned by Clean Air Act Section 202(a). 42 U.S.C. § 7521(a)(1) ("air pollution which may reasonably be anticipated to endanger public health or welfare"). Section 209(b) uses a conspicuously related phrase in requiring that California should determine its vehicles standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." As a technical and legal matter, California is therefore required to give credence to federal vehicular standards for greenhouse gases. Petitioners fail to offer any defensible approach for California to simply ignore that greenhouse gases are a vehicular pollutant, disregard the Act's defined term "welfare," 42 U.S.C. § 7602(h), and overlook that Congress has not acted in the last 15 years to legislatively overrule *Massachusetts v. EPA*. Petitioners' expectation that California should ignore greenhouse gas emissions in its vehicle regulations is an untenable recipe for illegality.

Last, Petitioners appear uncomprehending of the fact that EPA approved the challenged Zero-Emission Vehicle Standards into the federally-approved

implementation plan for the State of California over six years ago, recognizing the South Coast District's reliance on these standards to reduce emissions. *See* 81 Fed. Reg. 39424. As decided in *Committee for Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015), California vehicle emission standards that receive a waiver under Section 209(b) need to be included in State Implementation Plans that depend on them. In 2016, EPA approved California's zero-emission vehicle mandate under Section 110 of the Clean Air Act, thereby promulgating it as a requirement at 40 CFR § 52.220a with the force and effect of federal law. 42 U.S.C. § 7410(k); *see Safe Air for Everyone v. EPA,* 488 F.3d 1088, 1097 (9th Cir. 2007) (*citing Arkansas v. Oklahoma*, 503 U.S. 91, 110–112 (1992)). Petitioners did not challenge this approval, and whatever convoluted claims they could offer about how their petition should still be entertained, they could only do so while flouting the Clean Air Act's time limits on judicial review, 42 U.S.C. § 7607(b)(1), and badly skirting the issue that federal law does not preempt other federal law.

CONCLUSION

For the reasons set forth above, the petitions for review should be denied.

Date: January 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH WORD LIMITATION

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), it contains 3,761 words. I have relied on Microsoft Word's calculation feature.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system for service on all registered counsel in these consolidated cases.

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