NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-1230 and consolidated cases

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

UNION OF CONCERNED SCIENTISTS et al.,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,
Respondents.

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

RESPONDENTS' INITIAL BRIEF

JEFFREY BOSSERT CLARK
Assistant Attorney General
Environment & Natural Resources Div.
Acting Assistant Attorney General
Civil Division

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
Environment & Natural Resources Div.

CHLOE H. KOLMAN
DANIEL R. DERTKE
SUE CHEN
LAURA DUNCAN
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7611
Washington, D.C. 20044
(202) 514-9277 (Kolman)
chloe.kolman@usdoj.gov

Of Counsel

MICHAEL KUPPERSMITH
National Highway Traffic Safety Administration
Washington, D.C.

WINIFRED OKOYE
U.S. Environmental Protection Agency
Washington, D.C.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I certify under D.C. Circuit Rule 28(a)(1):

A. Parties and Amici.

Except for the following, all parties, intervenors, and amici appearing in these consolidated cases are listed in the Brief of State and Local Government Petitioners and Public Interest Petitioners:

Intervenors: Association of Global Automakers, Inc.

Amici: Edison Electric Institute; International Municipal Lawyers Association; Thomas C. Jorling; Leah M. Litman; Lyft, Inc.; National Association of Clean Air Agencies; National League of Cities; Margo T. Oge; Michael P. Walsh; and U.S. Conference of Mayors.

B. Rulings Under Review.

Under review is the action, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

C. Related Cases.

Three groups challenged part of the action in the U.S. District Court for the District of Columbia, which consolidated those cases and stayed them pending resolution of this litigation. *Calif. v. Chao*, No. 1:19-cv-2826-KBJ (D.D.C.); *Envtl. Def.*

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

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

---

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

---

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

Rules

Statutes

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

---

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

Code of Federal Regulations

State Administrative Regulation

---

* Authorities chiefly relied upon are marked with an asterisk.

Federal Registers

---

* Authorities chiefly relied upon are marked with an asterisk.

Legislative History

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

CAA	Clean Air Act
EISA	Energy Independence and Security Act of 2007
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
Industry Br.	Brief of petitioners National Coalition for Advanced Transportation, et al.
JA	Joint Appendix
NAAQS	National ambient air-quality standards
NEPA	National Environmental Policy Act
NHTSA	National Highway Traffic Safety Administration
Primary Br.	Brief of state and local government petitioners and public-interest petitioners

INTRODUCTION

Two federal agencies each regulate one side of the same coin. Each agency's authority expressly preempts state regulation. The Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") sets nationwide, "maximum feasible" fuel-economy standards for motor vehicles. NHTSA balances statutory factors, yielding standards neither too low nor too high. For decades, Congress has required that fuel economy be measured by tailpipe carbon-dioxide emissions per mile. Because of the direct, scientific relationship between combustion of gasoline and its carbon-dioxide emissions, NHTSA uses those emissions to calculate average miles per gallon of fuel economy.

For the past decade, the U.S. Environmental Protection Agency ("EPA") has also regulated carbon-dioxide emissions from motor vehicles. EPA similarly sets a nationwide standard, subject to a narrow mechanism for California to seek a waiver from preemption. In setting its standards, EPA balances considerations like public-health risks, technological lead time, and compliance costs.

When ruling that NHTSA's fuel-economy authority nevertheless permits EPA to regulate carbon dioxide, the Supreme Court held, "[t]he two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). EPA and NHTSA thus now jointly set one national standard. And that single national standard is expressed as two sides of that same coin: for EPA under the

Clean Air Act ("CAA"), in grams of carbon dioxide per mile; for NHTSA under the Energy Policy and Conservation Act ("EPCA"), in miles per gallon.

The dispute here goes back two decades. Petitioners argue that a jumble of thrown-together statutory sub-provisions, negative inferences, and unsupported assumptions mean the CAA's carefully circumscribed preemption waiver allows California's policy choices to override two federal agencies' careful deliberations. It does not.

Long before California first regulated carbon dioxide, EPCA allowed limited accommodation for the marginal impact on fuel economy from California's criteria-emission standards and the catalytic converters used in the 1970s.[1] That accommodation lasted for only a limited time. In any event, traditional criteria standards are not related to fuel-economy standards. So they are not preempted under EPCA.

Three decades after EPCA's enactment, however, California first purported to mandate "fleet average [carbon-dioxide] mass emission standards" expressed in "grams [per] mile." Cal. Code Regs. Tit. 13 § 1961.3(a). Through an accepted scientific conversion, California's standards can—like EPA's and NHTSA's

[1] "Criteria" pollutants are the six pollutants for which EPA has set national ambient air-quality standards ("NAAQS"). *See generally* 42 U.S.C. §§ 7408-09; 40 C.F.R. pt. 50. CAA Title I establishes a program for states to attain these standards on a local or regional basis. Greenhouse gases are not criteria pollutants.

standard—be expressed as miles per gallon. So California's regulations are "related to fuel economy standards"—precisely what EPCA preempts. 49 U.S.C. § 32919(a). NHTSA rightly determined that here.

EPA's conclusion regarding the CAA's express preemption provision for state vehicle-emission standards is likewise correct. While California can seek waivers for its emission standards, it "does not need" California-specific greenhouse-gas vehicle emission "standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B).

Petitioners' arguments to the contrary unreasonably aggrandize California's authority. EPA cannot regulate vehicle emissions without a pollutant-specific endangerment finding. But California says, so long as some part of the state suffers from persistent smog, *it* can set vehicle emission standards for *any* pollutant.

EPA rightly withdrew its prior waiver of preemption for California's standards. Even under Petitioners' irrational interpretation of these statutes, any reduced emissions in California will likely "be offset" by "vehicles produced for sale in the rest of the country, leading to little to no change in either fuel use or [greenhouse-gas] emissions at a national level." 84 Fed. Reg. 51,310, 51,354/1 (Sept. 27, 2019). Those state standards do not meaningfully reduce the overall U.S. contribution of greenhouse-gas emissions to the world inventory of such emissions, which mix evenly in the atmosphere. They do nothing more than disrupt orderly functioning of the national program.

Congress intended that fuel-economy and vehicle-emission standards be nationwide, uniform, and preemptive. Only the CAA is subject to a *limited* waiver. The challenged actions faithfully implement Congress's intent. The petitions should be denied.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 49 U.S.C. § 32909(a)(1) to review NHTSA's preemption regulations, and under 42 U.S.C. § 7607(b)(1) to review EPA's waiver withdrawal.

This Court lacks jurisdiction to review EPA's interpretation of CAA Section 177, 42 U.S.C. § 7507, because it is not final agency action.

STATEMENT OF THE ISSUES

1. Does this Court have jurisdiction to review NHTSA's preemption regulations under 49 U.S.C. § 32909(a)(1)?

2. a. Does NHTSA have authority to promulgate regulations that interpret the scope of 49 U.S.C. § 32919(a) to expressly preempt state tailpipe greenhouse-gas emission standards and zero-emission-vehicle mandates related to fuel economy?

   b. In the alternative, does it impliedly preempt such standards and mandates?

   c. Does the National Environmental Policy Act ("NEPA") apply to NHTSA's regulations?

3. Can EPA reconsider and withdraw preemption waivers under 42 U.S.C. § 7543(b), and did it reasonably do so in light of NHTSA's preemption regulations and where California does not "need" greenhouse-gas standards "to meet compelling and extraordinary conditions" within the meaning of 42 U.S.C. § 7543(b)(1)(B)?

4. Does the Court have jurisdiction to review EPA's interpretation of CAA Section 177, 42 U.S.C. § 7507, and did EPA reasonably read that provision as not applying to greenhouse gases?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not reproduced in the addendum to Petitioners' briefs are reproduced in the separate addendum to this brief.

STATEMENT OF THE CASE

To safeguard the integrity, efficiency, and uniformity of federal fuel-economy and vehicle-emission standards, Congress, with very narrow exceptions, preempted states from regulating in these inherently related areas. Under EPCA and the CAA, NHTSA and EPA strike careful balances when setting those standards. *See* 49 U.S.C. § 32902(f); 42 U.S.C. § 7521(a). A patchwork of states inserting their own standards disrupts that balance. 84 Fed. Reg. at 51,326/1 n.179. "[T]his preemption [i]s the cornerstone of" Congress's design. *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (internal quotation marks omitted).

I. Nationally uniform motor-vehicle regulation.

A. Vehicle emissions.

In 1965 Congress amended CAA Title II to authorize federal emission standards for motor vehicles.[2] Pub. L. No. 89-272, § 101, 79 Stat. 992 (1965). Then as now, Section 202 governs federal emission standards for pollutants emitted from new motor vehicles found to "cause, or contribute to…air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). In setting those standards, EPA must consider technological feasibility, lead time, and "cost of compliance." *Id.* § 7521(a)(2).

Even after Section 202's enactment, many states continued developing their own emission programs. *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 525 (2d. Cir. 1994). Congress responded in 1967 by adding a broad preemption provision. Pub. L. No. 90-148, § 208, 81 Stat. 485 (1967). Now Section 209(a), it is the "cornerstone" of Title II. *Motor Vehicle Mfrs.*, 17 F.3d at 526. It provides: "No State…shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). This differs from other CAA provisions. Congress chose cooperative federalism in Title I

[2] EPA's authority under this provision extends to new motor vehicles and their engines. We say "motor vehicles" or "vehicles" for simplicity. Likewise, 49 U.S.C. Chapter 329 governs "automobile" fuel economy. The terms "automobiles" and "motor vehicles" differ meaningfully for other purposes; we say "motor vehicles" throughout. And though we generally use "greenhouse gases" to refer to the pollutants at issue, we say "carbon dioxide" when specificity is required.

(generally governing stationary sources), but national uniformity in Title II (mobile sources). *Compare id.* § 7416 (retention of state authority) *with id.* §7543(a) (preemption of state emission regulations); *see Engine Mfrs.*, 88 F.3d at 1079.

Congress left only one narrow exception to Section 209(a)'s broad preemptive reach in what is now Section 209(b). Pub. L. No. 90-148, § 208(b); *see* 42 U.S.C. § 7543(b). Section 209(b) governs applications for preemption waivers by states who adopted certain standards before March 30, 1966. Congress knew this meant only California. 42 U.S.C. § 7543(b); 84 Fed. Reg. at 51,331/3 & n.218.

EPA cannot grant California a waiver if it finds:

- California "does not need such State standards to meet compelling and extraordinary conditions"; or
- "such State standards and accompanying enforcement procedures are not consistent with Section [202(a), 42 U.S.C. §] 7521(a)."

Id. § 7543(b)(1)(B), (C); *see also id.* § 7543(b)(1)(A).

Congress gave California special treatment because of the state's "unique" smog problems. H.R. Rep. 90-728, at 1958, 1986 (1967); *see infra* Statement of Facts § III. Even today, California is the only state with areas in "Extreme" nonattainment of criteria standards. These were "compelling and extraordinary circumstances sufficiently different from the Nation as a whole" to justify limited deviation from Section 209(a)'s demand for national uniformity. *Id.* at 1956; *see* S. Rep. 90-403, at 33

(1967). Congress thus let California address different "relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State." H.R. Rep. 95-294, at 1381 (1977).

Notably, Congress intended EPA's waiver authority to include authority to *withdraw* waivers. As the Senate explained, "[i]mplicit in this provision is the right of [EPA's Administrator] to withdraw the waiver [if] at any time after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of that waiver." S. Rep. 90-403, at 34.

B. Fuel economy.

Congress enacted EPCA in 1975. EPCA seeks to, among other things, improve motor vehicles' energy efficiency. 42 U.S.C. § 6201(5). Congress mandated fuel-economy standards, governing the number of miles vehicles can travel per gallon of fuel. 49 U.S.C. § 32902(a); *see id* § 32901(a)(11).

EPCA does not task NHTSA with reducing greenhouse-gas emissions from vehicles *per se*. But Congress understood that carbon-dioxide emissions are related to fuel economy, and emitted in proportion to fuel molecules combusted per mile. Indeed, fuel economy was (and is) measured by carbon-dioxide emissions from a vehicle's tailpipe in certain test procedures. *See* 38 Fed. Reg. 10,868 (May 2, 1973). EPCA specifically required NHTSA to use EPA's 1975 test procedures (or ones yielding "comparable results"). 49 U.S.C. § 32904(c); H.R. Rep. 94-340, at 1854 ("Fuel economy tests would be conducted in conjunction with emissions tests

conducted under the Clean Air Act."). Today, though the formulas differ slightly, EPA uses the same procedures to measure fuel-economy and tailpipe carbon-dioxide emissions. *See* 40 C.F.R. § 600.113-12(h)(1), (2).

NHTSA has exclusive authority to regulate "fuel economy." *See* 49 U.S.C. §§ 32901-19; *see also id.* § 32902(a); 49 C.F.R. § 1.95(a), (j). For each vehicle model year, automakers must meet NHTSA's fleet-wide average fuel-economy standards. 49 U.S.C. § 32902(a). The standards are set at the "maximum feasible average fuel economy level that [NHTSA] decides the manufacturers can achieve in that model year." *Id.*

Congress required maximum *feasible* standards for good reason. Overly stringent standards increase costs for automakers. *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 324-25 (D.C. Cir. 1992). Those costs are passed on to consumers through higher prices, which discourage them from buying newer, more fuel-efficient and lower-emitting cars, delaying turnover of the national fleet. *Id.*; *see* 84 Fed. Reg. at 51,311/3. So Congress required NHTSA to balance competing factors, like energy conservation, against technological feasibility and economic practicability. 49 U.S.C. § 32902(f). This nuanced approach yields stringent but feasible standards.

When enacting EPCA, Congress included a broad, express preemption provision. States "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards" that are covered by a

NHTSA fuel-economy standard. *Id.* § 32919(a). Congress created one exception for motor vehicles obtained for state or local government use. *Id.* § 32919(c).

