ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

Consolidated with Nos. 19-1239, 19-1241, 19-1242, 19-1243, 19-1245, 19-1246, 19-1249, 20-1175, and 20-1178

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,
Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION et al.,
Respondent-Intervenors.

PROOF REPLY BRIEF OF STATE AND LOCAL GOVERNMENT PETITIONERS AND PUBLIC INTEREST PETITIONERS

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GLOSSARY

CSAR Br.	Brief of Intervenor-Respondents Coalition for Sustainable Automotive Regulation et al.
EISA	Energy Independence and Security Act of 2007
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
Industry Reply Br.	Reply Brief of National Coalition for Advanced Transportation et al.
NHTSA	National Highway Traffic Safety Administration
Primary Br.	Principal Brief of State and Local Government Petitioners and Public Interest Petitioners
Resp. Br.	Brief of Respondents

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress decided that new motor vehicles should be subject to two coexisting emission-control programs: one designed and implemented by EPA and the other by California, which pioneered standards for vehicular emissions in the 1950s and has served the Nation as a laboratory of innovation ever since. EPA and NHTSA have now taken unprecedented actions to upend Congress's considered judgment and prevent California from addressing vehicular greenhouse gas emissions. In doing so, the Agencies arbitrarily reversed decades of prior practice. They improperly conflated emission reductions and fuel economy improvements. And they disregarded California's need to address increasingly extraordinary conditions. Indeed, as the parties briefed this case, climate change was "smacking California in the face" with record-breaking heatwaves, wildfires, toxic air, and a massive smoke plume that blotted out the sun.[1]

The Agencies' actions cannot stand. EPA lacks statutory authority for its Waiver Withdrawal, and its efforts to manufacture a categorical bar against California's well-established greenhouse gas and zero-emission-vehicle standards run headlong into the Clean Air Act's text and Congress's design. EPA's determination that other States cannot adopt California's greenhouse gas standards under Section

[1] Thomas Fuller & Christopher Flavelle, *A Climate Reckoning in Fire-Stricken California*, N.Y. Times, Sept. 10, 2020, https://tinyurl.com/y24c2ogk.

177 also violates the Act and is reviewable final action. And while review of NHTSA's Preemption Rule must begin in district court, that action too must fall. NHTSA lacks authority to make law on preemption, and its rule conflicts with Congress's repeated instruction to incorporate and build on California's emission standards, not tear them asunder.

ARGUMENT

I. EPA'S WAIVER WITHDRAWAL IS UNLAWFUL

EPA lacks authority for this Waiver Withdrawal, and the two grounds asserted for that action are unlawful in any event.

A. EPA Identifies No Authority for Its Action

Section 209(b)(1) of the Clean Air Act, 42 U.S.C. § 7543(b)(1), does not explicitly authorize EPA to withdraw a previously granted waiver. The agency claims "implicit" authority for this disruptive and unprecedented action. Resp. Br. 64. But implicit withdrawal authority is incompatible with the statute, and EPA's arguments do not support authority to withdraw this waiver on the bases asserted here.

1. EPA has no withdrawal authority. Congress invited States to adopt and enforce "California standards for which a waiver has been granted," 42 U.S.C. § 7507(1), and to include those standards in State Implementation Plans to meet federal air-quality requirements, *id.* §§ 7410(a)(2)(D), 7502(c)(1). Many States do so. Primary Br. 30-32. States have "primary responsibility" for ensuring they meet

federal air-quality standards, 42 U.S.C. § 7407(a), and face substantial sanctions for planning failures, *id.* § 7509. EPA cannot explain why Congress would *implicitly* authorize the withdrawal of waivers while *explicitly* inviting States to rely on them for long-term consequential planning.

EPA observes (Br. 73) that it once reversed a waiver *denial*, but that is different. Congress has not invited States to rely on denied waivers, and, contrary to Industry Intervenors' arguments (Br. 28), a denial does not provide certainty for future-year standards because California can make subsequent waiver requests. Moreover, reversing a denial is simply granting a waiver, an action Congress expressly authorized.

2. Even assuming EPA had implicit authority to withdraw a waiver in certain circumstances, it lacks authority to do so on the grounds asserted here: EPA's reinterpretation of Section 209(b)(1)(B) and its decision to look beyond Section 209(b)(1) to NHTSA's novel Preemption Rule. Primary Br. 36-39.

EPA contends (Br. 64-65) that a different waiver criterion, Section 209(b)(1)(C), implicitly authorizes the agency to "amend[]" a waiver if it later determines that California's standards have become infeasible. That contention cannot support *this* Waiver Withdrawal because EPA abandoned infeasibility under Section 209(b)(1)(C) as a basis for its action. JA____[FinalAction51350]; *see SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). EPA's contention is also wrong. Withdrawal

authority cannot derive from EPA's different authority to "reconsider[]," Resp. Br. 66, and "revise" its *own* standards "from time to time," 42 U.S.C. § 7521(a). EPA lacks such authority over the standards that *California* establishes, and may revise, through state-law rulemaking procedures. And state law can address any feasibility issues that might arise during implementation of those state standards. Primary Br. 34 n.8.

EPA (Br. 65) and Industry Intervenors (Br. 29) try to extract authority from legislative history. But an isolated reference in 1967 to a possible withdrawal if California "no longer complies with the conditions of the waiver," S. Rep. No. 90-403, at 34 (1967), cannot overcome reliance interests Congress invited ten years later, let alone authorize EPA's action here—even assuming the referenced "conditions" are the Section 209(b)(1) criteria.[2] One basis for EPA's Waiver Withdrawal (NHTSA's Preemption Rule) has nothing to do with those criteria. And for its second basis, EPA did not uncover non-compliance by California, but rather reinterpreted Section 209(b)(1)(B) to reconsider California's 2012 waiver request as "originally presented." Primary Br. 38.[3]

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[2] The Senate Report focused on California's *conduct*, not the Section 209(b)(1) criteria, Primary Br. 34-35, and EPA used the term "condition" similarly in an early waiver proceeding, 42 Fed. Reg. 31,637, 31,639 (June 22, 1977).

[3] Two isolated "review[s] of previous waivers" several decades ago (Resp. Br. 69)—where EPA considered whether later amendments to California's program satisfied the waiver criteria, JA___[FinalAction51331] n.216, ____[FinalAction51332]—do not resemble EPA's action here either.

EPA thus ultimately claims (Br. 71-72) a generalized "right" to "correct legal interpretations." But that claim fails too. EPA conceded that its prior interpretation "reasonably" construed Section 209(b)(1)(B). JA__[FinalAction51341]. And EPA acknowledges (Br. 86) that this Court has upheld that "reasonable" interpretation. *Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 627-28 (D.C. Cir. 2010). EPA thus did not seek to correct a "substantive error[]." CSAR Br. 33.[4] Nor did EPA identify intervening changes in statutory or decisional law. *Cf.* Fed. R. Civ. P. 60(b)(5). Instead, EPA reinterpreted Section 209(b)(1)(B) to reflect new policy preferences. Whatever discretion EPA may have to choose among permissible interpretations of a statute it administers prospectively, that discretion is not a license to reverse a decision made six years prior. Primary Br. 36-37.

Further, any such authority to reverse a prior decision must be exercised "within a short and reasonable time," typically "measured in weeks, not years." *Mazaleski v. Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977). EPA seeks to avoid that limitation by denying that the 2013 waiver decision was a "final, quasi-judicial" decision. Resp. Br. 70; *see also id.* at 72. Even if that mattered to the analysis, it contradicts EPA's stated position that the 2013 waiver decision was "final action," JA____[R-7839_2145], and an "adjudication," JA__[FinalAction51337]. Further, EPA's delay is measured from the 2013 decision it reversed, not, as the agency

[4] The brief of Industry Intervenors is cited herein as "CSAR Br."

proposes (Br. 72), from its subsequent reevaluation of federal greenhouse gas standards. *Cf. Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) (reconsideration authority tied to appeal period for agency's decision); *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (similar).

3. Finally, EPA (Br. 73-77) and Industry Intervenors (Br. 30-32) argue that States and other parties had no "justifiable reliance interests" in the waiver. They are wrong. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (agency action unlawful where it mistakenly found no cognizable reliance interests).

EPA rewrites history by claiming that California "specifically anticipated" and "acceded to" reconsideration of the *state* standards in its 2013 waiver, simply because EPA intended to reevaluate its own *federal* standards. Resp. Br. 70, 75. California's commitment to lend its expertise to a reevaluation of EPA's standards does not establish otherwise. JA___[EPA-HQ-OAR-2012-0562-0374_BdRes12-35_4] (resolution of California Air Resources Board). The regulation governing EPA's reevaluation of the federal standards, 40 C.F.R. § 86.1818-12(h), does not reference California's standards or the waiver, and EPA told this Court that the federal reevaluation had no effect on California, *see* Resp. Br., *California v. EPA*, No. 18-1118, 2019 WL 2338483, at *34-36 (May 28, 2019). Further, even if EPA contemplated that California might later seek a new waiver if the State *amended* its greenhouse gas standards, *see* Resp. Br. 66, EPA never claimed authority to *withdraw*

California's waiver for existing standards. In fact, EPA acknowledged California's intent to maintain "more stringent" state standards should EPA decide to weaken the federal ones. JA__[R-7839_2128-29].

EPA's other arguments against reliance also miss the mark. Resp. Br. 74-76. NHTSA had never taken final action purporting to preempt California standards for which EPA had granted a waiver,[5] and when industry plaintiffs argued that EPCA preempts California's greenhouse gas standards, courts uniformly rejected those arguments, Primary Br. 18. And California's recent agreements with certain automakers (those willing to commit to investments in clean-vehicle technologies) build upon and underscore the public and private investments made in reliance on California's waiver before the withdrawal. Regardless, EPA took no "position" on whether those agreements affected the waiver's validity, JA____[FinalAction51329] n.208, so cannot now claim they do.

Lastly, EPA's arguments entirely "ignore" reliance on California's zero-emission-vehicle standard, *DHS*, 140 S. Ct. at 1913-15, which was not at issue in the automaker agreements or EPA's reevaluation of federal greenhouse gas standards, and which NHTSA never previously suggested was preempted. Nothing

[5] NHTSA later acknowledged that the statement EPA cites, 71 Fed. Reg. 17,566 (Apr. 6, 2006), did not inform NHTSA's final action, *see Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1181 n.1 (9th Cir. 2008).

undermines Petitioners' substantial reliance interests in California's zero-emission-vehicle standard. *See also* Industry Reply Br. 1-4.

B. EPA's Unlawful Section 209(b)(1)(B) Determination Cannot Support the Waiver Withdrawal

Even if EPA had authority for its Waiver Withdrawal, neither ground asserted for that action is valid. The first ground—EPA's Section 209(b)(1)(B) determination that California does not "need" greenhouse gas and zero-emission-vehicle standards to address "compelling and extraordinary conditions"—fails for three independent reasons. First, EPA unlawfully narrowed the scope of its analysis, rejecting its long-standing program-level approach. Second, EPA arbitrarily disregarded its own prior conclusions and the record evidence demonstrating that these standards satisfy Section 209(b)(1)(B) because they reduce emissions of criteria pollutants. Third, EPA unlawfully concluded that climate change cannot constitute "extraordinary conditions" and that California does not "need" standards to address it.

1. EPA improperly departed from its traditional program-level analysis

For decades, EPA consistently interpreted Section 209(b)(1)(B) to require consideration of California's need for its own motor vehicle emissions program, rather than its need for particular standards. Primary Br. 40. In 2013, EPA described its program-level interpretation as "the most straightforward reading of the text and legislative history." JA___[R-7839_2127]. EPA now reads the provision as

authorizing separate inquiries into California's need for greenhouse gas and zero-emission-vehicle standards. This error, alone, is fatal to EPA's Section 209(b)(1)(B) determination.

EPA does not dispute that interpreting Section 209(b)(1)(B) differently for different pollutants is unlawful. Primary Br. 41-42; *see U.S. Dep't of the Treasury v. FLRA*, 739 F.3d 13, 21 (D.C. Cir. 2014) (rejecting "two inconsistent interpretations" of the same statutory provision). Yet that is exactly what EPA's Waiver Withdrawal did: It propounded a new interpretation only for standards that reduce greenhouse gases and left the program-level interpretation in place for all others. EPA now insists (Br. 85) that its revised interpretation applies "*for all types of pollutants*." But EPA proposed different interpretations for different pollutants, JA___[ProposedAction43247]; finalized this proposal, JA___[FinalAction51339]; and affirmed that its new interpretation "relates to the review of [greenhouse gas] standards" but not "criteria pollutant" standards, JA__[FinalAction51341] & n.263. EPA's interpretation plainly varies by pollutant.

EPA's new interpretation also contravenes the statutory text. EPA claims the phrase "such State standards" in Section 209(b)(1)(B) refers to "the particular standards in a given waiver request," but EPA fails to explain what "such" means in that interpretation. Resp. Br. 81. "Such" typically means "[o]f the kind or degree already described or implied." *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019). Thus,

EPA has historically read "such State standards" in Section 209(b)(1)(B) as referring to the antecedent "State standards … in the aggregate" described in Section 209(b)(1)'s protectiveness inquiry, 42 U.S.C. § 7543(b)(1). JA___[R-7839_2126]. EPA concedes (Br. 83-84) that "State standards … in the aggregate" refers to California's whole program. EPA now rejects that same program-level meaning for "such State standards," but never explains what "such" refers to if not the whole program described by the antecedent "State standards … in the aggregate."

Nor does EPA explain why the "need" inquiry under Section 209(b)(1)(B) would consider a narrower set of standards than those considered in the protectiveness inquiry under Section 209(b)(1). Primary Br. 42-43. In fact, as EPA previously explained, decoupling these two inquiries is illogical: Congress would not have authorized a determination that California does not "need" *one* of its standards when it is the *collective* set of standards that provides the requisite protection. *See* JA___[R-7839_2127]. EPA's only argument for now decoupling the scope of the two inquiries is that the protectiveness inquiry is "governed by its own waiver criterion, Section 209(b)(1)(A)." Resp. Br. 83. But that neither severs the logical connection nor squares with EPA's argument that the inquiries under Section

209(b)(1)(B) and (C)—which are likewise governed by their own waiver criteria—should have a similar scope.[6]

The program-level inquiry under Section 209(b)(1)(B) reflects the balance Congress struck when it subjected automakers to two, but "just two," emission-control *programs*—EPA's and California's. JA___[R-7839_2127]. Because the "compromise established by Congress" is a program-level one, the need inquiry analyzes California's "standards in general, not the particular standards for which California sought [a] waiver," 49 Fed. Reg 18,887, 18,890 (May 3, 1984) (quotation omitted). EPA's traditional program-level interpretation thus serves congressional design. It does not, as EPA now claims (Br. 80-81), render Section 209(b)(1)(B) a nullity, because the two-program scheme remains in place only so long as California needs its own program. *See* 78 Fed. Reg. 58,090, 58,102 (Sept. 13, 2013).

Nor does the reoccurrence of "such State standards" in Section 209(b)(1)(C) call into question the program-level inquiry under Section 209(b)(1)(B). Contrary to its claim here (Br. 83), EPA itself has previously asserted that Section 209(b)(1)(C)'s feasibility inquiry calls for evaluating California's "program." 81 Fed. Reg. 95,982, 95,986 (Dec. 29, 2016); *see also Motor & Equipment Mfrs. Ass'n v. Nichols* (*MEMA II*),

[6] Adding to the confusion, EPA claims to interpret "such State standards" as encompassing, "at least," "all of the standards that are the subject of the particular waiver request." JA___[FinalAction51341]; Resp. Br. 81-83. But EPA only reconsidered a subset of the standards in California's 2012 request, departing without explanation from the interpretation it purported to adopt. *See* Resp. Br. 17.

142 F.3d 449, 464 (D.C. Cir. 1998) (feasibility of California standards "is to be evaluated 'in the aggregate'"). In fact, *all three* Section 209(b)(1) criteria—protectiveness, need, and feasibility—can be viewed as program-level inquiries. That approach makes practical sense because technological feasibility, like protectiveness, can depend on interactions among standards. Primary Br. 9. Indeed, a House Report accompanying the 1977 Clean Air Act Amendments stated that EPA must "grant a waiver for *the entire set of California* standards unless" the State's conclusion that "its set of standards are at least as protective" as federal standards is arbitrary, or "the entire set of California standards" is not "technologically feasible." H.R. Rep. No. 94-1175, at 248 (1976) (emphasis added).[7] The scope of all three criteria can thus be given the "same parallel meaning," Resp. Br. 84, encompassing California's whole program.

Even if EPA adopted a different approach to Section 209(b)(1)(C)'s feasibility inquiry, that still would not justify EPA's rejection of the program-level approach to Section 209(b)(1)(B). "[A] statutory term … 'may take on distinct characters'" where Congress employs it for different purposes. *Util. Air Regulatory Grp. v. EPA*

[7] EPA's feasibility analysis is sometimes more granular, focusing on new standards or even specific model-year standards. But this simply reflects that, having already found California's existing standards feasible, EPA must determine whether the new standards "would cause" the already-existing standards—and, thus, California's whole program—to become infeasible. 73 Fed. Reg. 52,042, 52,043 (Sept. 8, 2008); *accord* 77 Fed. Reg. 73,459, 73,461 (Dec. 10, 2012).

(*UARG*), 573 U.S. 302, 320 (2014). Section 209(b)(1)(B) "fulfills the congressional determination," *Georgetown Univ. Hosp. v. Sullivan*, 934 F.2d 1280, 1284 (D.C. Cir. 1991), that two emission-control programs are warranted so long as California continues to need its own program. By contrast, Section 209(b)(1)(C) protects automakers from inadequate lead-time. To the extent the scope of those criteria differed, that would simply reflect that their separate inquiries "may vary to meet" these different purposes. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *see also Otsuka Pharm. Co. v. Price*, 869 F.3d 987, 998 (D.C. Cir. 2017) ("separate provision[s] dealing with … separate subject[s]" support different meanings of "such drug").[8]

Regardless, Congress resolved the scope of Section 209(b)(1)(B)'s "need" inquiry by ratifying the agency's program-level approach in 1977 and 1990. Primary Br. 43-45. EPA claims legislative history for the 1977 Amendments did not "speak to … EPA's *construction*" of the statute. Resp. Br. 87. But EPA quotes a House Report stating (approvingly) that EPA had "liberally *construed* the waiver provision."