Congress enacted EPCA against the backdrop of CAA's emission standards and preemption-waiver provisions. It noted "catalytic converters" used for compliance with EPA and California "carbon monoxide and hydrocarbons" standards of the 1970s could impose a "fuel penalty" on the new EPCA fuel-economy regime. H.R. Rep. 94-340, at 1849. Congress thus made a narrow, transitional, and expressly time-limited allowance. It included EPA and "emission standards applicable by reason of section 209(b) of [the CAA]" (that is, California standards covered by a waiver) as a category of "federal standards" that could justify relief from initial EPCA standards. Pub. L. No. 94-163, § 502(a)(1) & (3), (d)(2), (d)(3)(D)(i), 89 Stat. 871 (1975); *see* 83 Fed. Reg. 42,986, 43,210/2 (Aug. 24, 2018). This transitional mechanism did not extend past model year 1980. And when Congress recodified EPCA in 1994, it omitted this provision. 83 Fed. Reg. at 43,210/2-3 (citing H.R. Rep. No. 103-180, at 583–584, tbl. 2A). The recodification made no substantive changes to EPCA. Pub. L. No. 103-272, 108 Stat. 745 (1994) (preamble).

C. The California waiver.

In 1977, two years after enacting EPCA, Congress again amended the CAA. It added to Section 209(b) the requirement that California's emission standards be, "*in the aggregate*, at least as protective of public health and welfare as applicable Federal standards." Pub. L. No. 95-95, § 207, 91 Stat. 685 (1977) (emphasis added). This

accommodated California's request to adopt nitrogen-oxide standards more stringent than federal ones, but less stringent carbon-monoxide standards, in light of technological tradeoffs between controlling the two pollutants. *Id.*; H.R. Rep. 95-294, at 1381.

In the 1977 CAA amendments, Congress was well aware of EPCA's fuel-economy requirements. When Congress wanted the new statute to accommodate the earlier one, it said so. For example, the amendments allow waiver of certain nitrogen-oxide standards so long as, among other things, automakers use innovative technology that can potentially meet or exceed "the average fuel economy standards applicable under [EPCA]." Pub. L. No. 95-95, § 201(c); 42 U.S.C. § 7521(b)(3)(C).[3]

Congress also added Section 177 to CAA Title I, which generally deals with NAAQS pollutants. 42 U.S.C. § 7507. This "new provision permit[s] other States with nonattainment areas for oxidants, carbon monoxide, or nitrogen dioxide to adopt and enforce California new motor vehicle standards[.]" H.R. Conf. Rep. 95-564, at 1570 (Aug. 3, 1977). Standards must be "identical to the California standards for which a waiver has been granted," so that, under a provision added in 1990, no state can create a "third vehicle" that differs from a California-compliant vehicle. 42 U.S.C. § 7507; Pub. L. No. 101-549, § 232, 104 Stat. 2399 (1990).

[3] There appears to be a scrivener's error in the statute; this provision should probably be Section 7521(b)*(4)*(C).

II. Criteria pollutants, greenhouse gases, and fuel economy.

Under the CAA, emission standards are required for pollutants that, in EPA's judgment, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

In 1999, a petition sought to compel EPA to regulate vehicle greenhouse-gas emissions. *Massachusetts*, 549 U.S. at 510. In overruling EPA's petition denial, the Supreme Court held in 2007 that, though NHTSA "sets mileage standards" based on "carbon dioxide emissions from motor vehicles" and EPA's and NHTSA's "two obligations may overlap," "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.* at 532.

EPA issued an endangerment finding in 2009. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). It found: (1) six greenhouse gases endanger public health and welfare; and (2) motor-vehicle emissions of those gases contribute to air pollution that endangers public health and welfare. *Id.* at 66,496/1. Regulation of carbon-dioxide emissions is now EPA's mandatory duty under CAA Section 202(a), 42 U.S.C. § 7521(a).

In 2010 and 2012, EPA issued two sets of greenhouse-gas standards for light-duty vehicles like passenger cars. 75 Fed. Reg. 25,324 (May 7, 2010) (model years 2012-2016); 77 Fed. Reg. 62,624 (Oct. 15, 2012) (model years 2017-2025). These were joint rulemakings with NHTSA to "avoid inconsistency," *Massachusetts*, 549 U.S. at 532. The agencies continued to recognize that—as they and Congress had even before 1975—because greenhouse-gas and fuel-economy standards are scientifically

and mathematically two expressions for the same term, (1) if a given car can travel more miles burning less fuel, less carbon dioxide comes out of the tailpipe; and (2) a given car will emit fewer greenhouse gases if it burns less fuel per mile traveled. 84 Fed. Reg. at 51,313/3; *see id.* at 51,315/1-316/2.

California acceded to these standards. "California amended its [greenhouse-gas] regulations to provide that manufacturers could elect to comply with the EPA [greenhouse-gas] requirements and be deemed to comply with California's standards." 83 Fed. Reg. at 43,233/1-2. "[T]his amendment facilitated the National Program by allowing a manufacturer to 'meet all standards with a single national fleet.'" *Id.* at 43,233/2.

III. California regulation and waiver.

CAA Title I directs EPA to set and periodically revise standards, the NAAQS, for criteria pollutants. 42 U.S.C. §§ 7408(a)(1), 7409. EPA also must determine whether air quality in discrete areas across the country meets those standards. If not, the area is designated "nonattainment." *Id.* § 7407(d)(1)(A)(i).

States must adopt—subject to EPA's approval—implementation plans to attain and maintain air-quality standards. *Id.* § 7410(a). States with nonattainment areas must have plans that include enforceable emission limitations. *Id.* § 7502(c); *see generally id.* §§ 7501-7514a.

California has long struggled with smog and other air pollution caused by criteria pollutants interacting with its particular configuration of state-specific

characteristics. *See* H.R. Rep. 90-728 at 1985-86. Local topography and climate, combined with the sheer number and concentration of motor vehicles, all contribute to California's "unique problems[.]" *Id.* at 1958; *see* 84 Fed. Reg. at 51,342/2.

The long list of nonattainment designations California has amassed over the years reflects its continuing struggles with reducing emissions of criteria pollutants. *See* 40 C.F.R. § 81.305 (collecting designations). Today, the state has some of the worst criteria pollution in the country. *See id.* (listing "Extreme" nonattainment areas). When it comes to criteria pollutants, EPA acknowledges California still faces the kind of "compelling and extraordinary circumstances different from the Nation as a whole" that Congress had first observed when enacting Section 209(b). H.R. Rep. 90-728 at 1956; S. Rep. 90-403, at 33.

Over the decades, California requested many waivers under Section 209(b) to adopt and enforce its own criteria-pollutant vehicle emission standards. *See, e.g.*, 53 Fed. Reg. 7021 (Mar. 4, 1988); 55 Fed. Reg. 43,028 (Oct. 25, 1990); 57 Fed. Reg. 24,788 (June 11, 1992); 59 Fed. Reg. 48,625 (Sept. 22, 1994). These requests involved either individual standards or a package of standards. 84 Fed. Reg. at 51,341/3. In that context, where standards were needed to meet California's aggravated criteria-pollutant problems, EPA had interpreted Section 209(b)(1)(B) "as requiring a consideration of California's need for a separate motor vehicle program," not "whether the specific standard that is the subject of the waiver request is necessary to meet such conditions." *Id.* at 51,330/2.

In 2004, things changed. California adopted vehicle greenhouse-gas emission standards. It then sought, for the first time, a waiver in this new area. 73 Fed. Reg. 12,156, 12,156/2 (Mar. 6, 2008). Greenhouse gases, however, are very different from criteria pollutants. Criteria pollutants in elevated concentrations cause localized pollution (paradigmatically, smog in cities). But greenhouse gases affect the climate only after mixing globally in the upper atmosphere, so their concentration above California results from worldwide emissions and does not materially differ from concentrations elsewhere. *See id.* at 12,156/3-157/1, 12,158/2; *see also* 84 Fed. Reg. at 51,330/3, 51,347/1.

California's actions reignited legal disputes over the scope of its legal authority that continue into this case. In 2002, a federal district court preliminarily enjoined California's zero-emission-vehicle mandate and its "practical effect of regulating fuel economy" as preempted by EPCA. *Cent. Valley Chrysler-Plymouth v. CARB*, No. CV-F-02-5017, 2002 WL 34499459, at *3 (Jun. 11, 2002).[4] Numerous parties again sued California in 2005, asserting both EPCA and CAA preemption.

EPA denied California's waiver request in 2008. 73 Fed. Reg. at 12,157/1. Though EPA recognized "global climate change is a serious challenge," it concluded Section 209(b)(1)(B) was intended to allow California to address "local or regional"

[4] We cite this pre-2007 unpublished district court opinion here and elsewhere for factual background purposes, not for any precedential value. *See* D.C. Cir. R. 32.1(b)(2).

pollution, not global problems like climate change. *Id.* at 12,156/3-157/1. Alternatively, EPA concluded the effects of climate change in California were not "compelling and extraordinary compared to the effects in the rest of the country." *Id.* at 12,157/1.[5]

A year later, EPA reversed itself. It granted California's waiver request for greenhouse-gas standards. 74 Fed. Reg. 32,744 (July 8, 2009). After reconsideration, EPA said it was "returning to [its] traditional interpretation" of Section 209(b)(1). *Id.* at 32,745/1. EPA concluded that opponents of the waiver did not adequately show that either: (1) California no longer needs to have a separate motor-vehicle emission program *as a whole*; or (2) California did not need its greenhouse-gas standards to meet compelling and extraordinary conditions. *Id.* at 32,746/2.

EPA's waiver touched off further litigation. That last major round of litigation regarding California vehicle regulation concluded with "the withdrawal of [certain] appeals" as "a pre-condition to the 2010 issuance of the final rule establishing the 'National Program' of fuel-economy standards and [greenhouse-gas] emission[] standards for [model years] 2012-2016." 83 Fed. Reg. at 43,236/2.

[5] This relied on a different interpretation of that phrase than EPA adopted in this action. *See* 84 Fed. Reg. at 51,330/2-331/1.

IV. The 2013 California waiver.

In 2013, EPA then granted California's 2012 waiver request for its "Advanced Clean Cars" program. 78 Fed. Reg. 2112 (Jan. 9, 2013). This revised program, covering model years 2015 through 2025, had three main components that would be subject to preemption without a waiver. *Id.* at 2112/3.

The first was a set of criteria-pollutant emission standards (known as the low-emission-vehicle program). *Id.* at 2114/1-2. They are not at issue here.

The second component was a set of "tailpipe" greenhouse-gas emission standards for model years 2017 to 2025. *Id.* at 2114/2. These standards were similar, but not identical, to the greenhouse-gas standards EPA set in 2012 for the same model years. *Id.* at 2137/3-38/2; *see* 77 Fed. Reg. at 62,624. California's deemed-to-comply regulation—under which compliance with EPA's 2012 standards also satisfies California's standards—closed any gaps. 78 Fed. Reg. at 2113/1, 2138/2.

Though EPA set standards through 2025, it gave notice that it would reevaluate the later-year standards by April 2018. 77 Fed. Reg. at 62,652/1-2. This "Mid-Term Evaluation" required EPA to reconsider whether its standards for model years 2022 to 2025 remained appropriate. *Id.* at 62,652/2; *see id.* at 62,785/2 (noting that if EPA revises its standards, "California may need to amend one or more of its…standards and would submit such amendments to EPA with a request for a waiver, or for confirmation that said amendments fall within the scope of an existing waiver"). Moreover, Section 202(a)(1) directs EPA to revise its emission standards "from time

to time." 42 U.S.C. § 7521(a)(1). So there is always the possibility that EPA may revise existing standards.

The third component of California's vehicle program was its latest zero-emission-vehicle mandate. The mandate directed automakers to sell a certain number of zero-emission vehicles every model year. 78 Fed. Reg. at 2114/3. Because California's tailpipe standards apply on a fleet-wide average basis, automakers can offset their conventional vehicles' higher emissions—and meet the tailpipe standards—by selling zero-emission vehicles. *Id.* at 2138/2; Cal. Code Regs. tit. 13 § 1961.3.

V. The challenged action.

A. The proposal.

EPA completed the Mid-Term Evaluation in April 2018. 83 Fed. Reg. 16,077 (Apr. 13, 2018); *see California v. EPA*, 940 F.3d 1342, 1348 (D.C. Cir. 2019). It concluded the standards set in 2012 were not appropriate, which triggered EPA's duty to initiate a rulemaking to revise them. *See* 83 Fed. Reg. at 16,077; 40 C.F.R. § 86.1818-12(h).

A few months later, NHTSA and EPA jointly proposed to act. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule" proposed two types of action. 83 Fed. Reg. at 42,986.

One (not at issue here) set new federal fuel-economy and vehicle-emission standards for passenger cars and light-duty trucks. NHTSA proposed to amend its

existing fuel-economy standard for model year 2021 and to set new standards for model years 2022 to 2026. *Id.* at 42,986/1.[6] EPA correspondingly proposed to amend its existing greenhouse-gas standards for model years 2021 and later.[7] *Id.*

The other proposed action (at issue here) addressed issues of preemption and waiver. NHTSA proposed regulations clarifying that EPCA preempts state and local regulation of tailpipe greenhouse-gas standards and zero-emission-vehicle mandates. *Id.* at 43,232/2-239/3. EPA proposed to withdraw the parts of its 2013 waiver covering California's regulations of that nature. *Id.* at 42,240/3-253/1. In addition, EPA proposed to interpret Section 177 to exclude other states' adoption of California's greenhouse-gas standards. *Id.* at 43,253/1-2.