[8] Congress used different text to describe the set of standards for the need and feasibility inquiries in Section 209(e)(2)(A)'s non-road waiver provision—using "such California standards" for the "need" inquiry but simply "California standards" for feasibility. 42 U.S.C. § 7543(e)(2)(A)(ii), (iii). To the extent this suggests a difference in meaning, that would only confirm that the need inquiry encompasses California's whole program because "such" must refer either to the preceding "California standards … in the aggregate," *id.* § 7543(e)(2)(A), or to standards "of the kind" covered by Section 209(e)(2)(A)—i.e., all of California's non-road emission standards. *See Culbertson*, 139 S. Ct. at 522.

H.R. Rep. No. 95-294, at 301 (1977) (emphasis added). Likewise, EPA is wrong to assert (Br. 87) that the meaning of "such State standards" had not "materially arisen" by 1990. EPA was consistently applying its program-level interpretation at that time and had expressly rejected arguments for a narrower construction. *See* 49 Fed. Reg at 18,890; 44 Fed. Reg. 38,660, 38,661 (July 2, 1979). Section 209(b)(1)(B) had thus "already received … uniform construction by … a responsible administrative agency" and should "be understood according to that construction." *New York v. NHTSA*, -- F.3d --, 2020 WL 5103860, at *7 n.62 (2d Cir. 2020) (quotations omitted).

2. California needs these standards to reduce criteria pollution

Even assuming EPA could alter the scope of its Section 209(b)(1)(B) inquiry, EPA cannot lawfully conclude that California does not need its greenhouse gas or zero-emission-vehicle standards. EPA concedes (Br. 14) that California's persistent criteria-pollution problems are "compelling and extraordinary," and that California needs standards that reduce criteria-pollutant emissions. These standards do just that. EPA's contrary determination disregards the record and the agency's own prior conclusions.

1. Congress has recognized that zero-emission vehicles reduce criteria-pollutant emissions. 42 U.S.C. § 7586(f) (authorizing credits for zero-emission vehicles as part of state plans to attain criteria-pollution standards). EPA has

likewise recognized these emission benefits, granting multiple waivers for California's zero-emission-vehicle standards, Primary Br. 12, and approving their inclusion in California's State Implementation Plan to meet federal air-quality standards for criteria pollutants, *id.* at 60. In its 2013 waiver decision, moreover, EPA found that California had "reasonably refuted" arguments that its zero-emission-vehicle standard did not reduce criteria-pollutant emissions. *Id.* at 62-63.

Remarkably, EPA now contends that a mandate to sell vehicles with *zero emissions* provides no criteria-pollution benefits. Resp. Br. 101. EPA adopts the very reasoning it rejected in 2013—namely that isolated statements in California's 2012 waiver request, taken out of context, supposedly conceded a lack of such benefits. Primary Br. 61-63. In fact, the record before EPA at that time clearly demonstrated that zero-emission vehicles have tangible criteria-pollution benefits. EPA has not explained (Br. 102) why California's earlier demonstration of those benefits no longer suffices. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).[9] In any event, California (again) demonstrated such benefits in the Waiver Withdrawal

[9] EPA suggests (Br. 100-01) that emission reductions do not count if they come from refineries rather than vehicles. That was not a basis for this action, *see Chenery*, 318 U.S. at 87, and disregards that zero-emission vehicles produce *zero* tailpipe emissions. Moreover, EPA cannot explain why California would not "need" standards that reduce emissions, from all sources, to address criteria-pollution conditions that EPA concedes are "extraordinary."

proceeding. Primary Br. 63-64. EPA does not explain how it could lawfully ignore *that* demonstration now.

Instead, EPA argues (Br. 102) that California did not quantify an "exact" amount of emission reductions. But EPA has previously asserted that "it is not necessary for [California] to quantify the exact emissions benefits" of its standards. 49 Fed. Reg. at 18,891. Regardless, California *did* quantify criteria-pollution benefits of its zero-emission-vehicle standard in both the 2012 proceeding and this one. JA___, ____, ____, ____[EPA-HQ-OAR-2012-0562-0008_78][EPA-HQ-OAR-2012-0562-0004_16][EPA-HQ-OAR-2018-0283-5054_287_372]. And EPA's Section 209(b)(1)(B) determination was based on the erroneous conclusion that California's standard has *no* criteria-pollution benefits, JA___[FinalAction51349] n.284, not that those benefits were imprecisely quantified. *See Chenery*, 318 U.S. at 87.[10]

2. EPA's contention that California's greenhouse gas standard does not reduce criteria pollution fares no better. EPA concedes that *federal* vehicular greenhouse gas standards reduce criteria pollution, and that EPA has approved incorporation of

[10] EPA also claims (Br. 102) that California's "long term" emission goals for this standard are "unspecified." EPA made no such claim in its Waiver Withdrawal, and, regardless, that claim conflicts with EPA's approval of this zero-emission-vehicle standard as part of California's long-term plan to achieve federal standards by 2031. *E.g.,* 84 Fed. Reg. 52,005, 52,012-13 (Oct. 1, 2019).

California's greenhouse gas standard into multiple State Implementation Plans to meet federal air-quality standards for criteria pollution. Resp. Br. 100.[11] EPA now says it "estimated" that state-level criteria-pollution benefits of vehicular greenhouse gas standards would be "of limited scope," but EPA made no such "estimate[]" in the Waiver Withdrawal or in the distinct Federal Register notice EPA cites. *Id.* (citing 83 Fed. Reg. 16,077, 16,085 (Apr. 13, 2018)). EPA also claims that any criteria-pollution reductions would not "establish any particular *nexus* between California's local standards, conditions, and impacts." *Id.* But this, too, is a post-hoc rationalization and, in any event, EPA fails to explain why higher in-state sales of cleaner vehicles would lack a nexus to California's local pollution conditions.

3. EPA compounded its unlawful refusal to acknowledge the criteria-pollution benefits of California's standards by failing to consider whether the Waiver Withdrawal conformed with State Implementation Plans, 42 U.S.C. § 7506(c), and declining to respond to comments demanding that it do so, Primary Br. 64-65. EPA cannot cure these failures in its brief. Resp. Br. 104. Nor may it rely on *NHTSA's* separate conformity analysis, *id.* (citing Federal Register section concerning only "NHTSA's Action"), or a conformity exemption for rulemakings, *id.* at 103, after maintaining that waiver proceedings are adjudications, *see supra*, at 5; *Stand Up for*

[11] California's choice not to rely on reductions from the greenhouse gas standard in its own plan does not negate EPA's repeated conclusion elsewhere that this standard reduces criteria-pollutant emissions.

California! v. DOI, 959 F.3d 1154, 1166 (9th Cir. 2020) (exemption inapplicable to adjudications). In any event, EPA's post-hoc contentions that criteria pollution will not increase—or that such increases are not "foreseeable" (Br. 104)—contravene EPA's previous findings, as discussed above.

3. California needs these standards to reduce greenhouse gas emissions

EPA's Section 209(b)(1)(B) determination also fails because California has compelling and extraordinary climate change conditions and needs greenhouse gas and zero-emission-vehicle standards to address them.

a. California's climate change "conditions" are "extraordinary"

Although the 2020 fire season is not over, California has already seen six of the twenty largest wildfires in state history, including fires that burned so hot that they created their own tornadoes and lightning storms.[12] The quantity and severity of these wildfires are extraordinary, even catastrophic, by any measure. These fires—along with the droughts and rising temperatures that helped fuel them—are the very type of climate impacts documented in this record. *E.g.*, JA___-____, ___-___[EPA-HQ-OAR-2018-0283-568_NOAA_State_Summ_10-14;EPA-HQ-OAR-

[12] *See* Susanne Rust & Tony Barboza, *How Climate Change Is Fueling Record-Breaking California Wildfires, Heat and Smog*, L.A. Times, Sept. 13, 2020, https://tinyurl.com/y4skzftm; Matthew Cappucci, *California's Wildfire Smoke Plumes Are Unlike Anything Previously Seen*, Wash. Post, Sept. 12, 2020, https://tinyurl.com/y5au5r9z.

2018-0283-5481App_IndicatorsOfClimateChangeInCA_S1-S13]. EPA does not dispute that these circumstances are "compelling," but claims (Br. 89) they are not "extraordinary conditions." EPA casts aside the common meanings of "extraordinary" and "conditions" and disregards the striking sweep and severity of California's circumstances.

1. EPA acknowledges that the everyday meaning of "extraordinary" is "out of the ordinary" or "beyond the usual." EPA nonetheless defines the term as "particular or unique to" California, supposedly to avoid rendering "extraordinary" duplicative of "compelling." Resp. Br. 89-90. But "compelling" has a different meaning: "demanding attention."[13] California's climate conditions are "beyond the usual" as a matter of historical record and as compared to other States, Primary Br. 55-57; *see infra*, at 22-23. They also "demand[] attention" for a different reason: the dangers they pose to California's residents, natural resources, and economy. Neither word renders the other surplusage.

Further, EPA cannot explain (Br. 94) why Congress would have allowed other States to adopt and enforce standards designed to address only conditions "unique" to California. *See* 42 U.S.C. § 7507; Primary Br. 49-50. A single occurrence of the word "unique" in the legislative history, Resp. Br. 91, cannot override the text or the

[13] *Compelling*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/compelling; *accord* Webster's Third New International Dictionary 463 (1961).

structure Congress enacted, *see Bostock v. Clayton Cnty,* 140 S. Ct. 1731, 1749 (2020), particularly given Congress's clear intent to afford California "the broadest possible discretion" to implement its own program, *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA* (*MEMA I*), 627 F.2d 1095, 1122 (D.C. Cir. 1979); *see* Primary Br. 6-10.