B. California changes its regulations.

Two months after the proposal's comment period closed, California amended its deemed-to-comply provision. Now, the only federal standards that satisfy California's greenhouse-gas standards are those EPA and NHTSA set in 2012 (since revised). 84 Fed. Reg. at 51,311/1 & n.2. That is, California would not recognize revisions to the 2012 federal standards. California has not sought a preemption

[6] EPCA limits NHTSA to setting standards for no more than five years at a time, 49 U.S.C. § 32902(b)(3)(B). So, regardless of EPA's Mid-Term Evaluation, NHTSA would have had to promulgate new standards.

[7] The agencies later finalized new and revised standards. 85 Fed. Reg. 24,174 (Apr. 30, 2020). Those are subject to another lawsuit in this Circuit. *Competitive Enter. Inst. v. NHTSA*, No. 20-1145, and consolidated cases.

waiver for this change. Today, California's "CO_2 Target Value" is set to ratchet up in stringency by roughly 5 percent per year. Cal. Code Regs. tit. 13 § 1961.3(a)(1). NHTSA and EPA's joint standards (established earlier this year) will increase in stringency by 1.5 percent per year. 85 Fed. Reg. at 24,175/2.

California later reached a side deal with certain automakers. This purports to allow them to meet reduced standards (i.e., some set of new standards identical neither to the 2012 federal standards, nor to California's own standards). 84 Fed. Reg. at 51,311/1; *see also* Calif. Air Resources Board, Framework Agreements on Clean Cars.[8] In return, the automakers agreed to not challenge California's authority to establish greenhouse-gas standards or the zero-emission-vehicle mandate. *Id.* The side deal further disrupted national uniformity and consistency.

As for automakers who intervened on the United States' behalf here, California retaliated by stopping purchases of their vehicles. Coral Davenport, California to Stop Buying from Automakers that Backed Trump on Emissions, *N.Y. Times* (Nov. 18, 2019).[9]

C. The One National Program action.

In 2019, NHTSA and EPA finalized the proposed preemption regulations and waiver withdrawal. 84 Fed. Reg. at 51,310. The action, known as the One National

[8] Available at: https://ww2.arb.ca.gov/news/framework-agreements-clean-cars.

[9] Available at: https://www.nytimes.com/2019/11/18/climate/california-automakers-trump.html.

Program, addresses three issues: NHTSA's preemption regulations, EPA's waiver withdrawal, and EPA's Section 177 interpretation.

1. NHTSA's preemption regulations.

NHTSA finalized regulations to clarify that EPCA preempts state and local regulations of tailpipe greenhouse-gas emissions and zero-emission-vehicle mandates. 49 C.F.R. §§ 531.7, 533.7; *id.* pt. 531 Appx. B & pt. 533 Appx. B; *see* 84 Fed. Reg. at 51,313/2, 51,314/3. NHTSA confirmed that these state standards and mandates have "the direct and substantial effect of regulating fuel consumption." 84 Fed. Reg. at 51,313/3; *see id.* at 51,314/3. They are thus "related to" fuel-economy standards and preempted under EPCA's preemption provision, Section 32919(a). *See id.* at 51,313/3, 51,314/3. And because these standards and mandates are void *ab initio*, a CAA waiver does not waive EPCA preemption. *Id.* at 51,314/1.

California's emission standards for criteria pollutants, by contrast, do not have a substantial or direct relationship to fuel-economy standards and are thus not preempted. *Id.* at 51,356/1. As it has for decades, NHTSA considers the effect that criteria-emission-control technologies have on fuel economy when setting its national standards. *Cf.* 83 Fed. Reg. at 43,209/2. But if NHTSA and EPA did likewise for California's separate greenhouse-gas standards, it would only disrupt national consistency with "little benefit." 84 Fed. Reg. at 51,353/1. Since compliance with federal standards is determined by averaging all cars nationwide, "[original engine manufacturers] would likely produce more efficient vehicles for sale in California and

[Section 177 states,] but the increased fuel economy of these vehicles would likely be offset by less efficient vehicles produced for sale in the rest of the U.S., leading to little to no change in either fuel use of [greenhouse-gas] emissions at a national level." *Id.* at 51,354/1.

NHTSA also noted that its conclusion regarding preemption of state and local regulation of tailpipe greenhouse-gas emissions is severable from its conclusion regarding preemption of zero-emission-vehicle mandates. *Id.* at 51,315/1.

2. EPA's waiver withdrawal.

EPA withdrew its 2013 waiver covering California's greenhouse-gas standards and zero-emission-vehicle mandate. *Id.* at 51,328/3. This action rests on two independent bases.

First, EPA withdrew the waiver in light of NHTSA's preemption action. *Id.* at 51,337/3. As EPA explained, leaving the waiver in place would put the United States "in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*." *Id.* at 51,338/2.

Second, EPA concluded that California's greenhouse-gas standards and zero-emission-vehicle mandate fail Section 209(b)(1)(B)'s requirement that California "need such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B); *see* 84 Fed. Reg. at 51,339/1. The statutory phrase "such State standards," EPA explained, refers back to the particular standards that California, in

its waiver request, says are necessary to address a particular type of environmental problem—rather than to whether California needs *any* standards at all. 84 Fed. Reg. at 51,341/3.

EPA also concluded that whether California "needs" its standards to "meet compelling and extraordinary conditions," 42 U.S.C. § 7543(b)(1)(B), turns on whether there is a particularized, local nexus between (1) pollutant emissions from sources, (2) air pollution, and (3) resulting impact on health and welfare. 84 Fed. Reg. at 51,339/1, 51,347/1. As EPA explained, these elements match the elements of the predicate finding EPA must make before regulating, 42 U.S.C. § 7521(a)(1), and are evident in California's criteria-pollutant problems, which prompted Congress to create the waiver. 84 Fed. Reg. at 51,339/1, 51,340/1, 51,348/3-349/1 n.280.

No such California nexus exists for greenhouse gases: (1) these emissions from California cars are no more relevant to climate-change impacts in the state than emissions from cars elsewhere; (2) the resulting pollution is globally mixed; and (3) climate-change impacts in California are not extraordinary to that state. *Id.* at 51,339/2.

EPA also stated that the different components of its waiver withdrawal are severable. *Id.* at 51,351/2.

3. EPA's Section 177 interpretation.

EPA interpreted Section 177 not to authorize other states to adopt California's greenhouse-gas emission standards. *Id.* at 51,350/1-51,351/2. This provision, EPA

explained, is available only to states with approved nonattainment plans. *Id.* at 51,350/2-3. Nonattainment designations exist only as to criteria pollutants, and greenhouse gases are not criteria pollutants. *See id.* The agency also stated that this interpretation is severable. *Id.* at 51,351/2.

SUMMARY OF ARGUMENT

NHTSA's preemption regulations reasonably exercise its authority to prescribe regulations to carry out EPCA's national fuel-economy program. EPCA's judicial review provision grants the courts of appeals exclusive jurisdiction to review those regulations. The preemption regulations correctly implement Section 32919(a)'s express preemption of all state regulations "related to fuel economy standards." State greenhouse-gas emission standards and zero-emission-vehicle mandates, unlike criteria-pollutant standards, fall within that express preemption provision. Even if not expressly preempted, they conflict with NHTSA's national standards.

EPA properly withdrew portions of California's 2013 waiver under CAA Section 209(b). EPA acted consistent with its authority, considering statutory text and legislative history. EPA explained why no reliance interests had accrued around these long-disputed issues sufficient to preclude withdrawal. And EPA duly considered NHTSA's determination that the subject standards are void as a matter of federal law.

EPA also reasonably interpreted and applied Section 209(b)(1)(B). That section allows California to have its own standards for pollutants only where it "need[s] such State standards to meet extraordinary and compelling conditions."

EPA interpreted this to require a state-specific, particularized nexus to *California's* emissions, pollution, and impacts. California's greenhouse-gas standards and zero-emission-vehicle mandate lack this.

These actions should be upheld. But this Court has no jurisdiction to review EPA's Section 177 interpretation, because it is not a final agency action. In the alternative, the Court should uphold it as a reasonable interpretation of the CAA.

STANDARD OF REVIEW

This Court reviews an agency's interpretation of a statute it administers for reasonableness. If "Congress has directly spoken to the precise question at issue," the inquiry ends. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). But "if the statute is silent or ambiguous," the analysis proceeds to step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. To prevail, an agency interpretation need not be the only permissible construction of the statute, merely a reasonable one. *See Nat'l Recycling Coal., Inc. v. Browner*, 984 F.2d 1243, 1251 (D.C. Cir. 1993).

The Administrative Procedure Act sets forth the standard of review for EPA's waiver withdrawal. 5 U.S.C. § 706. The Court "must uphold the Administrator's action" unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and may not "substitute [its] judgment for that of the [EPA] Administrator." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1105 (D.C. Cir. 1979) ("*MEMA I*") (internal citation omitted).

ARGUMENT

I. The Court should uphold NHTSA's preemption regulations.

A. The Court has jurisdiction to review the preemption regulations.

EPCA's judicial review provision, Section 32909(a)(1), vests jurisdiction to review Petitioners' claims exclusively in the federal courts of appeals:

> A person that may be adversely affected by *a regulation prescribed in carrying out any of* sections 32901-32904 or 32908 of this title may apply for review of the regulation by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 32909(a)(1) (emphasis added).

Section 32909(a)(1) reflects Congress's intent that the courts of appeals review not only regulations directly promulgated under the cited provisions (e.g., the fuel-economy standards themselves), but also any regulations NHTSA "prescribe[s] in carrying out" those provisions. This Court has jurisdiction to review NHTSA's preemption regulations if they are "colorably authorized" by a provision cited in Section 32909(a)(1). *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 723 (D.C. Cir. 2016).

The preemption regulations, 49 C.F.R. §§ 531.7, 533.7, fall within this scope. They are "prescribed in carrying out" NHTSA's authority under Sections 32901 through 32903 to protect the integrity and consistency of the national fuel-economy program. Section 32902(a) requires NHTSA to set fuel-economy standards at the

"maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a). These "[u]niform national fuel economy standards are essential to accomplishing the goals of EPCA." 84 Fed. Reg. at 51,312/1. The preemption regulations, in turn, are "*necessary to the effectiveness* of NHTSA's existing and forthcoming fuel economy standards [under Section 32902]…specifically, one set of *national* standards." *Id.* at 51,316/2 (emphases added); *id.* at 51,311/2.

NHTSA interprets EPCA as requiring it to ensure that fuel-economy standards are, in fact, uniform nationwide as Congress intended, and that congressional intent is not "frustrated [by] State and local actors regulat[ing] in this area." *Id.* at 51,313/1; *see also id.* at 51,311/3-312/1; 51,316/2 ("Preemption provides for just that uniformity. Indeed, that was the very purpose for Congress's including the express preemption provision in EPCA."). The preemption regulations are directly and integrally tied to NHTSA's authority over national fuel-economy standards. Thus, they "carry[] out" the EPCA provisions for such standards: 49 U.S.C. §§ 32901 through 32903.

Section 32909(a)(1)'s text confirms that the preemption regulations fall within its jurisdictional grant. If Congress had intended to limit review to regulations setting fuel-economy standards, it would not have used the broadening phrase "carrying out." Instead, it would have provided for review of any "regulations prescribed in sections 32901-32904 or 32908," as it did elsewhere. *Compare* 49 U.S.C. § 30161(a) (providing appellate review of "an order prescribing a motor vehicle safety standard under this

chapter"). Yet Congress *added* "carrying out" to Section 32909(a)(1) when recodifying the transportation statutes.

The original language of Section 32909(a), allowing direct review of regulations "prescribed under" the specified sections, is not materially different in the breadth of its plain meaning. *See* 15 U.S.C. § 2004(a) (1976). Petitioners argue that the Court should read Section 32909(a)(1) as if it still contained the now-repealed "prescribed under" phrase, and that this reading defeats jurisdiction. They rely on legislative history expressing that the recodification statute was generally not intended to have "substantive" effect. Primary Br. at 78. But Congress replaced the "prescribed under" phrase in Section 32909(a)(1), while retaining it in Sections 32909(a)(2) and 32909(b). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). This Court should give effect to Section 32909(a)(1)'s broad reference to "regulations…carrying out" NHTSA's responsibility to set national fuel-economy standards by exercising its jurisdiction.

Given the foregoing, the conclusion that the preemption regulations carry out NHTSA's authority in 49 U.S.C. §§ 32901-03 is not merely "colorable"; it is correct. The regulations carry out (or are even prescribed under) NHTSA's authority to regulate fuel economy under Section 32902(a) by ensuring the "maximum feasible" standards set by NHTSA are the only such standards that automakers must meet

nationwide. *See* 84 Fed. Reg. at 51,325/1 ("*49 U.S.C. 32902* makes clear that NHTSA sets nationally applicable fuel-economy standards, and NHTSA is *implementing its authority to do so* through this regulation clarifying the preemptive effect of its standards consistent with the express preemption provision in 49 U.S.C. 32919." (emphases added)).

Judicial economy also favors litigating in one forum matters addressed in the same proceeding. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 742-43 (1985) (rejecting result that would duplicate review in district and appellate courts). That is especially true in rulemakings, where "there is no need for judicial development of an evidentiary record." *N.Y. Republican State Comm. & Tenn. Republican Party v. SEC*, 799 F.3d 1126, 1131 (D.C. Cir. 2015); *Lorion*, 470 U.S. at 744 ("The fact-finding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking.").

Citing *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018) ("*NAM*"), Petitioners first argue that the "mere invocation of authority under a statutory section" is insufficient to give this Court jurisdiction. Primary Br. at 75-76. Petitioners note that Section 32909(a)(1) does not specifically list EPCA's preemption provision, Section 32919(a), nor its general rulemaking provision, 49 U.S.C. § 322(a). Primary Br. at 77. *NAM* is inapplicable.