2. EPA likewise misinterprets "conditions," a term that simply refers to the "attendant circumstances" California faces. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990) (citing Webster's Third New International Dictionary 473 (1961)). EPA now reads this uncomplicated term to require a showing of highly particularized "causes and effects." Resp. Br. 89-90. Indeed, EPA claims to define "conditions" to include "effects," *id.* at 95-96, but then considers atmospheric levels of greenhouse gases as the only relevant effect, effectively disregarding the particular on-the-ground effects climate change has in California. This constrained view is unmoored from the text and departs, without justification, from EPA's conclusion in 2013 that "the impacts of climate change in California" qualify as "conditions" and are "extraordinary." JA___[R-7839_2129]. EPA also invents (Br. 88-89) a strict causation requirement that obliges California to show that its motor vehicles are the particular cause of a purely local problem. But neither "cause" nor "local" appears in the statute, and neither derives naturally from "conditions."

EPA attempts (Br. 90-91) to justify its "causes and effects" test by looking outside Section 209(b) to Section 202(a), under which an "endanger[ment]" finding

is a precursor to EPA's promulgation of *federal* vehicular emission standards. 42 U.S.C. § 7521(a). But "the only waiver standards with which California must comply" are set forth in Section 209(b), *MEMA II*, 142 F.3d at 462, which requires no endangerment finding. Moreover, Section 202(a) does not impose *even on EPA* the requirements the agency seeks to impose on California, namely, that local vehicles be the sole or primary source of air pollution that is uniquely concentrated in and uniquely affects a specific area. *See Massachusetts v. EPA*, 549 U.S. 497, 523-25 (2007). Section 202(a) directs EPA to regulate vehicular emissions that "cause *or contribute to*" dangerous air pollution. 42 U.S.C. § 7521(a)(1) (emphasis added). And EPA has concluded that greenhouse gas emissions from vehicles on American roads do so, even though those emissions mix in the global atmosphere. 74 Fed. Reg. 66,496, 66,537-40 (Dec. 15, 2009).

3. EPA's reinterpretation of "extraordinary conditions" is also impermissibly pollutant-specific and contrived to "exclude greenhouse gases from the class of regulable air pollutants under" Section 209(b)(1). Resp. Br. 93 (quoting *UARG*, 573 U.S. at 320). EPA's exclusion cannot be reconciled with Congress's decisions to build corporate fleet and federal procurement programs, respectively, around California's zero-emission-vehicle and greenhouse gas standards. Primary Br. 94-98; *see infra*, at 41-43, 44-45. Moreover, this exclusion creates an unsupportable structural gap between the standards "subject to waiver" under Section 209(b) and those

covered by Section 209(a), which preempts state standards that control *any* emissions from new motor vehicles. Primary Br. 50; *see MEMA I*, 627 F.2d at 1107 ("Congress intended to make the waiver power coextensive with the preemption provision"). It is EPA's contrived prohibition (Br. 93-94), not the ordinary meaning of "extraordinary conditions," that is "inconsistent with the statutory scheme." *UARG*, 573 U.S. at 319.[14]

4. In any event, California's climate change conditions satisfy even EPA's new conception of "extraordinary conditions." EPA concedes that "the sheer number" of vehicles in California and the State's "exacerbating effects of local climate and geography" qualify as "causes." Resp. Br. 14, 91 (quotation omitted). That sheer number of vehicles causes the transportation sector's contribution to California's greenhouse gas emissions to be uniquely large—almost forty percent, as compared to approximately thirty percent nationally. JA___[EPA-HQ-OAR-2018-0283-5054_369]; 77 Fed. Reg. 62,624, 62,634 (Oct. 15, 2012). And California's climate and geography lead to impacts in California that are unique in both depth and breadth. Primary Br. 55-57.

[14] Moreover, California standards that reduce greenhouse gas emissions do not "radically transform" the two-program system Congress enacted or "render [it] unworkable." *UARG*, 573 U.S. at 320. California has had these standards for more than a decade.

For example, California has some of the country's hottest and driest areas, which are particularly threatened by record-breaking heatwaves and sustained droughts. JA___-___; ___-___; ___-___[EPA-HQ-OAR-2018-0283-568_NOAA_State_Summ_3-12;EPA-HQ-OAR-2018-0283-5481App_IndicatorsOfClimateChangeInCA_98-103;EPA-HQ-OAR-2018-0283-5682_Mann_1-2]. The State's unusual dependence on snowpack creates particular risks for its water supply and the Nation's most productive agricultural economy. JA___, ____, ____[EPA-HQ-OAR-2018-0283-568_NOAA_State_Summ_2,10,13]; Nat'l Parks Ass'n Amicus Br. 25-26. And California's unique challenges with ozone pollution make it particularly susceptible to greater ozone formation from rising temperatures. JA___-____[EPA-HQ-OAR-2018-0283-5683_UCSRpt_2-3]; Primary Br. 62; Am. Thoracic Soc'y Amicus Br. 22-24.

EPA responds (Br. 96) that greenhouse gas *concentrations* in California are not locally "extraordinary." But even if that were true,[15] "unique causes and effects" would nonetheless still include uniquely large sources of greenhouse gas emissions in California, unique effects that pollution produces on the ground in California, *see*

[15] EPA cannot disregard documented *localized* carbon dioxide concentrations and ocean acidification impacts *in California*, Primary Br. 58, simply because those local effects *may* be found elsewhere, Resp. Br. 97 n.25. Nor can EPA renege on its explicit commitment to consider late comments unless impracticable. *See Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003).

Climate Scientists Amicus Br. 20-26, and unique conditions in California that exacerbate those effects.

b. California "needs" these standards

EPA also adopted an unlawfully constrained, pollutant-specific interpretation of "need." EPA historically required only that California's standards result in "some further reduction in air pollution," largely leaving California's determination of its needs to the State "consistent with the Congressional intent." 49 Fed. Reg. at 18,889, 18,891. But EPA now requires—for greenhouse gas and zero-emission-vehicle standards only—a showing that California's standards "meaningfully redress" local problems, JA___[FinalAction51345], by which EPA means effectuate a change in global temperatures, Resp. Br. 97. EPA neither acknowledges its changed position, *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), nor responds to Petitioners' demonstration that EPA's new interpretation contradicts congressional intent and impermissibly varies by pollutant, Primary Br. 53-54. Instead, EPA tries in vain (Br. 98) to evade the Supreme Court's recognition of the value of incremental progress in *Massachusetts v. EPA* by mischaracterizing that decision as focused on temperature change, rather than "reduction[s] in domestic emissions," 549 U.S. at 526.

EPA cannot rescue its "need" determination (Br. 98-99) by relying on *NHTSA's* assertion that California's greenhouse gas and zero-emission-vehicle

standards will produce no emission benefits because automakers will sell higher-emitting vehicles in other States. JA___[FinalAction51354]. For its part, EPA did not dispute that that California's standards would have at least "incremental" benefits. JA___[FinalAction51341]. Nor does EPA have any response to California's demonstration that it also needs standards now to drive technological development necessary for deeper emission reductions in the future. Primary Br. 58. In any event, NHTSA does not support its assumption that automakers would decline to sell any cleaner vehicles in other States, despite consumer demand and state incentive programs. *See* JA___, ____-____, ____[EPA-HQ-OAR-2018-0283-5481_AppB_3;EPA-HQ-OAR-2018-0283-5456_Att15_1-5,15].

4. The equal-sovereignty doctrine does not apply

The equal-sovereignty doctrine cannot save EPA's Waiver Withdrawal. EPA and State Intervenors each invoke this doctrine, but to different ends. EPA claims (Br. 91-92) the doctrine supports its interpretation of "extraordinary." State Intervenors go much further and assert (Br. 8-22) that Section 209(b) is facially unconstitutional.[16] Both arguments are incorrect.

[16] If the Court intends to entertain State Intervenors' sweeping constitutional argument, which would imperil many federal statutes, it should order supplemental briefing to give the parties a full and fair opportunity to respond. *Cf.* 28 U.S.C. § 2403.

The Supreme Court has applied the equal-sovereignty doctrine where Congress undertook "a drastic departure from basic principles of federalism" by authorizing "federal intrusion into sensitive areas of state and local policymaking" like state elections. *Shelby Cnty. v. Holder*, 570 U.S. 529, 535, 545 (2013) (quotation omitted); *see* Litman Amicus Br. 12-17. Congress did not so intrude in exercising its Commerce Clause power to structure the regulation of vehicular air pollution. EPA nonetheless contends (Br. 91) that "national laws" that "favor or disfavor the different states" automatically trigger the doctrine and heightened scrutiny. But "[f]ederal laws that have differing impacts on different states are an unremarkable feature of, rather than an affront to, our federal system." *Mayhew v. Burwell*, 772 F.3d 80, 95 (1st Cir. 2014); *see, e.g., Sturgeon v. Frost*, 136 S. Ct. 1061, 1070-71 (2016) (upholding "Alaska-specific" carve-out that "treated [Alaska] differently"). Section 209's differing impacts thus do not support EPA's departure from the provision's ordinary meaning.