NAM considered a facially narrower judicial review provision that gives appellate courts direct jurisdiction over actions "'approving or promulgating any

effluent limitation or other limitation under [S]ection 1311.'" 138 S. Ct. at 620 (quoting 33 U.S.C. § 1369(b)(1)(E)). This means an action "approved or promulgated 'pursuant to' or 'by reason of the authority of'" those provisions. *Id.* at 621. The disputed rule, which defined a statutory term, was promulgated under the agency's "general rulemaking authority 'to prescribe such regulations as are necessary to carry out [its] functions under [the governing statute].'" *Id.* at 630. Because the rule was not an effluent or other limitation under Section 1311, it was not promulgated "under" that provision. *Id.*

Section 32909(a)(1) is far broader. It does not only enumerate discrete, expressly delineated agency actions or regulations. Section 32909(a)(1) instead expansively provides for jurisdiction over challenges to any regulations "carrying out" any aspect of the range of provisions it cites. Even if the Court were to swap in the defunct text in for operative text, NHTSA's preemption regulations are "prescribed under" Sections 32901-32904. Here, the regulations prevent state laws regulating tailpipe greenhouse-gas emissions—emissions which Congress mandates that NHTSA measure "under" Section 32904(c) and therefore regulate "under" Section 32902—from disrupting NHTSA's setting and enforcement of fuel-economy standards "under" Section 32902.

Petitioners' argument that EPCA requires NHTSA to "consult with the Secretary of [the Department of] Energy in carrying out" Section 32902 fares no better. Primary Br. at 76 (citing 49 U.S.C. § 32902(i)). They say NHTSA did not so

consult, and thus the preemption regulations cannot carry out Section 32902. Primary Br. at 76-77. But NHTSA did consult with the Department of Energy throughout the rulemaking process. *See* 83 Fed. Reg. at 43,477/3 ("NHTSA submitted this proposed rule to the Department of Energy for review"); 84 Fed. Reg. at 51,361/2 ("the Department of Energy has been afforded the opportunity to review" the final rule).

Section 32902(i) imposes no procedural or substantive requirements for such consultation. Nor can this Court. *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 524 (1978) (explaining agencies have discretion to grant additional procedural rights but reviewing courts "are generally not free to impose them"). In contrast, the very next subsection imposes a particular consultation process with the Department of Energy, but only when NHTSA is "prescrib[ing] or amend[ing] an average fuel economy standard" for passenger vehicles. 49 U.S.C. § 32902(j)(1). This confirms that NHTSA has discretion to determine the extent of consultation required before promulgating the preemption regulations. And the distinction between subsections (i) and (j) further confirms that Congress envisioned "carrying out" Section 32902 to encompass more than prescribing fuel-economy standards.

Petitioners claim this Court lacks jurisdiction under *Delta Construction Company, Inc. v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015). Primary Br. at 78. That case actually supports jurisdiction here. It held that the courts of appeals lack jurisdiction over NHTSA's denial of petitions for rulemaking. But such a denial "is not the same as prescribing a regulation under the provisions enumerated in the direct review statute."

783 F.3d at 1299. Here, NHTSA did affirmatively "prescribe" the preemption regulations, in order to carry out the enumerated provisions.

EPCA broadly grants this Court review of "regulations…carrying out" the agency's responsibility to set national fuel-economy standards. That is what the preemption regulations do. This Court has jurisdiction.

B. NHTSA has authority to issue the preemption regulations.

1. NHTSA has authority under EPCA.

"The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer." 49 U.S.C. § 322(a). Congress's broad authorization comes without caveats.

The Secretary delegated her authority under Chapter 329 of Title 49 to NHTSA. *See* 49 C.F.R. § 1.95(a); *see generally* 84 Fed. Reg. at 51,320/1. Chapter 329 is EPCA's fuel-economy chapter; it includes Sections 32901 through 32903 and Section 32919(a). So NHTSA is authorized to issue regulations to carry out Sections 32901 through 32903. *See* 84 Fed. Reg. at 51,320/1 (NHTSA "has clear authority to issue [the preemption regulations] under [Sections] 32901 through 32903 to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements").

Petitioners argue NHTSA cannot "pronounce on preemption absent express delegation by Congress." Primary Br. at 79. To the contrary, expert agencies are well-

positioned to do so. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) ("Because the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act, the agency is uniquely qualified to determine whether a particular form of state law … should be preempted."); *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 21 (D.C. Cir. 2017) (affirming agency declaration that state law is "categorically preempted by the" statute). All the more so here, where Congress itself preempted all state regulations "related to fuel economy standards." 49 U.S.C. § 32919(a). NHTSA's regulations simply implement the boundaries set by Congress. *See, e.g.*, 84 Fed. Reg. at 51,318/2.

Petitioners' reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), and *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), does not help them. Primary Br. at 79-82. In *Wyeth*, the Food and Drug Administration claimed approval of a drug label preempted conflicting state law. 555 U.S. at 575-76. Petitioners note Congress had not delegated the power to preempt state labeling laws. Absent delegation, it had "no special authority to pronounce on pre-emption." *Id.* at 577. But Congress had not expressly preempted state laws in the underlying statute. *Id.* at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [statute's] 70-year history."); *id.* at 576-77. Here, Congress did preempt.

Mozilla is farther afield. Congress neither preempted state regulation of broadband Internet or information services, nor gave the Federal Communications

Commission authority to regulate them. 940 F.3d at 74-75, 78. This Court held the Commission's "self-made agency policy" of "nonregulation," *id.*, insufficient to confer "preemption authority." *Id.* at 79. Here, preemption is Congress's policy.

Petitioners also cite *Mozilla* to argue that NHTSA cannot "declare" inconsistent state requirements preempted because they frustrate a "preferred means of implement[ation]." Primary Br. at 81-82. Again, Congress, not NHTSA, chose a preemptive scheme of uniform, nationwide fuel-economy standards. Ensuring uniformity is a reasonable application of NHTSA's statutory role, not its mere preference. *See, e.g.*, 84 Fed. Reg. at 51,317/1.

Petitioners argue NHTSA lacks authority even to express views on preemption. They assert, because Congress in other preemption provisions expressly authorized agencies to carry them out, Section 32919(a)'s alleged "silence" evidences NHTSA has no role. Primary Br. at 80. But none of Petitioners' examples are remotely comparable. *See* 49 U.S.C. § 5125 (allowing for an application to the Secretary for a decision on whether a specific transportation requirement is preempted); *id.* § 31141 (providing for the Secretary's review of certain state safety laws, which can only be enforced depending on the Secretary's decision about their stringency). The absence of a specific preemption-review process for fuel-economy standards does not mean that Congress precluded NHTSA from articulating that state actions are "related to" those standards.

Petitioners also point to EPCA Section 327(b). Under that provision, interested persons may petition the Department of Energy for a rule *waiving* statutory preemption of certain state testing and labeling requirements. *See* 42 U.S.C. § 6297(d). It is not surprising that Congress would be explicit when delegating the ability to *override* a statutory preemption provision, and to require rulemaking to do so. That does not render 49 U.S.C. § 322(a)'s general delegation of regulatory authority an insufficient basis for NHTSA's preemption regulations. Nor does it mean that Congress must explicitly delegate to NHTSA the power to provide regulations further explaining the preemption provision.

Petitioners also suggest NHTSA cannot interpret by regulation the preemption provision because it is self-executing. Primary Br. at 79. But as NHTSA explained, and the history of these issues shows, the provision's scope is nonetheless disputed, *cf., e.g.*, *Metro. Taxicab Bd. Of Trade v. New* York, 615 F.3d 152, 157 (2d Cir. 2010), and in some cases ignored. *See* 84 Fed. Reg. at 51,323/3 (explaining prior district court decisions "entirely failed to consider the agency's views [of preemption]; they did not consider and reject them or even find that they were due any weight. This is among the reasons that NHTSA is formalizing its views in a regulation."). The preemption regulations are an appropriate means for NHTSA to carry out EPCA by giving effect to the preemption provision. *See id.* at 51,317/1 (noting that failure to address preemption through regulations "amounts to ignoring the existence of EPCA's preemption provision").

2. The Court owes deference to NHTSA's interpretation.

Section 32919(a) on its face preempts state regulations related to fuel-economy standards. But if any ambiguity exists, NHTSA is entitled to *Chevron* deference. *Medtronic*, 518 U.S. at 496 (giving "substantial weight to the agency's view of the statute" and its preemptive effect).

First, Petitioners' argument to the contrary, Primary Br. at 81, wrongly assumes NHTSA lacks authority to issue preemption regulations. Petitioners again cite *Wyeth*. But there, the Supreme Court declined to give an agency deference in a statutory scheme where Congress did not enact a statutory policy of preemption. *See* 555 U.S. at 576-77. EPCA expressly preempts.

Petitioners note that after *Wyeth* other circuits have applied *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), rather than *Chevron*. Primary Br. at 83. But, as in *Wyeth*, those courts confronted questions of implied preemption, because the federal scheme either occupied the entire field or conflicted with state law. *See, e.g.*, *Franks Investment Co. LLC v. Union Pac. RR. Co.*, 593 F.3d 404, 413 (5th Cir. 2010) (discussing "which test should be used to determine whether [petitioner's] action is impliedly preempted").

This circuit has not resolved whether *Wyeth* alters the level of deference owed to agency interpretations of express preemption provisions. *See Delaware*, 859 F.3d at 21 (noting the agency's preemption interpretation "survives under either standard of review"). If the Court finds ambiguity here, NHTSA's view of the "appropriate

scope" of an express statutory preemption provision should get "substantial weight" under *Chevron*. *Medtronic*, 518 U.S. at 496.

Petitioners also argue deference to NHTSA's statutory interpretation is unwarranted because NHTSA "did not exercise its interpretive discretion" and instead wrongly believed its interpretation is the only reasonable reading of the statute. Primary Br. at 84. Their authority, *PDK Laboratories Inc. v. DEA*, 362 F.3d 786, 794 (D.C. Cir. 2004), did not involve an agency's "policy considerations or other matters within the agency's expertise." Nor did the agency invoke *Chevron* or ask the court for "any special deference to the [agency's] judgment about the meaning of the provision." *Id.* Here, NHTSA invoked *Chevron*, 84 Fed. Reg. at 51,320/2, and explained why deference is warranted.

Second, turning to implied preemption, Petitioners argue it is "improper" to defer to NHTSA's judgment that state zero-emission and tailpipe greenhouse-gas vehicle regulations conflict with EPCA's national fuel-economy regime. Primary Br. at 83. But NHTSA is well-suited to address that relationship and the impact of California's program on NHTSA's ability to carry out its duties under EPCA. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 883 (2000). The preemption here depends on the scientific relationship between fuel economy and tailpipe greenhouse-gas emission requirements. *See* 84 Fed. Reg. at 51,320/2. NHTSA is entitled to at least *Skidmore* deference concerning which state requirements conflict with the federal program.

Petitioners cite *Wyeth* to counter. Ironically, there the Court stated that *Skidmore* deference on conflict preemption *could* be appropriate; it simply gave no deference on those facts. 555 U.S. at 576-77. The Food and Drug Administration had not undertaken notice and comment on its preemption position, nor did it provide a reasoned explanation for changing a longstanding position. *Id.* at 577. Here, NHTSA clearly proposed and explained its position. *See* 83 Fed. Reg. at 43,232-239. And NHTSA explained its view on preemption is consistent and longstanding. *See* 84 Fed. Reg. at 51,312/2-3. Indeed, NHTSA has asserted EPCA preemption of certain state standards a number of times in fuel-economy rulemakings. *Id.*; *see, e.g.*, 67 Fed. Reg. 77,015, 77,025 (Dec. 16, 2002).

Petitioners assert incorrectly that NHTSA has never before stated that EPCA preempts state emission standards that (Petitioners say) the CAA preserves. Primary Br. at 91 n.27. NHTSA in fact previously recognized more than a dozen years ago that state standards may be preempted "regardless of whether or not they have received…a [CAA] waiver." 71 Fed. Reg. 17,566, 17,669/3 (Apr. 6, 2006).

Petitioners also argue the Court should not defer to NHTSA on whether the CAA preserves state standards. Primary Br. at 83. But NHTSA here relies on *its* interpretation *of EPCA* (to the extent EPCA is ambiguous). Even if NHTSA can be said to have relied on an interpretation of the CAA, any such reliance is based on *EPA*'s statutory interpretations in the joint rulemaking. EPA determined here that state regulations preempted by EPCA cannot be saved by a CAA waiver. 84 Fed.

Reg. at 51,338/3. *See Massachusetts*, 549 U.S. at 532 ("The [agencies'] two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."). The joint rulemaking determining California's standards are preempted is thus an example of precisely the cooperation between NHTSA and EPA that the Supreme Court counseled.

C. EPCA expressly preempts state tailpipe greenhouse-gas emission standards and zero-emission-vehicle mandates.

1. Tailpipe greenhouse-gas emission standards are related to fuel-economy standards.

Under Section 32919(a), Congress broadly preempted state requirements that are "related to" fuel-economy standards. 49 U.S.C. § 32919(a). "Related to" preemption clauses are "deliberatively expansive" and "conspicuous for [their] breadth." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). Thus, numerous courts have held EPCA preempts state laws. *Metro. Taxicab*, 615 F.3d at 157 (affirming EPCA preemption of requirement to use a certain proportion of hybrid vehicles); *Cent. Valley Chrysler*, 2002 WL 34499459 (enjoining California zero-emission-vehicle mandate as preempted by EPCA). State requirements "relate to" matters of federal regulation when they have a "connection with," or even just contain a "reference to," such matters. *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 370 (2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *see generally* 83 Fed. Reg. at 43,233/3.

State standards regarding tailpipe carbon-dioxide emissions have a direct and substantial effect on fuel consumption. There is a direct, scientifically recognized, mathematical relationship between combustion of gasoline (producing energy to push pistons that drive engines) and the amount of carbon dioxide emitted at the vehicle's tailpipe. This fact is so well understood that—from well before Congress passed EPCA through today—fuel economy is tested by measuring those emissions. *See* 38 Fed. Reg. 10,868 (May 2, 1973)). Congress even specified that fuel economy be measured using test procedures gauging carbon-dioxide emissions. 49 U.S.C. § 32904(c). EPA itself uses the same procedure (with slightly different formulas) to measure tailpipe carbon-dioxide emissions, as does California as part of its own tailpipe greenhouse-gas emission standards. *See* 13 Cal. Code of Regs. § 1961.3(a)(5)(A).

A fuel-economy standard and a carbon-dioxide standard are thus two sides of the same coin. The more gasoline a vehicle burns to travel a mile, the more carbon dioxide is emitted. Likewise, to reduce grams of carbon dioxide emitted per mile from the tailpipe of a gasoline-powered vehicle, its fuel economy must inexorably improve. Thus, a vehicle fuel-economy standard can be stated as a tailpipe greenhouse-gas emission standard in grams per mile, and vice versa. This means California's standard, requiring vehicles to emit fewer grams of carbon dioxide per mile, *ipso facto* entails a fuel-economy enhancement. *See, e.g.*, 84 Fed. Reg. at 51,315/3. These two matters are thus unquestionably more than "related to" each other. This

has been NHTSA's longstanding position. *See* 71 Fed. Reg. at 17,659/3; *see also* 84 Fed. Reg. at 51,312/2-3. And the Supreme Court itself has recognized this inherent link. *Massachusetts*, 549 U.S. at 532; *see* 84 Fed. Reg. at 51,326-327.

Petitioners strain to obscure this relationship. Primary Br. at 99-102. They assert an "incomplete and transient" overlap between technologies to comply with greenhouse-gas emission standards and technologies to comply with fuel-economy standards. *Id.* at 101. They also say fuel economy is not *always* premised on tailpipe carbon-dioxide emissions, citing credits for air-conditioning-refrigerant leakage reductions. *Id.* at 99 n.28. But the preemption regulations specifically target state regulation of "*tailpipe* carbon dioxide emissions from automobiles." 84 Fed. Reg. at 51,362/1 (emphasis added). And NHTSA recognized refrigerant regulations are not preempted. *See id.* at 51,314/1.

Next, Petitioners argue that a state law related to fuel *economy* is not necessarily "related to" fuel-economy *standards*. Primary Br. at 99. It is not clear what Petitioners mean. California itself has recognized that its carbon-dioxide standards in "grams [per] mile" can be represented as fuel-economy standards in "miles per gallon."[10]

[10] *See Comparison of Greenhouse Gas Reductions for The United States and Canada under U.S. CAFE Standards and California Air Resources Board Greenhouse Gas Regulations*, California Air Resources Board (Feb. 25, 2008), at Table 4 (describing "California CO2 Equivalent Emission Standards and Estimated Fuel Economy in California"), available at https://ww2.arb.ca.gov/sites/default/files/2020-03/pavleycafe_reportfeb25_08_ac.pdf.

Perhaps Petitioners suggest states should be able to regulate greenhouse-gas emissions for model years for which NHTSA has not yet set fuel-economy standards.[11] But just because NHTSA has not yet set standards for some future model years does not mean NHTSA will not do so. In fact, it is legally obliged to. *See* 84 Fed. Reg. at 51,318/3-319/1. Petitioners provide no reason to believe Congress intended its express preemption provision to somehow operate in a patchwork, disappearing/reappearing, peekaboo fashion.

2. Zero-emission-vehicle mandates are related to fuel-economy standards.

The only feasible way to eliminate all tailpipe carbon-dioxide emissions would be to eliminate the use of fossil fuel. 84 Fed. Reg. at 51,320/3. Zero-emission-vehicle mandates require automakers to do just that for at least a portion of their fleet. *Id.* at 51,314/3. These mandates "have just as a direct and substantial impact on corporate average fuel economy as regulations that explicitly eliminate carbon dioxide emissions." *Id.* at 51,320/3.

Indeed, the purpose of a zero-emission-vehicle mandate is to affect fuel economy in gross across manufacturers' entire fleets. 83 Fed. Reg. at 43,238/3. California has acknowledged as much. *Id.* at 43,238 n.539 (citing Fact Sheet: 2003

[11] NHTSA can set fuel-economy standards for up to only 5 model years at a time. 49 U.S.C. § 32902(b)(3)(B).

Zero Emission Vehicle Program, California Air Resources Board (March 18, 2004)[12] (stating one of the "significant features of the April 2003 changes to the [zero-emission-vehicle] regulation" included removal of "all references to fuel economy or efficiency," after the 2002 *Central Valley Chrysler* lawsuit holding certain provisions preempted by EPCA, 2002 WL 34499459). Prohibitions on all tailpipe greenhouse-gas emissions are thus "related to" fuel-economy standards and preempted by EPCA. 84 Fed. Reg. at 51,320/3*; see also id.* at 51,314/3.

Moreover, EPCA expressly links "fuel economy" to zero-emission vehicles. Under EPCA, "for any model of dedicated automobile manufactured by a manufacturer after model year 1992, the fuel economy measured for that model shall be based on the fuel content of the alternative fuel used to operate the automobile." 49 U.S.C. § 32905(a). A "dedicated automobile" is an automobile that operates only on "alternative fuel," including hydrogen and electricity. *Id.* § 32901(a)(8), (1); *see also* Industry Br. at 11 ("the statute incentivizes manufacture of alternative fuel vehicles, *id.* § 32905, and allows calculation[s necessary for measuring the contribution] of electric vehicles [to] overall fleet compliance, *id.* § 32904(a)(2)").

Petitioners choose not to grapple with the design and operation of the EPCA program. Instead, Petitioners claim that when Congress added zero-emission vehicles

[12] Available at: https://www.arb.ca.gov/msprog/zevprog/factsheets/2003zevchanges.pdf.

to the definition of automobiles in 1992, it wanted to reward automakers with credits usable towards compliance. And so, Petitioners say, it is unreasonable and inconsistent to suppose Congress intended to preempt zero-emission-vehicle mandates. Primary Br. at 103-104; *see also* Industry Br. at 11-12. But in a different section of the same 1992 bill, dealing with the states' authority to regulate certain radiation levels, Congress included a provision that "[t]his section may not be construed to imply preemption of existing State authority." Pub. L. No. 102-486, § 2901(b), 106 Stat. 2776 (Oct. 24, 1992) (codified at 42 U.S.C. § 2023(b)). Congress's ultimate decision *not* to include a comparable provision sparing state-mandated zero-emission vehicles is compelling evidence that those programs are not exempt from preemption.

Petitioners make a similar argument for 49 U.S.C. § 32902(h)(1), claiming this shows that zero-emission vehicles do not affect fuel-economy standards. Primary Br. at 104; *see* Industry Br. at 11. In reality, the opposite is true. That section prohibits NHTSA from considering "the fuel economy of dedicated automobiles" in specific circumstances, such as prescribing fuel-economy standards. 49 U.S.C. § 32902(h)(1). But under Petitioners' theory that zero-emission-vehicle mandates are unrelated to fuel economy, Congress would have had no need to limit NHTSA's consideration in such a manner.

Petitioners claim NHTSA failed to address their specific point about 49 U.S.C. § 32902(h)(1). Not so. NHTSA explained why zero-emission-vehicle mandates affect

federal fuel-economy standards. 84 Fed. Reg. at 51,321/1 (prohibiting all tailpipe carbon-dioxide emissions "is the equivalent of setting a specific emissions level—zero, which also prohibits the use of fossil fuel"); *id.* at 51,314/3. A more specific response is not required. *Sierra Club v. EPA*, 353 F.3d 976, 986 (D.C. Cir. 2004) (explaining an agency's response to a public comment is sufficient if it demonstrates that the agency considered the relevant factors raised in the comment).

Petitioners also argue the preemption regulations impermissibly bar "appropriately tailored incentives" for zero-emission vehicles, such as discounts on tolls. Primary Br. at 104 n.29. NHTSA recognized that states can "continue to encourage [zero-emission vehicles] in many different ways," but cautioned such incentives are constrained by EPCA's preemption provision. 84 Fed. Reg. at 51,321/2. As an example, NHTSA explained a state cannot prohibit dealers from leasing motor vehicles that do not meet fuel-economy standards. *Id.* at 51,318/1 n.96. Petitioners' policy preferences cannot override Congress's preemptive intent.

3. State standards and mandates are preempted whether they improve fuel economy—or not.

Petitioners argue because state tailpipe greenhouse-gas emission standards and zero-emission-vehicle mandates improve fuel economy, they "further, rather than frustrate, EPCA's dominant aim of petroleum conservation" and should not be preempted. Primary Br. at 105. Citing 49 U.S.C. § 32901(a)(6), Petitioners say EPCA provides only a minimum fuel-economy level, noting that individual automakers may

obtain credits if they exceed the federal minimum. Primary Br. at 105-106. They are wrong.

EPCA certainly sought to increase motor vehicles' energy efficiency. *See* Pub. L. No. 94-163 § 2 (Dec. 22, 1975), 89 Stat. 871, 874. But EPCA does so through a comprehensive framework. NHTSA must balance countervailing factors, such as technological feasibility, consumer acceptance and preferences, safety, and new vehicle costs. NHTSA then determines the "maximum feasible average fuel economy level" that all "manufacturers can achieve in that model year" *in gross*. 49 U.S.C. § 32902(a). So not too low, but also not too high. And those standards are fleet-wide and nationwide.

EPCA also includes a program for manufacturers to earn credits for exceeding the minimum fuel-economy standard. *Id.* § 32903. It also requires civil penalties for failure to meet that standard, with a provision to prevent the manufacturer's insolvency. *Id.* §§ 32912, 32913. Congress considered giving states the authority to enact identical standards, or for states to obtain CAA-like state waivers—but did not do so. 83 Fed. Reg. at 43,233/1. State regulation in this area—issuing civil penalties and credits—would frustrate congressional purpose and EPCA's balanced, comprehensive approach committed to NHTSA's care. 84 Fed. Reg. at 51,313/1; *see also id.* at 51,317/2 ("Even identical standards interfere with the national program by imposing requirements not applicable to nationwide fleets and impose compliance regimes inconsistent with EPCA.").

Petitioners are also mistaken that EPCA preempts state laws that impair energy conservation but accommodates those that further it. Primary Br. at 106. EPCA preempts *all* state requirements related to fuel-economy standards, whether they increase or decrease fuel economy.

4. No statute preserves preempted state standards and mandates.

a. Nothing in EPCA or the CAA preserves preempted state standards and mandates.

Congress itself set minimum fuel-economy standards for passenger cars for model years 1978-1980. A long-expired (and since-removed) EPCA provision then allowed individual manufacturers to petition NHTSA to lower those standards to provide temporary, transitional relief as EPCA's new scheme got underway. 83 Fed. Reg. at 43,210/2. Under this provision, originally codified at 15 U.S.C. § 2002(d) (1976) (Section 502(d)), NHTSA was required to grant such petitions if compliance with different "Federal standards" reduced a manufacturer's average fuel economy. *Id.*; *see id.* at n.414. Congress defined what constituted "Federal standards" specifically "[f]or purposes of *this subsection*" (d). *Id.* at 43,237/2 (emphasis added). This included emission standards that EPA itself sets under CAA Section 202. It also included "emission[] standards applicable by reason of [CAA] Section 209(b)," i.e., emission standards for which California has received a CAA waiver. *Id.*

Petitioners advance one district court's mistaken interpretation of this provision as "requir[ing] that NHTSA take into consideration the effect of [California]

standards when determining maximum feasible average fuel economy." *See Green Mountain Chrysler Plymouth v. Crombie*, 508 F. Supp. 2d 295, 354 (D. Vt. 2007). They argue that because California's emission standards are "applicable by reason of Section 209(b)," they are "Federal standards" that Congress could not have intended to preempt. Primary Br. at 85. Petitioners' argument fails.

First, Section 502(d) did deem California's emission standards for model years 1978 to 1980 "Federal standards" for that subsection, but only for the narrow purpose of allowing parties to seek a reduction in the applicable fuel-economy standard *for those years*. And Congress's specific awareness of CAA Section 209(b) in Section 502(d) only highlights Congress's failure to provide such a carve-out in Section 32919(a), EPCA's preemption section. If Congress wanted to exempt all California emission standards from preemption, it certainly could have done so. But it did not. *See* 83 Fed. Reg. at 43,210/1. Inclusion of specific text in one place reflects Congress's decision not to have that definition apply elsewhere in the statute. *Russello*, 464 U.S. at 23.

Petitioners purport to see "no apparent rationale" why Congress would have required NHTSA to consider state emission standards only for model years 1978-80. Primary Br. at 92. The reason is obvious. As NHTSA explained, in Section 502(d), "Congress recognized the potential interplay for three model years between California's smog regulations and the possibility that it could reduce Federal fuel economy standards *for those model years*." 83 Fed. Reg. at 43,237/1 (emphasis added).

In other words, Congress provided a transition period during the phase-in of the EPCA regime. But, after 1980, federal fuel-economy standards must be complied with, without reference to CAA 209(b). So any California emission standard that relates to fuel-economy standards is thereafter flatly prohibited by EPCA's unwaivable preemption provision. 49 U.S.C. § 32919(a). Transition periods end.