Section 209 of the Clean Air Act is not "an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Shelby Cnty.*, 570 U.S. at 545 (quotation omitted). Balancing the interests of industry and States, as well as the need for innovation in pollution-control technologies, Congress allowed two, and only two, regulatory regimes for vehicular air pollution: one led by EPA, the other by California (and subject to adoption at the discretion of other qualifying States). Primary Br. 9-10. That is a constitutionally permissible

exercise of an enumerated legislative power, *see* Litman Amicus Br. 17-22, that preserves state "laborator[ies]" to "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 similar choices in other Commerce Clause contexts. *E.g.*, 16 U.S.C. §§ 824k(k), 824p(k), 824q(h), 824t(f) (reserving to Texas's electric-grid operator several regulatory powers that, for other jurisdictions, belong to the Federal Energy Regulatory Commission); *see also* Litman Amicus Br. 22-23.

State Intervenors do not address the balance Congress struck between the burdens that 51 different standards could impose on automakers and the need for technological innovation and pollution control. Primary Br. 52. State Intervenors likewise ignore the extreme criteria-pollution and climate change conditions in California and the State's unique expertise in designing and implementing vehicle emission regulations—expertise that predates EPA's existence and continues to grow. Primary Br. 5-6. If the equal-sovereignty doctrine applies, it is not offended here because Section 209(b) is "sufficiently related to the problem [the statute] targets." *Mayhew*, 772 F.3d at 96.

C. NHTSA's Preemption Rule Cannot Sustain EPA's Waiver Withdrawal

EPA's second basis for the Waiver Withdrawal is also unlawful. EPA does not justify abandoning—for this action only—its long-standing position that it may

consider only the criteria specified in Section 209(b)(1). The sole reason EPA gives for looking outside those criteria here is that "NHTSA has now explained" its view that EPCA preempts California's standards. Resp. Br. 78. The Court cannot presently *uphold* this basis for EPA's Waiver Withdrawal because it lacks jurisdiction to review the validity of NHTSA's (unlawful) determination. Primary Br. 65 n.20; *see also id.* at 74-78; *infra*, at 32-33.[17] But the Court nonetheless can—and should—*reject* this basis now because, even if NHTSA's rule were valid, it would not justify EPA's withdrawal.

EPA's defense mischaracterizes its action. EPA did not refuse to "grant" a waiver "in the face of NHTSA's preemption regulations." Resp. Br. 77. Nor have Petitioners sought to "compel" EPA to either "contradict[]" NHTSA or "resurrect" an invalidated law. *Id.* at 78. Rather, EPA *chose* to reach back and withdraw a waiver granted six years before.

The Supreme Court's observation in *Massachusetts v. EPA* that the Agencies may have "overlapping" obligations does not aid EPA's cause either. Resp. Br. 77. The Court held that EPA acted unlawfully where, as here, it relied on factors external to the Clean Air Act—including NHTSA's "wholly independent" EPCA responsibilities. 549 U.S. at 532-35.

[17] Because EPA's defense turns on whether NHTSA "correctly determined" the preemption issue, Resp. Br. 78, the Court cannot find that EPA reasonably relied on NHTSA's rule by merely *assuming* the rule's validity, *id.* at 77 n.21.

Finally, EPA intimates, for the first time, that Section 209(b)(1) "impliedly" authorizes consideration of NHTSA's rule. Resp. Br. 79 (quoting *MEMA II*, 142 F.3d at 467). But it is "telling" that EPA has "never before" claimed that Congress intended it to consider factors outside the Section 209(b)(1) criteria, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995), much less to reflexively follow another agency's unprecedented regulation that conflicts with the uniform judgments of federal courts, Primary Br. 18.

II. EPA'S SECTION 177 DETERMINATION IS REVIEWABLE AND UNLAWFUL

EPA's Section 177 Determination is reviewable "final action," 42 U.S.C. § 7607(b)(1), and should be vacated because it exceeds EPA's authority and misconstrues the statute.

The Section 177 Determination satisfies both prongs of the finality test. First, it "marks the culmination of EPA's decisionmaking," *NRDC v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020), by "finalizing [the agency's] determination" that "States Cannot Adopt California's [Greenhouse Gas] Standards Under [Clean Air Act] Section 177," JA__[FinalAction51350].[18] Second, contrary to EPA's arguments (Br. 105), the Determination "carries legal consequences" by "withdraw[ing] [EPA's] discretion"

[18] EPA cannot now, by footnote (Br. 107 n.29), broaden its Section 177 Determination to include California's zero-emission-vehicle standard, which was not mentioned in either the proposed or final determination. *See* Primary Br. 68 n.22.

to approve State Implementation Plans that incorporate such standards. *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 405 (D.C. Cir. 2020). The Determination thus "imposes obligations" on States, *id.*, by "alter[ing] the legal regime" for plan approvals, *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011). States face significant consequences for failing to submit compliant plans, such as loss of highway funds or imposition of federal plans overriding state authority. 42 U.S.C. §§ 7410(c)(1), 7509. Those potential consequences, combined with the "lengthy and expensive task of developing state implementation plans," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001), subject States "to the choice between costly compliance and the risk of a penalty," *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019). Thus, "the prospect of eventual review of [a plan] disapproval is no reason to deny" review here. *POET*, 970 F.3d at 406.

On the merits, EPA lacks authority to issue the Section 177 Determination. Section 177 grants qualifying States discretion to "adopt and enforce … California standards for which a waiver has been granted." 42 U.S.C. § 7507. EPA newly claims (Br. 106) that its authority to approve State Implementation Plans, *see* 42 U.S.C. § 7410(a), subsumes the authority to decide which standards Section 177 States may adopt. EPA cannot rely on a source of authority asserted only in its brief. *Chenery*, 318 U.S. at 87. Regardless, the assertion is wrong. As EPA has previously acknowledged, those States "are not required to seek EPA approval" when adopting

California standards. 77 Fed. Reg. at 62,637 n.54. Nor are States necessarily required to include those standards in implementation plans, particularly since the standards may regulate pollutants for which no plan is required. Thus, Section 177 "gives states the discretion" to adopt California standards, and EPA may not lawfully "take[] this choice from the states." *Virginia v. EPA*, 108 F.3d. 1397, 1412 (D.C. Cir. 1997).

EPA also misinterprets Section 177, which refers, unambiguously, to "California standards for which a waiver has been granted," 42 U.S.C. § 7507(1)—the very same standards described in Section 209(b)(1), *see Motor Vehicle Mfrs. Ass'n v. NYSDEC*, 17 F.3d 521, 532 (2d Cir. 1994). Section 177 limits which "[S]tates can use the provision," Resp. Br. 108, but allows eligible States to adopt and enforce "any" California standards, *id.* at 110. Thus, even if the reference to nonattainment *areas* in the provision's title were relevant, *but see Whitman*, 531 U.S. at 483, neither Section 177's title nor its text limits which California *standards* eligible States may adopt. The provision's location in Title I of the statute is irrelevant for the same reason, Primary Br. 72, especially because Congress could not plausibly have intended Title II's substantially identical provision regarding California non-road

standards, 42 U.S.C. § 7543(e)(2)(B), to "function differently," Resp. Br. 109; *see also id.* at 107.[19]

Finally, even if Section 177 aimed solely to "give [S]tates … another option" to reduce criteria pollution, Resp. Br. 109, EPA has long acknowledged that vehicular greenhouse gas standards do just that. *See supra*, at 16-17.

III. THIS COURT SHOULD VACATE NHTSA'S PREEMPTION RULE IF IT HAS JURISDICTION TO DIRECTLY REVIEW IT

A. This Court Cannot Review the Preemption Rule Directly

No statute authorizes direct appellate review of the Preemption Rule. Primary Br. 75-78. NHTSA argues that EPCA permits direct review whenever a regulation is "tied to" federal fuel-economy standards, Resp. Br. 27; is "necessary to [their] effectiveness," *id.*; or "protect[s] the[ir] integrity and consistency," *id.* at 26. Most rules implementing EPCA's fuel-economy chapter could be so characterized, but Congress directed only some of them to courts of appeals while relegating the rest to district courts. Primary Br. 77. NHTSA cannot reconcile its argument with the express inclusions and exclusions in EPCA's direct-review provision, particularly the exclusion of 49 U.S.C. § 32919, which the Preemption Rule supposedly "implement[s]," Resp. Br. 33; *see also id.* at 60.

[19] Because EPA failed to respond to comments about a possible "third-vehicle" problem resulting from its interpretation, Primary Br. 71, the Court should disregard EPA's post-hoc rationalizations (Br. 110-11). *See Sierra Club v. EPA*, 863 F.3d 834, 838 (D.C. Cir. 2017).

Moreover, EPCA limits direct review to regulations "prescrib[ed] … under the provisions enumerated." *Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1299 (D.C. Cir. 2015). The statute originally employed the phrase "prescribed under," and when Congress substituted "prescribed in carrying out," it admonished in statutory text—not mere "legislative history," Resp. Br. 28—that the substitution did not alter the scope of direct review. Primary Br. 78.