Second, California's greenhouse-gas emission standards are different. Section 502(d) specifically contemplated only California's smog-related regulations for criteria pollutants. *See* 83 Fed. Reg. at 43,237/1. It was adopted "at a time when only conventional pollutants were regulated." *Id.* Congress recognized that the additional weight associated with catalytic converters reduces fuel economy. *Id.*; *see also* H.R. Rep. 94-340, at 1849 ("The 1975 California standards … appear to result in a 5.7 percent fuel penalty relative to automobiles subject to the 49 state standards."). But NHTSA has never said that EPCA preempts criteria-pollutant emission standards—notwithstanding that compliance therewith may have a marginal impact on fuel economy. *See id.* Congress's intent (and NHTSA's interpretation) that *some* California standards are not preempted does not mean that *no* standards are preempted.

To be sure, the Supreme Court rejected EPA's argument that designation of carbon dioxide as a pollutant was prohibited, even though that would cause EPA to regulate in an area already well-regulated by NHTSA. *See Massachusetts*, 549 U.S. at 513. The Court reasoned that EPA and NHTSA standards could be administered to "avoid inconsistency." *Id.* at 532. But Petitioners now try to steal a base. They imply

that if EPA can regulate carbon-dioxide emissions as a "pollutant" without running afoul of EPCA, EPCA must allow California to do so too. That does not follow.

Third, Petitioners argue that Section 502(d) establishes the "permanent meaning" of EPCA's preemption provision. Primary Br. at 89. Even if one assumes Section 502(d) provides any inference about how Section 32919(a) applies to the novel question of whether a greenhouse-gas emission standard is related to fuel-economy standards—and it does not—"[i]t is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). Thus, the terms in Section 502(d) must be applied only for the limited "purposes of th[at] subsection," and for the limited time-period explicitly stated. Notably, when Congress recodified EPCA in 1994, it omitted this provision. 83 Fed. Reg. at 43,210/2-3 (citing H.R. Rep. No. 103-180, at 583-584, tbl. 2A).

Petitioners cite *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). That does not help them. The Supreme Court held that while the meaning of a statutory term "is fixed at the time of enactment," "new *applications* may arise in light of changes in the world." *Id.* (emphasis in original). That is what happened here. If Congress wanted to exempt from EPCA preemption *any* California emission standards permitted by a CAA Section 209(b) waiver, *forever*, it easily could have done so. But Section 32919(a)'s preemption provision contains no such comprehensive

waiver for California. By regulating tailpipe carbon emissions, California has set a standard "related to fuel economy." 84 Fed. Reg. at 51,315.

Fourth, Petitioners argue even though the term "Federal standards" is now historic artifact, NHTSA must still consider the fuel-economy effects of "Federal motor vehicle standards," which they assert means the same thing as the defined term "Federal standards" discussed above. Primary Br. at 90-91. That requirement is still in effect, albeit now phrased as "other motor vehicle standards of the Government." 49 U.S.C § 32902(f). Petitioners provide no support for equating one defined provision with another provision using different language. Regardless, even if NHTSA considers compliance with *certain* California emission standards (i.e., criteria-emission standards), that does not mean that *no* emission standards are preempted.

Petitioners suggest NHTSA lacks a limiting principle for the scope of preemption. Primary Br. at 86. But Congress gave one. EPCA's preemption provision applies only to requirements "related to" fuel-economy standards. This is broad, but not unlimited, preemption. State emission standards that merely incidentally affect fuel economy—for example, criteria-pollutant controls that marginally impact fuel economy—are not necessarily preempted. 83 Fed. Reg. at 43,235 n.508. And not even all greenhouse-gas emission standards for motor vehicles are preempted by EPCA. *See* 84 Fed. Reg. at 51,313-314 (recognizing some greenhouse-gas emissions from vehicles are not related to fuel economy because they have insignificant or no effect on it); *id* at 51,314/1 (discussing examples of state

regulation of vehicle air-conditioning-refrigerant leakage and state requirement to use child seats).

In sum, there is an obvious, direct, plain-text reading of Section 32919(a)'s preemption provision. It is *not* limited by Section 209(b). Congress was thinking about California's criteria emission standards at the time of EPCA's passage. And Congress specifically accommodated those in a "self-contained" transitional scheme, expressly limited to specified model years. 83 Fed. Reg. at 43,210/2. But Congress did not do so in the preemption provision. To the extent that compliance with other criteria emission standards have mere incidental impact on fuel economy—like the criteria-pollutant standards of the 1970s—those are not preempted. But tailpipe greenhouse-gas emission standards are directly and substantially "related to" fuel economy. They are the flip side of the same coin. They are preempted.

b. Nothing in the 1990 CAA Amendments or the Energy Independence and Security Act preserves preempted state standards and mandates.

Petitioners argue the 1990 amendments to the CAA and the 2007 amendments to EPCA—enacted through the Energy Independence and Security Act ("EISA")—"recognized" that state standards and zero-emission-vehicle mandates "survived" EPCA. Primary Br. at 94. But neither of those amendments mention, much less override, EPCA's preemption provision.

Under 42 U.S.C. § 7586(f)(1)(B), added to the CAA in 1990, certain state implementation plans under the CAA must provide for the issuance of credits for,

among other things, the "purchase of clean fuel vehicles" which meet "standards established by [EPA]." EPA's "clean fuel vehicle" standards must "conform as closely as possible to standards which are established by the State of California for [zero-emission] vehicles[.]" *Id.* § 7586(f)(4). Petitioners argue "Congress's instruction to EPA to follow California's lead" would "mean nothing" if California were unable to establish zero-emission-vehicle standards in the first place. Primary Br. at 94. But California *can* establish such standards. Under 49 U.S.C. § 32919(c), a state is not preempted from prescribing requirements for fuel economy for vehicles obtained for its own use. It is not meaningless for Congress to require EPA's "clean fuel vehicle" standards to conform to the non-preempted standards California sets for its own vehicles. But it is implausible that Congress would use a state implementation plan credit provision to implicitly modify the scope of EPCA's express preemption provision. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (noting strong presumption that repeals by implication are disfavored).

Nor did EISA alter EPCA's preemption. Among other things, EISA amended EPCA to mandate annual increases in fuel-economy standards through model year 2020, and maximum feasible fuel-economy standards thereafter. 83 Fed. Reg. at 43,232/3. Petitioners point to EISA Section 141. 42 U.S.C. § 13212(f)(3)(B). This requires EPA to identify models of "low greenhouse gas emitting vehicles" to

prioritize for federal procurement, and "take into account 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." Petitioners argue that the phrase "most stringent standards" would be meaningless if only EPA could promulgate such standards, and that as of EISA's enactment in 2007 the only "applicable" greenhouse-gas emission standards were California's. Primary Br. at 96. That is wrong for four reasons.

First, NHTSA's interpretation in no way makes EISA Section 141 meaningless. Vehicles emit greenhouse gases from more than just their tailpipes. That is why, as Petitioners themselves note, NHTSA's and EPA's authorities are not entirely congruent. Primary Br. at 19. NHTSA acknowledged that some state requirements, like laws governing refrigerant leakage, "would not be preempted because they have only incidental impact on fuel economy or carbon dioxide emissions." 84 Fed. Reg. at 51,318/1. So EPA can "take into account" the most stringent federal or state refrigerant emission standards "for vehicle greenhouse gas emissions applicable…anywhere in the United States," just as EISA contemplates.

Second, as noted above, state and local governments can set fuel-economy requirements for vehicles obtained for their own use. 49 U.S.C. § 32919(c). These requirements both apply to manufacturers and, through procurement contracts, are enforceable against them. 84 Fed. Reg. at 51,322/2-3. Congress logically directed

EPA to consider state and local fleet requirements when evaluating vehicles for the federal government's fleet.

Third, EISA's direction to EPA to "take into account" greenhouse-gas emission standards is part of a subsection listing various factors. EPA must consider these when issuing guidance "identifying the makes and model number of vehicles that are low greenhouse gas emitting vehicles" to aid federal procurement decisions. 42 U.S.C. § 13212(f)(3)(A). Just as with the CAA's subsection on state implementation plan credits, 42 U.S.C. § 7586(f)(4), it is implausible that Congress would use a federal procurement policy to tacitly modify EPCA's preemption provision, 49 U.S.C. § 32919(a).

Fourth, Petitioners argue EISA's savings clause and legislative history establish that state tailpipe greenhouse-gas standards are not preempted. Primary Br. at 95-96. That savings clause actually undercuts Petitioners' claims. It does prevent EISA from limiting preexisting authority, but "does not purport to expand pre-existing authority or responsibility." 83 Fed. Reg. at 43,234/1. States had long lacked authority to set standards "related to fuel economy standards." 49 U.S.C. § 32919(a). EISA's savings clause could not give them that authority.

Some members of Congress members did make statements characterizing the savings provision as doing more than its text provided. 84 Fed. Reg. at 51,321/3-322/1. But such statements, once again, undercut Petitioners' claims. California's authority to regulate tailpipe greenhouse-gas emissions was, by then, long in dispute.

See, e.g., *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CV F 04-6663, 2007 WL 135688, at *15 (Jan. 16, 2007) (enjoining California's greenhouse-gas emission standards pending EPA review). Then, Congress *did not adopt* language expressly endorsing California's claims. California's Senators later submitted, but failed to get passed, legislation specifically granting California authority to regulate tailpipe emissions of greenhouse gases. *See* S. 2555, S. Rep. No. 110-407 (2008). Self-interested legislator statements cannot alter a statute's plain text. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). Congress's collective refusal to change EPCA's preemption provision when it adopted EISA equally reflects its intent not to modify EPCA's preemptive effect.

D. EPCA impliedly preempts state tailpipe greenhouse-gas emission standards and zero-emission-vehicle mandates.

Even if the Court concludes Section 32919(a) does not explicitly preempt state tailpipe greenhouse-gas emission standards and zero-emission-vehicle mandates, those requirements are impliedly preempted. They frustrate Congress's goals for the federal fuel-economy program and conflict with NHTSA's implementation thereof.

NHTSA must consider and balance four statutory factors when establishing maximum feasible fuel-economy standards. 49 U.S.C. § 32902(f). These factors do not uniformly favor more stringent fuel economy. *See, e.g.*, *Public Citizen v. NHTSA*, 848 F.2d 256, 264-65 (D.C. Cir. 1988) (affirming NHTSA's decision to lower a fuel-

economy standard based on NHTSA's determination that increased consumption—the energy-conservation factor—did not outweigh severe economic hardship of higher standards—the economic-practicability factor); *see generally* 83 Fed. Reg. at 43,213-217 (evaluating EPCA factors in context of 2018 proposed fuel-economy standards). Allowing a state to make state-specific determinations—for example, how much energy should be conserved—necessarily frustrates NHTSA's efforts to make and efficiently implement those determinations on a national level. State emission standards effectively requiring greater fuel economy, as greenhouse-gas emission standards might, interfere with NHTSA's ability to effectively balance and achieve Congress's goals. 84 Fed. Reg. at 51,313/1, 51,317/2.

Moreover, "even consistent programs subject manufacturers to duplicative enforcement regimes, in conflict with EPCA." *Id.* at 51,326/1; *see also id.* (because "fuel economy standards are fleetwide average standards, it is more difficult to achieve a standard in a particular State, averaged across a smaller pool of vehicles, than it is to achieve the Federal standard, averaged across the pool of vehicles for all States"). Zero-emission-vehicle mandates in particular conflict with NHTSA's ability to consider and balance the statutory factors EPCA mandates in establishing fuel-economy standards. Such mandates are intended to force the deployment of zero-emission vehicles regardless of their technological feasibility or costs. *Id.* at 51,320/3. They are design mandates, whereas EPCA requires NHTSA to set performance-based standards. *Id.* at 51,321/1.

Adding to the complexity, California regulates under an entirely different regulatory paradigm. NHTSA sets and applies standards based on the rule of law. It treats regulated parties equally based on their objective performance. California, in contrast, has granted select automakers special dispensation in the form of reduced standards in part in exchange for their agreement not to challenge California's ability to establish tailpipe greenhouse-gas emission standards and a zero-emission-vehicle mandate. *Id.* at 51,311/1. At the same time, California refuses to purchase cars from automakers who have challenged California's standards.

This type of "quid pro quo" regulation for certain favored entities is anathema to the federal framework, which imposes a single set of objective standards for all regulated entities. NHTSA (and EPA) found that California's "voluntary framework" "conflict[s] with the maintenance of a harmonized national fuel economy and tailpipe [greenhouse-gas] program," and "confirm[s] that the only way to create one actual, durable national program is for [greenhouse gas] and fuel economy standards to be set by the Federal government, as was intended by Congress." *Id.* California's punitive fit of pique also suggest certain automakers are unlawfully penalized for exercising their lawful option to contest the illegality of California's state law. *Ex Parte Young*, 209 U.S. 123, 147-48 (1908) (holding "unconstitutional on their face" state law provisions "so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation").

Petitioners argue conflict preemption cannot be addressed in the abstract. Primary Br. at 80-81. Perhaps, but NHTSA rightly found in the rulemaking record that the direct relationship between fuel efficiency and tailpipe emissions is an indisputable, scientific fact. 84 Fed. Reg. at 51,319/3. That is sufficient to ground the inquiry. NHTSA did *not* say, as Petitioners assert, that preemption is independent of the relationship between federal fuel-economy standards and "a particular state or local law." Primary Br. at 80. NHTSA stated preemption is independent of any particular model year's fuel-economy standards, specifically those for model years 2021-2026 (finalized earlier this year). 84 Fed. Reg. at 51,320/2-3.

Petitioners also argue that because technology can change, NHTSA cannot "declare the same group of measures forever 'related to' federal law based solely on an analysis of current automotive technologies." Primary Br. at 81. But the law makes no such distinction. If state requirements conflict with the federal fuel-economy framework, EPCA preempts them. Petitioners are also free to request a change in how NHTSA interprets and applies EPCA if automotive technology ever changes to a sufficient extent to warrant a change in course.