NHTSA's argument that it prescribed the Preemption Rule under Section 32902 is not even "colorabl[e]." *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 723 (D.C. Cir. 2016). The agency contends (Br. 30) that "Congress mandates that NHTSA measure [greenhouse gas emissions] 'under' Section 32904(c)" and that NHTSA thus regulates those emissions "'under' Section 32902." On the contrary, Section 32904(c) instructs EPA (*not* NHTSA) to measure fuel economy (*not* emissions), and Section 32902 directs NHTSA to prescribe fuel-economy standards. And neither provision hints at, much less authorizes, a regulation whose sole purpose is to declare that EPCA preempts certain vehicular emission standards.

This Court accordingly lacks jurisdiction and must dismiss the protective petitions for review.

B. The Preemption Rule Exceeds NHTSA's Authority

NHTSA cannot issue preemption regulations. Primary Br. 78-82. The agency conflates an "*ability* to make informed determinations" about a statute's preemptive

scope and the "*authority*" to speak with the force of law on that question. *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (emphases added). However "well-positioned" an agency may be to interpret a statutory provision, Resp. Br. 32-33, no agency can inscribe its interpretation in the Code of Federal Regulations and "purport to act with the force of law" unless a statute authorizes such action, *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

NHTSA concedes (Br. 35) Congress did not "explicitly delegate" authority to promulgate preemption regulations. But NHTSA contends that Section 32919—a self-executing provision that never mentions the agency—implicitly grants NHTSA lawmaking power to declare the scope of express *and* implied preemption. Resp. Br. 33 (relying on Section 32919 to distinguish Petitioners' authorities). That contention is all the more remarkable because NHTSA insists that, for direct-review purposes, its authority stems from a different part of the statute.

NHTSA also cites (Br. 35) its "general delegation of regulatory authority." But that authority is limited to the agency's delegated "duties and powers." 49 U.S.C. § 322(a), which do not include legislating preemption under EPCA's fuel-economy chapter. In the cases cited by Industry Intervenors (Br. 12-13), by contrast, Congress

either delegated broad authority "to enforce *all* provisions of the statute," *City of Arlington v. FCC*, 569 U.S. 290, 302 n.3 (2013) (quotation omitted); *accord City of New York v. FCC*, 486 U.S. 57, 66 (1988); or authorized substantive rules with collateral preemptive effects, *see Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 162 (1982), not rules, like this one, with the exclusive purpose of preempting state law.[20]

NHTSA's reliance (Br. 33) on *Medtronic v. Lohr*, 518 U.S. 470 (1996), is likewise misplaced. There, the plurality's construction of an express-preemption clause was "informed" by an agency rule "implementing [an explicit] grant of authority," *id.* at 495-96, to exempt certain state requirements from preemption, *id.* at 482 n.5. *See Wyeth*, 555 U.S. 576 & n.9 (citing the statute in *Medtronic* and "similar examples" where Congress authorized agencies to decide whether state laws are preempted). NHTSA concedes (Br. 34) that it has no "remotely comparable" role in deciding the preemptive effect of EPCA's fuel-economy chapter.

Nor can NHTSA conjure regulatory power from its disagreement (Br. 35) with the judicial branch's uniform judgments that state greenhouse gas emission standards are not preempted by EPCA. Agency officials are free to "express views on preemption," *id.* at 34, including in future cases raising preemption challenges to

[20] *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), did not decide, as Industry Intervenors suggest (Br. 12), that every federal agency's power to regulate subsumes the power to issue rules declaring state laws preempted. This Court held that "[n]o matter how desirous of protecting their policy judgments, [federal] officials cannot invest themselves with power that Congress has not conferred." 940 F.3d at 83.

state laws, *see* Fed. R. Civ. P. 24(b)(2); Fed. R. App. P. 29(a)(2). But NHTSA lacks authority to codify its own views into law.

C. NHTSA's Preemption Determinations Merit No Deference

The Court should not defer to NHTSA's rule, for three reasons: Courts normally do not defer on questions of preemption; this preemption question requires reconciliation of distinct statutory regimes; and NHTSA did not purport to exercise interpretive discretion. Primary Br. 82-84.

1. Even if an agency is authorized to *interpret* an express-preemption provision, courts do not defer to administrative determinations of preemption unless the agency is authorized "to pre-empt state law directly." *Wyeth*, 555 U.S. at 576; *e.g.*, *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1192-93 (9th Cir. 2018). The Preemption Rule does not arise from "a specific preemption-review process," Resp. Br. 34, nor is its "preemptive effect … merely an ancillary consequence," *Del Grosso v. STB*, 811 F.3d 83, 84-85 (1st Cir. 2016). Its "sole purpose was to pre-empt state law rather than to implement a statutory command." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 44 (2007) (Stevens, J., dissenting). Judicial deference to such action is unwarranted.

2. NHTSA argues (Br. 38-39) that this Court should not "exercise independent interpretive judgment," because these preemption determinations do not call for "'reconciliation' of distinct statutory regimes." *Epic Sys. Corp. v. Lewis*,

138 S. Ct. 1612, 1629 (2018). But NHTSA's rule and brief *do* rest on an attempted reconciliation of EPCA and statutes administered by EPA—chiefly by treating the latter as irrelevant to EPCA preemption. Resp. Br. 47-56. NHTSA now claims (Br. 38) that it relied on EPA's interpretations. But the Agencies are playing a shell game. EPA reflexively adopted NHTSA's opinions on how EPCA interacts with Section 209 of the Clean Air Act. *See supra*, at 28 & n.17. And neither EPA nor NHTSA addressed EPA's contrary interpretations of other pertinent statutory provisions. *See infra*, at 42, 44-45.

3. NHTSA has disavowed interpretive discretion, which undermines its claim for deference. *See* Primary Br. 84. The agency maintains it can simply "invoke[] *Chevron*" and "explain[] why deference is warranted." Resp. Br. 37. But mere mention of *Chevron* is neither necessary nor sufficient for deference. *Cf. Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019). And NHTSA never explained where Congress delegated interpretive discretion regarding preemption. JA__[FinalAction51320].

D. NHTSA's Preemption Determinations Are Wrong

1. NHTSA's express-preemption determinations are wrong

The express-preemption arguments of NHTSA and Industry Intervenors begin and end with the indeterminate phrase "related to." Relying on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and cases of similar vintage, they argue that

"related to" has an expansive "plain meaning," CSAR Br. 15, that furnishes the only "limiting principle" of EPCA preemption, Resp. Br. 51. But the Supreme Court more recently has cautioned that "related to" and similar phrases "provide[] little guidance without a limiting principle consistent with the structure of the statute and its other provisions," *Maracich v. Spears*, 570 U.S. 48, 60 (2013); *accord Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 & n.11 (2015). NHTSA and Industry Intervenors mischaracterize EPCA's structure, ignore or misread its other provisions, and offer no cogent explanation for later enactments in which Congress recognized California's greenhouse gas and zero-emission-vehicle standards and built federal programs around them.

a. EPCA accommodated, rather than preempted, all California vehicular emission standards

Emission standards for which EPA waives preemption under Section 209(b) of the Clean Air Act are not preempted by EPCA. Primary Br. 87-93. To the contrary, Congress fashioned EPCA to accommodate those standards. Congress did this, first, via the "Federal standards" provision, 15 U.S.C. § 2002(d)(3) (1976), which authorized variances from fuel-economy standards that Congress set for model year 1978-80 passenger cars, to account for fuel-economy effects of state emission standards. Congress did so again through the extant "other motor vehicle standards of the Government" provision, 49 U.S.C. § 32902(f), which directs NHTSA to consider effects of state emission standards when determining federal fuel-economy

standards. NHTSA dismisses these provisions as immaterial to preemption and contends that they do not implicate greenhouse gas or zero-emission-vehicle standards. Resp. Br. 48-52. The agency is wrong on both counts.

NHTSA maintains (Br. 48-49, 52) that EPCA's "Federal standards" provision is irrelevant to preemption of state emission standards for any vehicles other than model year 1978-80 passenger cars. But that provision confirms that all "emissions standards applicable by reason of section 209(b)," 15 U.S.C. § 2002(d)(3)(D) (1976), are among the "state law[s] that Congress understood would survive" EPCA's enactment, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). Primary Br. 89-90. Whether Congress "carved out" these state laws from EPCA's preemptive reach, *see* Resp. Br. 48, or merely recognized that those laws were not "related to" fuel-economy standards in the first place, *see id.* at 49, is irrelevant. Either way, there is no reason why Congress would preserve only California's passenger-car standards for model years 1978-80—particularly when California already had applied the same standards to subsequent model years, *see* Primary Br. 90 n.26.

The "obvious" reason, Resp. Br. 48, why Congress authorized *variances* only for model year 1978-80 passenger-car standards is that those are the only standards Congress itself prescribed in the statute. NHTSA was obliged to set all other standards and, in so doing, already had to consider state emission standards' effects

on average fuel economy. Primary Br. 88.[21] EPCA's "motor vehicle standards of the Government" provision, which "is still in effect," Resp. Br. 51, extends Congress's accommodation of state emission standards to all vehicle types and model years. NHTSA does not grapple with the many reasons that "motor vehicle standards of the Government" must be construed to include "Federal standards." *Compare id.*, *with* Primary Br. 90-93. Because EPCA compels NHTSA to consider state emission standards applicable via Section 209(b) when setting fuel-economy standards, EPCA cannot reasonably be interpreted to preempt those same emission standards.