E. The National Environmental Policy Act does not apply.

NEPA's goals are twofold: (1) to inform agency decision-makers of a proposed action's environmental impacts; and (2) to assure the public that before acting, an agency considered environmental impacts and related public input. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004). But NEPA does not apply here because

NHTSA could not meaningfully use NEPA analysis in this decision-making. And even had there been any error, it would have been harmless.

The Supreme Court uses a "rule of reason" to determine whether NEPA applies. *Id.* at 767. It asks whether, under the agency's reasonable interpretation of the relevant statute, the agency "lack[ed] the power to act on whatever information might be contained in the [NEPA analysis]." *Id.* at 768. If so—if the agency lacked authority to prevent an action—then NEPA does not apply. *Id.* at 769-70; *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("The touchstone of whether NEPA applies is discretion.").

First, Congress—not NHTSA—preempted state regulations "related to" fuel-economy standards. 49 U.S.C. § 32919. Section 32919—not NHTSA's action—is the "legally relevant cause" of any environmental consequences. *Pub. Citizen*, 541 U.S. at 769. That provision allows no consideration of environmental impacts before preempting state regulations. And it exists independently of NHTSA's action; NHTSA cannot avoid or waive it. *Id.* at 756; 84 Fed. Reg. at 51,313/2, 51,354/1. Because NHTSA cannot prevent preemption through an environmental analysis, NEPA does not apply. *Pub. Citizen*, 541 U.S. at 768.

Petitioners' contrary claims are wrong. An agency's interpretive discretion does not confer sufficient discretion to trigger NEPA. *See Pub. Citizen*, 541 U.S. at 766 (noting NEPA not required under agency's "entirely reasonable reading" of statute); *Rails-to-Trails*, 267 F.3d at 1153 (confirming decision not to conduct NEPA based on

agency's reasonable statutory interpretation). The same is true of NHTSA's authority to issue the preemption regulations. *Pub. Citizen*, 541 U.S. at 760-61 (holding that though agency had authority to issue rule about disputed operation, it lacked sufficient discretion over operation's existence to trigger NEPA). And NHTSA's NEPA regulations (on which Petitioners rely) do not apply unless NEPA does.

Second, any supposed failure by NHTSA to conduct a separate NEPA analysis for this first part of the two-step finalization of the proposed rule was, at worst, harmless error. 5 U.S.C. § 706 (incorporating the "rule of prejudicial error"); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) (Congress admonished that in reviewing agency action, "due account shall be taken of the rule of prejudicial error"). NHTSA made a reasoned and well-supported finding of no significant environmental impact from the preemption regulations; any failure to conduct further NEPA analysis was harmless. 84 Fed. Reg. at 51,354/1. Moreover, NHTSA explained, specifically regarding the preemption regulation, that manufacturers would likely offset vehicles produced for sale in California and Section 177 states with less efficient vehicles produced for sale in the rest of the United States, "leading to little to no change in either fuel use or [greenhouse-gas] emissions at a national level." *Id.* The agency also considered that California's "deemed-to-comply" provision remained operative at the time, and that California had specifically acknowledged in its 2013 waiver request that the zero-emission-vehicle program would have no criteria emission benefits. *Id.* at 51,354/1, 51,355/1.

So the agency did not ignore environmental impacts. Instead, the preemption regulation will not have significant impacts. 84 Fed. Reg. at 51,354/1-2.[13] This makes a remand to comply with NEPA unnecessary. *See Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 61 (1st Cir. 2001) ("[I]t makes no sense to remand for an environmental assessment where, as here, the [agency] has already made a reasoned finding that the environmental effects are *de minimis*."). At most, any environmental concerns are properly the subject of a different agency action: the promulgation of NHTSA's new fuel-economy standards, subject to another challenge before this Court. For that, a significant NEPA analysis was completed. *See* 84 Fed. Reg. at 51,354/1; NHTSA-2017-0069.[14] That analysis projects approximately 3/1000th of a degree Celsius difference in global temperature in 2100. 85 Fed. Reg. at 25,172/1. Thus, even assuming California's independent standards have meaningful environmental benefit—and they do not—remand of the first step of the SAFE rulemaking would still be a "meaningless gesture." *Ill. Commerce Comm'n v. I.C.C.*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (refusing remand where agency considered certain environmental

[13] The Council on Environmental Quality's updated NEPA regulations, effective on September 14, 2020, rely on *Public Citizen* and expressly direct agencies to determine if they hold authority to consider environmental impacts in their decision before engaging in NEPA analysis. 85 Fed. Reg. 43,304, 43,304/2-3, 43,359/3 (text of 40 C.F.R. 1501.1(a)(5)) (July 16, 2020).

[14] Available at: https://www.nhtsa.gov/document/final-environmental-impact-statement-feis-safer-affordable-fuel-efficient-safe-vehicles.

consequences during rulemaking and ensured future actions would involve fuller consideration of environmental concerns).

II. EPA lawfully withdrew portions of California's 2013 waiver.

The CAA establishes a program of nationwide, new-vehicle emission standards and expressly preempts state standards. Congress enacted a single exception: California can set its own standards if it meets Congress's conditions. Pursuant to a reasonable interpretation of its CAA authority, EPA withdrew portions of its January 2013 waiver grant on two independent bases. First, the waiver for California's greenhouse-gas emission standards was inconsistent with NHTSA's preemption regulations. Second, EPA reasonably interpreted waiver grants to require a state-specific, particularized nexus between California-specific conditions and the elements of the pollution problem and standards at issue in a particular waiver application. That is lacking here.

A. EPA has authority to reconsider and withdraw waivers it previously granted under Section 209(b).

Congress anticipated EPA would use its authority on an ongoing basis to withdraw Section 209(b) waivers if a State "adopt[s] or attempt[s] to enforce any standard" not meeting the conditions Congress set. 42 U.S.C. § 7543(a). Petitioners lack valid reliance interests sufficient to preclude EPA from exercising that authority.

1. EPA has reconsideration authority.

EPA explained the text and "the structure of the statute" show Congress intended "that EPA [have] inherent authority to reconsider" the continued propriety of California waivers and, if need be, withdraw them. 84 Fed. Reg. at 51,332/2. "Although [this Court] ha[s] often described these powers as 'inherent,' the more accurate label is 'statutorily implicit.'" *See HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) (analyzing agency's claim of "inherent authority" instead as whether "implicitly authorize[d]"); *see also* S. Rep. 90-403, at 34 (describing EPA's authority as "[i]mplicit in this [209(b) waiver] provision").

Section 209(b), which is carefully cabined, does allow California to request exceptions to the "principally federal project" of regulating vehicle emissions. *Engine Mfrs.*, 88 F.3d at 1079. But Congress did not limit EPA review of California's requests to a singular moment when a request is first made.

To begin, Section 209(b)(1)(C) forbids waivers whenever state standards "are not consistent with section [202(a), 42 U.S.C. §] 7521(a)" of the Act. *Id.* § 7543(b)(1)(C). Because Section 202(a)—containing the factors for setting standards—requires EPA to anticipate lead times for developing "requisite technology," it lets EPA modify its standards "if the actual future course of technology diverges from expectation." *NRDC Inc. v. EPA*, 655 F.2d. 318, 329 (D.C. Cir. 1981). Congress's cross-reference to this provision in Section 209 thus makes California's waiver dependent on the standards' *continued* feasibility. It would be illogical to bar EPA

from amending waivers under Section 209 if EPA later determines them infeasible—especially since Congress did not limit a waiver's duration. *See* 84 Fed. Reg. at 51,332/1-2 & n.220; 78 Fed. Reg. at 2112/3 (granting ten-year waiver).

EPA did not base its withdrawal on Section 209(b)(1)(C).[15] But nothing in the statutory text or structure suggests Congress intended EPA to revisit its judgments under Section 209(b)(1)'s third prong, but not its second. *See* 42 U.S.C. § 7543(b)(1)(B)-(C). To the contrary, the drafters expressly acknowledged EPA's authority to reconsider *and withdraw* its waiver decisions. The Senate Report noted, "Implicit in this provision is the right of the [Administrator] to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver." S. Rep. No. 90-403, at 34.[16] Congress intended EPA to ensure California's waivers continued to meet *all* of Section 209(b)(1)'s conditions.

Ongoing review of California's entitlement to a waiver is a necessary element of EPA's application of Section 209(b)—as this dispute demonstrates. EPA's 2013 waiver grant was premised on a compromise with California (as well as NHTSA and

[15] After the Mid-Term Evaluation of 2018, EPA did propose to withdraw California's waiver on this ground. 83 Fed. Reg. at 43,250/1-253/3. But EPA finalized the withdrawal before finishing reconsideration of the feasibility of EPA's prior (and California's continuing) greenhouse-gas emission standards. 84 Fed. Reg. at 51,350/1. And EPA has specifically reserved the possibility of future action under Section 209(b)(1)(C). *See id.* at 51,330/1-2 n.215.

[16] This action occasionally mis-cites this report as S. Rep. No. *50*-403.

automakers) establishing coordinated federal and state vehicle emission standards for greenhouse gases through model year 2025. *See* 78 Fed. Reg. at 2122/2. But EPA and NHTSA recognized concerns regarding the "long timeframe of the rule and uncertainty in assumptions given this timeframe." 77 Fed. Reg. at 62,643/1. So EPA and NHTSA agreed, with California's cooperation, that federal standards set for model years 2022-2025 would be reconsidered in a "Mid-Term Evaluation" in 2018. *Id.* at 62,784/1, 62,632/1; *see California v. EPA*, 940 F.3d at 1346-47.

Though this obligation governed only the federal greenhouse-gas standards, at that time, California's deemed-to-comply provision meant any manufacturer meeting those standards also complied with California's program. 77 Fed. Reg. at 2121/2. The 2012 rule thus explained, "if EPA revises its standards in response to the mid-term evaluation, California may need to amend one or more of its [model year] 2022-2025 standards." *Id.* at 62,785/2. EPA explicitly noted such changes could affect California's waiver, obligating California to "submit such amendments to EPA with a request for a [new] waiver, or for confirmation that said amendments fall within the scope of an existing waiver." *Id.*[17] So California's 2013 waiver was deliberately and transparently the subject of ongoing consideration.

[17] Indeed, the January 2013 waiver grant records automakers' position that the Mid-Term Evaluation and potentially resulting changes to federal standards could require further consideration of the waiver. 78 Fed. Reg. at 2,132/1 n.99.

Given the statutory text, context, and specific history of this waiver, EPA's assertion of reconsideration authority reasonably construes the statute.[18] 84 Fed. Reg. at 51,331/2. Courts "will uphold [a] decision of less than ideal clarity if the agency's path may be reasonably discerned." *Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

Petitioners' counterarguments are unavailing.

First, Petitioners press a narrow reading of Section 209. But they identify no text in Section 209(b) suggesting that a waiver, once granted, cannot be disturbed. *See Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (noting Congress must specifically displace reconsideration authority). Instead, they wrongly claim that 42 U.S.C. § 7545(c)(4)(A) shows Congress knew how to "stop state laws that are already in effect." Primary Br. at 33. That section is a preemption provision, like Section 209*(a)*. *Compare* 42 U.S.C. § 7545(c)(4)(A) *with id.* § 7543(a). It is not comparable to the waiver Congress created in Section 209(*b*)—which authorizes limited preemption *exemptions*. *Id.* § 7543(b). Petitioners' mistaken reliance on precedent stating only "precise terms" can preempt state law, Primary Br. at 29, therefore fails. Section 209(b) is not a preemption provision—it's a waiver. And the "precise terms" of Section 209(a) clearly preempt state law, absent waiver.

[18] EPA's interpretation that Congress could not have intended state provisions preempted by EPCA to be eligible for a CAA preemption waiver is another basis for its reconsideration authority. *See infra* Argument § II.B.

Petitioners' reliance on 42 U.S.C. § 7416 also fails. Primary Br. at 29. That section preserves state authority "[e]xcept as otherwise provided." Section 209, in its entirety, is among the listed exceptions. 42 U.S.C. § 7416.

Petitioners falter again citing *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). They say agencies cannot presume delegation of powers not expressly withheld. Primary Br. at 28. But *Michigan* rejected EPA's authority to promulgate a wholly new permit program simply because Congress had not forbidden it. 268 F.3d at 1082. Here, EPA is not asserting jurisdiction over new subject matter. It is exercising review authority that is "statutorily implicit" in administering expressly delegated subject matter. *See HTH*, 823 F.3d at 679.

Nor can Petitioners rely on this Court's prior statement that EPA should conduct a "single review" under Section 209(b). Primary Br. at 29. The Court's reference in *Ford Motor Co. v. EPA* to a "single review" was not temporal, barring future reassessment. 606 F.2d 1293, 1302 (D.C. Cir. 1979). Rather, the Court was rejecting the suggestion that EPA must simultaneously conduct two reviews of California's protectiveness determination in a single waiver—one deferential, the other searching. The Court rejected that in favor of a single (type of) review. *Id.*

Second, Petitioners misread the legislative history. They say the 1967 Senate Report affirming EPA's withdrawal authority applied only to California's cooperation on enforcement and certification procedures. Primary Br. at 34-35. But the Report's discussion of enforcement coordination is unrelated to the succeeding paragraph's

discussion of withdrawal authority. The Report states EPA may withdraw a waiver where California "no longer complies with the *conditions* of that waiver," S. Rep. No. 90-403, at 34 (emphasis added), not the singular "condition" of enforcement procedures. Notably, the drafters explained the right to withdraw a waiver was "[i]mplicit in this provision." *Id.* The Report uses the term "provision" only when referring to "the waiver provision of subsection (b)" as a whole. *Id.* at 33.

Petitioners' claim that the 1977 and 1990 amendments to the CAA superseded the 1967 legislative history is similarly meritless. Primary Br. at 35; Industry Br. at 6-7. These amendments did not address EPA's authority to review a waiver once issued. "In the absence of some affirmative showing of an intention to repeal" that authority, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). There was plainly no conflict here: EPA twice initiated review of previous waivers after the 1977 amendments, in 1978 and 1982. *See* 84 Fed. Reg. at 51,333/1 n.223. The 1990 amendments made no changes in response to EPA's open exercise of that authority. *See generally* Pub. L. No. 101-549.