Moreover, "Federal standards"—and, by extension, "motor vehicle standards of the Government"—cannot be read to exclude state greenhouse gas and zero-emission-vehicle standards. "Federal standards" include *all* "emissions standards applicable by reason of section 209(b)," without limitation. 15 U.S.C. § 2002(d)(3)(D)(i) (1976); *see also id.* § 2002(d)(3)(D) (grouping these standards as "a category"). NHTSA disregards that statutory definition and instead speculates about which emission standards members of Congress might have been "thinking about … at the time of EPCA's passage." Resp. Br. 52. Such speculation cannot support a departure from unambiguous text. *See Bostock*, 140 S. Ct. at 1749-50.

[21] NHTSA's explanation for the "Federal standards" provision (Br. 48-49)—that Congress envisioned "potential interplay" between state emission standards and federal fuel-economy standards only for model year 1978-80 passenger cars because other state emission standards affecting fuel economy were subject to preemption—assumes its own conclusion.

Regardless, NHTSA is wrong to suggest that Congress did not intend "Federal standards" to include emission standards with more than "marginal" effects on fuel economy. Resp. Br. 49. Congress knew that California's criteria-pollutant standards, which EPCA undisputedly preserved, *substantially* affected fuel economy. Primary Br. 87. Congress considered those effects when prescribing fuel-economy standards for model year 1978-80 passenger cars, *see* 15 U.S.C. § 2002(a)(1) (1976), and authorized variances if additional California emission standards caused further, non-marginal—i.e., greater than "0.5 mile per gallon," *id.* § 2002(d)(3)(C)—effects that rendered it infeasible for automakers to comply with both state emission standards and federal fuel-economy standards. State emission standards would take priority. Congress thus understood that state emission standards could affect fuel economy substantially yet decided to preserve them anyway.

b. Congress embraced California's greenhouse gas and zero-emission-vehicle standards after EPCA

When California established a zero-emission-vehicle standard, Congress built a Clean Air Act program around it, Primary Br. 94, and amended EPCA to further the purpose of the State's standard, *id.* at 103-04. And when California later established a greenhouse gas standard, Congress built another federal program around it. *Id.* at 96-98. NHTSA strains to avoid the obvious lesson of these enactments: EPCA does not preempt state greenhouse gas or zero-emission-vehicle standards.

1. The 1990 Clean Air Act Amendments embraced state zero-emission-vehicle standards. The Amendments created an emissions-reduction program for corporate fleets and instructed EPA to adopt eligibility criteria for zero-emission vehicles whose purchase could generate "credits" under the program. Primary Br. 94. Congress required those criteria to "conform as closely as possible to" California's "standards" for zero-emission vehicles. 42 U.S.C. § 7586(f)(4). EPA logically interpreted this language to reference California's recently established zero-emission-vehicle standard. 59 Fed. Reg. 50,042, 50,050 (Sept. 30, 1994).

Ignoring that logical interpretation of the administering agency, NHTSA claims "standards" referred to (nonexistent) California "*requirements* for fuel economy" for state fleets, Resp. Br. 53 (emphasis added), which are not subject to preemption under EPCA, *see* 49 U.S.C. § 32919(c). In 1990, however, California's zero-emission-vehicle *standard* undisputedly was not subject to EPCA's preemption provision either, because EPCA can only preempt state regulation of "automobiles covered by" federal fuel-economy standards, *id.* § 32919(a), and zero-emission vehicles were not defined as "automobiles" until 1992, Primary Br. 103; *see infra*, at 43. Moreover, Congress differentiated procurement *requirements* from *standards,* both in this specific program, 42 U.S.C. § 7587(a) ("fleet vehicle purchase requirements"); *id.* § 7588(f) ("[a]cquisition requirement"), and EPCA's preemption section, 49 U.S.C. § 32919(c) (preserving state procurement "requirements").

NHTSA and Industry Intervenors dismiss the clean-fuel-vehicles program as irrelevant, arguing that Congress would not hide "elephants in mouseholes," Resp. Br. 53, by modifying—or impliedly repealing, CSAR Br. 23—EPCA's preemption clause through a credit provision. But Petitioners do not contend this provision *changed* EPCA's preemptive scope. Rather, by recognizing and premising federal action on California's zero-emission-vehicle standard, the 1990 Amendments confirmed that EPCA did not preempt that standard.

2. Congress further built on California's zero-emission-vehicle standard in the Energy Policy Act of 1992, which amended EPCA to add zero-emission vehicles to the definition of "automobile" and offer fuel-economy "credits" to automakers deploying them. Primary Br. 103-04. NHTSA obliquely concedes (Br. 43-44) that, prior to the Energy Policy Act—which NHTSA never mentioned in this rulemaking—EPCA could not have preempted any zero-emission-vehicle standards. But that Act did not expand EPCA's preemptive reach, as NHTSA now suggests. To borrow the agency's phrase, "it is implausible that Congress would use" a "credit provision to implicitly modify the scope of EPCA's express preemption provision." Resp. Br. 53.[22]

[22] A far-flung provision of the Energy Policy Act that repudiated a Nuclear Regulatory Commission preemption statement, *see* Pub. L. No. 102-486, § 2901(b), 106 Stat. 2776, 3122 (1992), is not "compelling evidence," Resp. Br. 44, of legislative intent to preempt state zero-emission-vehicle standards that "Congress previously

Congress took care in the Energy Policy Act to preclude zero-emission vehicles from affecting NHTSA's fuel-economy "standards" at all, let alone "substantially and directly." JA___[FinalAction51314]. NHTSA cannot "consider the fuel economy of" zero-emission vehicles, 49 U.S.C. § 32902(h)(1), when setting federal fuel-economy standards. The agency ignored that prohibition during the rulemaking, however, and now argues (Br. 44) that "Congress would have had no need to limit NHTSA's consideration" of zero-emission vehicles if they were "unrelated to fuel economy." But preemption turns on a relationship to "fuel economy *standards*," 49 U.S.C. § 32919(a) (emphasis added), and Congress foreclosed any such relationship.

3. Congress later embraced California's greenhouse gas standards, just as it had the State's zero-emission-vehicle standard. Section 141 of the Energy Independence and Security Act of 2007 (EISA) established a federal-fleet procurement program and charged EPA with identifying models of vehicles that meet "the most stringent standards for vehicle greenhouse gas emissions applicable to and enforceable against [automakers] for vehicles sold anywhere in the United States." 42 U.S.C. § 13212(f)(3)(B). On the day NHTSA published the Preemption Rule, EPA issued guidance reaffirming its own long-standing construction of

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sought to foster," *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316, 331 n.7 (1997).

"standards" in Section 141 to mean standards for a vehicle's total greenhouse gas emissions. *See* Primary Br. 98.

Ignoring EPA's construction, NHTSA argues (Br. 54-55) that "standards" include procurement "requirements." But, as before, Congress differentiated *standards* from *requirements*. 42 U.S.C. § 13212(a), (b), (d), (f) (listing federal-fleet "requirements"). NHTSA cannot explain why Congress would use these two terms of art interchangeably, or how EPA could practicably administer Section 141 if NHTSA's interpretation were correct. *See* Primary Br. 97.

NHTSA's brief posits (Br. 54) a new theory that Section 141's "standards" include state controls on non-tailpipe greenhouse gas emissions (e.g., emissions from air-conditioning refrigerant leakage), because the Preemption Rule declares these are the only greenhouse gas standards not preempted by EPCA. Aside from the fact that California has not adopted standalone, non-tailpipe greenhouse gas standards—and would not have had reason to until the Preemption Rule issued—NHTSA's theory has bizarre implications. It would require that EPA compare apples to oranges and decide whether state standards for non-tailpipe emissions are "more stringent" than federal standards that cover non-tailpipe *and* tailpipe emissions. It is far more reasonable for EPA to compare federal standards to California's actual standards, which likewise cover greenhouse gas emissions from the entire vehicle.

NHTSA's elephants-in-mouseholes argument (Br. 55) is no more apt here than elsewhere. Petitioners do not allege that Section 141 *ended* preemption of greenhouse gas emission standards under EPCA, but that such preemption never *began*.

NHTSA similarly misperceives the relevance of EISA's savings clause. Resp. Br. 55-56. That clause did not change EPCA's preemptive scope. But it confirms that Congress's understanding of that scope differs from NHTSA's new understanding. By codifying the status quo on preemption in December 2007, Congress ratified courts' judgments months earlier that EPCA does not preempt greenhouse gas standards for which EPA grants a Section 209(b) waiver. Primary Br. 94-96. NHTSA dramatically understates the voluminous evidence of ratification. *See* Members of Congress Amicus Br. 16-26.

c. Greenhouse gas and zero-emission-vehicle standards do not have a "direct and substantial" effect on federal fuel-economy standards

Against Congress's repeated confirmations that EPCA does not preempt state greenhouse gas or zero-emission-vehicle standards, NHTSA and Industry Intervenors offer only a fragile defense of the "foundation for [the agency's] preemption analysis," i.e., a purported "direct scientific link between tailpipe carbon dioxide emissions and fuel economy." JA__[FinalAction51315].

1. No one argues that such a link exists for zero-emission vehicles, which lack "fuel economy" because they do not burn "fuel." *See* 49 U.S.C. § 32901(a)(10), (11).

Fuel economy for those vehicles is a legal construct without a "direct" or "scientific link" to emissions of carbon dioxide or any other greenhouse gas. Primary Br. 102-03. NHTSA resorts to arguing that EPCA (via the Energy Policy Act of 1992) "links 'fuel economy' to zero-emission *vehicles*" by incentivizing their deployment. Resp. Br. 43 (emphasis added). That is a far cry from arguing that California's zero-emission-vehicle standards substantially affect federal fuel-economy *standards*. It does not even support the Preemption Rule's premise of a link between fuel economy and *emissions*.[23]

NHTSA also maintains (Br. 42) that zero-emission-vehicle standards are preempted because they depress production of gasoline-powered vehicles. But any such effect would have no bearing on the emissions or fuel economy of zero-emission vehicles themselves. Whatever indirect effect zero-emission-vehicle standards may have on automakers' fleet-average fuel economy, NHTSA's "fuel-economy *standards*," 49 U.S.C. § 32919(a) (emphasis added), remain unaffected, by congressional design, *see supra*, at 44. NHTSA also fails to grapple with the overbreadth of its theory, given the array of state laws that affect production of gasoline-powered vehicles. Primary Br. 107.

[23] NHTSA further confuses the matter by quoting (Br. 43) Section 32905(a), a provision for measuring fuel economy of vehicles *other than* zero-emission vehicles. Sections 32904(a)(2) and 32905(c) govern "fuel economy" measurements of electric and hydrogen-powered vehicles, respectively. Primary Br. 102-03.

NHTSA further argues (Br. 42) that state zero-emission-vehicle standards "relate to" fuel-economy standards because the aim of the former is to affect fuel economy. That misstates the aim of California's "zero-emission" vehicle standards; their purpose has always been to reduce harmful emissions, *see supra*, at 15-16; Primary Br. 12, 61-63; JA__[EPA-HQ-OAR-2012-0562-0008_ES1-2]—like many other measures to support zero-emission vehicles that NHTSA admits California can freely pursue (Br. 45). NHTSA's citation (Br. 42-43) of an unpublished, interlocutory district court opinion and a 16-year-old "Fact Sheet" cannot change the purpose of California's zero-emission-vehicle standard. Regardless, NHTSA cannot rely on purpose-based reasoning it abandoned in the final rule. *See Chenery*, 318 U.S. at 87. *Compare* JA__[ProposedAction43238] & n.539, *with* JA__[FinalAction51321].

2. Greenhouse gas emission standards and federal fuel-economy standards are not "two sides of the same coin." Resp. Br. 40. First, only the former are prescribed in a way that accounts for automakers' ability to produce zero-emission vehicles. *Cf.* 49 U.S.C. § 32902(h)(1). As those vehicles increasingly influence the stringency of greenhouse gas emission standards, those standards will increasingly diverge from fuel-economy standards, and any present technology overlap between the two will shrink. Primary Br. 100-01. Yet, as NHTSA (Br. 59) and Industry Intervenors (Br. 17) grudgingly admit, the Preemption Rule takes the agency's assessment of a

temporary technology overlap and cements it in the Code of Federal Regulations to govern indefinitely.

Second, NHTSA points only to a relationship between greenhouse gas emissions and fuel economy, Resp. Br. 40, when the pertinent comparison for preemption is between "standards" for each, 49 U.S.C. 32919(a). And NHTSA exaggerates from the first page of its brief. EPCA does not "*require*[] that fuel economy be measured by tailpipe carbon-dioxide emissions per mile." Resp. Br. 1 (emphasis added). It *permits* EPA to measure gasoline-powered vehicles' fuel economy using the metric the agency used in 1973. That metric incorporates emissions of not only carbon dioxide but also two pollutants—carbon monoxide and hydrocarbons, *see* 38 Fed. Reg. 10,868 (May 2, 1973)—that California controls with standards that NHTSA concedes are not preempted, Resp. Br. 49. Moreover, EPA is free to use a different metric. *See* 49 U.S.C. § 32904(c); H.R. Rep. No. 94-340, at 92 (1975) (highlighting EPA's "wide latitude" in this regard). EPCA's fuel-economy measurement provision thus cannot bear the preemptive weight NHTSA places on it. Indeed, the provision expressly distinguishes the measurement of "fuel economy" and "emissions." 49 U.S.C. § 32904(c); *see also id.* § 32908(g)(1)(A) (differentiating labeling requirements for "fuel economy and greenhouse gas and other emissions").

2. NHTSA's conflict-preemption determinations are wrong

NHTSA does not address the contradiction between its conflict-preemption rationale and its acknowledgment in the rulemaking that "conflict principles of implied preemption do not apply" here. JA__[ProposedAction43236]; *see also* JA__[FinalAction51312] ("fully reaffirm[ing]" proposal's analysis). Indeed, both NHTSA and Industry Intervenors dress their express-preemption arguments in conflict-preemption garb. Resp. Br. 56-59; CSAR Br. 17-20. The arguments fare no better the second time around.

For example, NHTSA claims greenhouse gas and zero-emission-vehicle standards are *expressly* preempted because they "frustrate … EPCA's balanced, comprehensive approach committed to NHTSA's care," Resp. Br. 46, and are *impliedly* preempted because they "interfere with NHTSA's ability to effectively balance and achieve Congress's goals," *id.* at 57; *see also* CSAR Br. 20. But those goals include accommodating state emission standards as part of that balance. *See supra*, at 38-40. That accommodation dooms the Preemption Rule's assertion of conflict preemption.[24]

Regardless, NHTSA cannot demonstrate a conflict between EPCA and California's emission standards. At most, fuel economy and greenhouse gas

[24] Notably, NHTSA does not posit any conflict that it could not also have posited when zero-emission-vehicle standards were first established and embraced by Congress as not preempted. *See supra*, at 42-43.

emissions have a "transitory" relationship. CSAR Br. 17. That cannot support "a categorical determination that any and all forms of state regulation" of zero-emission vehicles or tailpipe greenhouse gas emissions "inevitably conflict" with EPCA, *Mozilla Corp. v. FCC*, 940 F.3d 1, 82 (D.C. Cir. 2019), irrespective of technological progress. NHTSA's pledge (Br. 59) to consider future petitions to amend the Preemption Rule in light of new technology only underscores the problem: "The Supremacy Clause gives priority to 'the Laws of the United States,' not the … priorities or preferences of federal officers" confronting rulemaking petitions. *Kansas v. Garcia*, 140 S. Ct. 791, 807 (2020).

The remaining arguments of NHTSA and Industry Intervenors are irrelevant or inimical to conflict preemption. Any effect California's emission standards may have on individual automakers' compliance strategies for federal fuel-economy standards, *see* CSAR Br. 20, is too remote to trigger conflict preemption, *see* Primary Br. 107. And any effect of California's emission standards on federal fuel-economy standards would be lessened, not heightened, if NHTSA's speculation (Br. 61) were correct that automakers "offset" in-state sales of low- and zero-emitting vehicles with increased sales of higher-emitting vehicles elsewhere. Lastly, NHTSA's criticisms (Br. 58) of California's fleet-procurement policies and voluntary agreements with certain automakers are misplaced because NHTSA did not rely on them to support its action. The Preemption Rule does not target those actions, and

NHTSA never argues that they somehow render California's *emission standards* conflict-preempted.

E. NHTSA Violated the National Environmental Policy Act

NHTSA's claim (Br. 60) that Section 32919 renders the National Environmental Policy Act inapplicable conflicts with the agency's claim of authority to issue the Preemption Rule. NHTSA insists initially (Br. 27) that its *rule* is "necessary to the effectiveness" of federal fuel-economy standards prescribed under Section 32902. Yet NHTSA argues later that the rule's environmental impacts are solely attributable to the *statute,* and a different section of it, no less. The agency cannot have it both ways. NHTSA's invocation (Br. 60-61) of *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), is misplaced for the same reason. Any "interpretive discretion" NHTSA exercised, Resp. Br. 60, was, on the agency's own account, exercised under Sections 32901-32903, *id.* at 26-27. NHTSA does not argue that *those* sections "allow[] no consideration of environmental impacts." *Id.* at 60.

Nor can NHTSA demonstrate "harmless error" (Br. 61-62) on the ground that preemption of state environmental laws has no environmental impact. First, NHTSA did not prepare a valid "finding of no significant environmental impact" premised on a final environmental assessment or impact statement. *See* 40 C.F.R. §§ 1501.4(b)(2), 1508.9(a)(1); 49 C.F.R. §§ 520.3, 520.21(e)(8). Second, NHTSA's

Preemption Rule will significantly increase emissions of greenhouse gases and criteria pollutants that otherwise would be controlled by the state laws that the rule declares preempted. *See supra*, at 14-17, 22-24. NHTSA's utter failure to consider those environmental impacts is unlawful.

CONCLUSION

EPA's Waiver Withdrawal and Section 177 Determination should be vacated. This Court should dismiss the protective petitions challenging NHTSA's action for lack of jurisdiction or, in the alternative, vacate that action.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of the applicable rules and this Court's briefing format order dated May 20, 2020 (ECF No. 1843712). According to Microsoft Word, the portions of this document not excluded by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1) contain 11,594 words. When added to the words of the other petitioners' reply brief, this does not exceed the 13,000 words the Court allocated to all petitioners. I further certify that 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 document has been prepared in a proportionally spaced, 14-point typeface (Garamond).

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing reply brief of State and Local Government Petitioners and Public Interest Petitioners with the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF system. All parties that are represented by counsel registered as CM/ECF users will be served by that system. I further certify that service will be accomplished via email for the following participants:

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