Similarly, commentary that California should not be "at the mercy" of EPA, or should drive technological innovation, Primary Br. at 35, does not speak to EPA's continuing authority. Only the Senate Report addresses that narrow issue. The Court should reject the relevance of "general remarks" in legislative history "obviously not

made with this narrow issue in mind." *Chevron*, 467 U.S. at 862 (internal quotation marks omitted).

Third, Petitioners claim that even if EPA has authority to reconsider, EPA was limited to correcting inadvertent errors, Industry Br. at 7, and was untimely, Primary Br. at 37-38. EPA's waiver withdrawal is not comparable to the decisions of "administrative officers and tribunals" considered in Petitioners' authorities. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) (concerning licensing applications to the Interstate Commerce Commission); *United States v. Seatrain Lines Inc.*, 329 U.S. 424 (1947) (same); *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977) (concerning personnel action by the Involuntary Separation Board at the National Institute of Occupational Safety and Health). EPA did not reach a final, quasi-judicial result here, only to later seek to reopen its settled terms. *Cf. Mazaleski*, 562 F.2d at 720 (considering the timeliness of an agency's offer to reopen administrative proceedings to "retroactively" correct a personnel action); *Am. Trucking*, 358 U.S. at 134-36 (allowing correction of errors in common carrier operating certificates). Rather, EPA's withdrawal was the culmination of a reconsideration process that was specifically anticipated at the time of the waiver grant in 2013.[19] 77 Fed Reg. at 62,785/2.

[19] EPA's withdrawal on the basis of NHTSA's determination that the waiver was void *ab initio* was not a "retroactive" application of Section 209(b)(1); EPA acted only "to

Cont.

And EPA did not call into being some broad authority untethered (or even contrary) to the statutory scheme. It interpreted the text and operation of Section 209(b) itself, supported by clear congressional direction in the legislative history. Petitioners' reliance on *American Methyl Corp. v. EPA*, 749 F.2d 826 (D.C. Cir. 1984)—which they claim "reject[ed] 'implied power' as 'contrary to the intention of Congress and the design of' the [CAA]," Primary Br. at 32—illustrates the distinction. There, the Court rejected EPA's invocation of inherent authority to revoke a waiver concerning fuel additives because Congress provided an alternative means of prohibition and legislative history weighed against the agency's interpretation. *Am. Methyl Corp. v. EPA*, 749 F.2d at 835-36 ("We need not consider what further inherent or implicit authority might exist in the abstract, since, in the present case, Congress has provided a mechanism for correcting error."); *see also Seatrain*, 329 U.S. at 429-31 (rejecting implied authority because Congress had expressly provided authority to revoke some certificates but not others). This case is precisely the opposite. Congress did not provide an alternative mechanism of reconsideration or withdrawal, instead stating the authority is "implicit" within Section 209.

Even if applicable, however, these authorities would not invalidate EPA's withdrawal. Agencies have the right to correct legal interpretations and other

---

the extent that administrative action is necessary on EPA's part to reflect that state of affairs." 84 Fed. Reg. at 51,338/3; *see infra* Argument § II.B.

substantive legal errors. *See Gun S., Inc. v. Brady*, 877 F.2d 858, 861 (11th Cir. 1989) (finding inherent authority to suspend import permits where agency's reconsideration of a statutory term might render grant of those permits erroneous); *see also Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 194 (2d Cir. 1991) (upholding authority to reconsider a substantive decision to grant postage refunds); *Voyageur Outward Bound Sch. v. United States*, 444 F. Supp. 3d 182, 193 (D.D.C. 2020) (acknowledging authority to reconsider where "the agency had selected a legally tenable interpretation that it subsequently disavowed" (citation omitted)).

EPA's implicit authority to reconsider is likewise subject to no timeliness limitation—Congress's design here allows reconsideration whenever circumstances make it appropriate. Regardless, even for "inherent" reconsideration of quasi-judicial decisions, this Court has set no bright-line limit on timely reconsideration, especially in the unusual circumstances here. *See Voyageur*, 444 F. Supp. 3d at 194 ("There is no consensus among the courts about what amount of time is reasonable."); *cf. Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (explaining reconsideration within a "reasonable time," is "absent unusual circumstances" "measured in weeks, not years"). EPA's reconsideration began only four months after completion of the Mid-Term Evaluation—an evaluation to which California acceded.

Petitioners acknowledge that "reasonable time" depends in part on parties' justifiable reliance interests. Primary Br. at 37; *see also Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961). Four months was a "reasonable time" for

reconsidering a waiver for standards the parties understood were subject to reconsideration and not applicable until at least 2020. *See, e.g.*, *Belville Mining Co. v. United States*, 999 F.2d 989, 1001-02 (6th Cir. 1993) (reconsideration reasonable after eight months).

Tellingly, Petitioners' arguments are an opportunistic attempt to avoid a result they dislike. Earlier, "California believe[d] EPA has the *inherent authority to reconsider* the denial and should do so in order to restore the interpretations and applications of the Clean Air Act to continue California's longstanding leadership role in setting emission standards." Letter from Mary Nichols, California Air Resources Board, to Lisa Jackson, Administrator-Designate, EPA (Jan. 21, 2009), at 1[20] (emphasis added); *see* 84 Fed. Reg. at 51,333/2 n.225 (citing 2009 reversal of waiver denial). Petitioners now strain to assert that EPA can reconsider to *grant* a waiver, but not to *withdraw* one. Industry Br. at 8 n.5. This is unfounded. The text, structure, and logical operation allows no such distinction—and the drafters' legislative history is to the contrary.

2. Petitioners lack sufficient reliance interests to preclude reconsideration.

Petitioners say, regardless, EPA could not reconsider *this* waiver due to reliance interests. Primary Br. at 37-38. But EPA *did* "assess" reliance interests. EPA simply concluded they did not preclude reconsideration. 84 Fed. Reg. at 51,334/2-336/3; *cf.*

[20] Available at: https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-OAR-2006-0173-7044.

Regents, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914-15 (2020).

EPA's conclusion is sound. Petitioners say they designed state plans and invested in electric-vehicle infrastructure in reliance on California's greenhouse-gas standards. Primary Br. at 29-31; Industry Br. at 8-9. But California's authority has long been in dispute. All parties knew the standards agreed to in resolving earlier litigation were subject to further review. 83 Fed. Reg. at 42,987/1. The "out-year" standards in the waiver were always contingent on EPA's 2018 Mid-Term Evaluation. California's, and other interested parties', concurrence with this Mid-Term Evaluation stipulation negates any justifiable expectation of fixed standards for those future years or a permanent, unchangeable waiver. *See* 84 Fed. Reg. at 51,335/3-336/1.

The out-year standards' lack of finality was confirmed in April 2018. EPA's revised Mid-Term Evaluation concluded that the 2022-2025 standards were "not appropriate" and "should be revised." 83 Fed. Reg. at 16,077/3. EPA specifically proposed to withdraw California's waiver in August 2018, 83 Fed. Reg. at 42,986, well before the affected standards would come into effect.

The parties also knew by 2006 (at the latest) that NHTSA believed EPCA preempted California's greenhouse-gas standards—a position that NHTSA has never conceded or changed. 71 Fed. Reg. at 17,654/2 ("A state law that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly preempted [by EPCA]."). Though conflict with EPCA was deferred by the 2012 rulemaking, *see* 84

Fed. Reg. at 51,323/1-2, this unresolved legal issue and its implications for California's greenhouse-gas standards were long known. *See Solenex LLC v. Bernhardt*, 962 F.3d 520, 529 (D.C. Cir. 2020) ("[R]eliance interests incurred when an issue had long been in dispute were not reasonable.").

Petitioners do not rebut these facts. While making no mention of the Mid-Term Evaluation and broader history, they baldly claim "public awareness that regulations may change does not obviate reliance interests in those regulations." Primary Br. at 38 n.11. But their authority, *FCC v. Fox Television Stations, Inc.*, described the government's general authority to change policy. 556 U.S. 502, 513-16 (2009). It did not consider reliance in the context of long-disputed statutory text and structure, where parties had ample notice of a forthcoming reassessment—and specifically acceded to it.

Here, interested parties assumed the risk for basing planning and investments on a presumption that the out-year greenhouse-gas standards would remain unaltered. They cannot now claim justifiable reliance interests to preclude EPA's reconsideration. *See, e.g.*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 710 (D.C. Cir. 2016) (finding no reasonable reliance interests where "shifting regulatory treatment" prevented settled expectations).

Moreover, to obtain support here, California itself acted in 2019 to alter its standards and reduce favored automakers' obligations (provided they agreed not to dispute California's authority in this litigation). *See supra* Statement of the Case

Section § V.B. So before EPA even finalized its waiver withdrawal, California's own actions undercut the same public and private investments it now cites as reliance interests. California cannot claim reliance in the *status quo* it upended. *See* 84 Fed. Reg. at 51,334/1-2; Primary Br. at. 29-30.

Industry Petitioners' declarations, meanwhile, reflect that they made electric-vehicle investments regardless of the out-year standards' permanency. For example, Southern California Edison cites its June 2018 application to California for electric-vehicle infrastructure. Decl. of Carla Peterman ¶ 8, Industry Add. at 17-18. But it filed *after* EPA revised its Mid-Term Evaluation. The Sacramento Municipal Utility District claims reliance interests in 25 years of investment in electric vehicles—long predating any greenhouse-gas waiver. Decl. of Paul Lau ¶ 9, Industry Add. at 4-5. To be relevant, Petitioners' alleged reliance must arise from *these* standards.

Petitioners' last argument—that five states relied upon California's standards in NAAQS implementation plans—also misses the target. The purpose of these plans is not to reduce greenhouse gases. *See supra* Statement of the Case § III; 42 U.S.C. § 7410. (Indeed, California's own plan omits its tailpipe greenhouse-gas standards. 81 Fed. Reg. 39,424, 39,427-28 (June 16, 2016).) And EPA's action changes none of these plans. That would occur only if and when EPA conducts further plan review. *See infra* Argument § III.A.

Even if any party had reliance interests, they would not be sufficient to bar EPA from withdrawing California's waiver in furtherance of the "right result." *See*

Civil Aeronautics, 367 U.S. at 321. "[R]eliance does not overwhelm good reasons for a policy change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2128 (2016) (Ginsburg, J., with Sotomayor, J., concurring). The law requires a "reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 516. EPA provided detailed justifications for withdrawal, *see infra* Argument §§ II.B-C, and weighed that action against possible reliance interests. 84 Fed. Reg. at 51,324/3, 51,338/3 n.256; *Regents*, 140 S. Ct. at 1914-15. No more was required.

B. EPA properly withdrew those portions of the waiver preempted by EPCA.

In the challenged action, EPA reasonably determined it could not grant a CAA waiver for state standards in the face of NHTSA's preemption regulations, explaining that the standards are preempted and unlawful.[21] This is consistent with the Supreme Court's decision in *Massachusetts*. 549 U.S. at 497. *Massachusetts* recognized NHTSA and EPA have overlapping jurisdiction in vehicle standards, but found "no reason to

[21] Petitioners claim, without authority, that if this Court lacks jurisdiction over NHTSA's regulations, it cannot uphold EPA's separate action premised on those regulations. Primary Br. at 65 n.20. But the CAA gives this Court immediate jurisdiction over EPA's final action. 42 U.S.C. § 7607(b)(1). Petitioners suggest no reason the Court may not review the reasonableness of EPA's reliance on NHTSA's action regardless of whether that action is also before this Court—just as it could review EPA's reliance on any number of legal documents or other material that are not themselves subject to its review.

think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.* at 532; *see* 84 Fed. Reg. at 51,338/2-3.

NHTSA correctly determined that state tailpipe greenhouse-gas and zero-emission-vehicle standards are preempted by federal law, voiding California's standards. 84 Fed. Reg. at 51,338/3. This created an inconsistency with EPA's 2012 action to authorize those same standards—one that EPA could not reasonably ignore. Otherwise, EPA would put the United States "in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*." *Id.* at 51,338/2. Petitioners would compel two federal agencies to act in contradiction. Petitioners make no attempt to reconcile this position with *Massachusetts*, which specifically foreclosed this result—and which EPA expressly cited in its determination.

EPA acknowledged previously disclaiming authority to consider "whether California's [greenhouse-gas] standards are preempted, either explicitly or implicitly, under EPCA." *Id.* at 51,338/1 (quoting 78 Fed. Reg. at 2145). In those earlier waiver reviews, however, EPA would have been speculating about the effect of EPCA, a statute it does not administer. *See* 84 Fed. Reg. at 51,337/3. But NHTSA has now explained that EPCA preempts California's greenhouse-gas standards. So EPA reasonably responded. EPA also reasonably explained it generally need not "consider factors outside the statutory criteria in…section 209(b)(1)(A)-(C) [of the CAA]" in

future waiver proceedings where the unique interrelation of the two agencies' actions will not be at issue. *Id.* at 51,338/1-2.

This Court's holding in *Motor & Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462-63 (D.C. Cir. 1998) ("*MEMA II*"), does not foreclose this approach. *See* Primary Br. at 66. There, industry sought to compel a waiver denial based on additional requirements in Section 202(m), 42 U.S.C. § 7521(m). 142 F.3d at 459. The Court said these provisions were not a "prerequisite to any waiver approval," *id.*, adding that obligating EPA to consider them threatened to "eviscerate" California's "flexibility" under the waiver program, *id.* at 464. By contrast, here EPA did not consider some additional technical prerequisite. EPA instead considered Congress's express preemption in EPCA—that is, EPA considered the state standards' *inherent* legality *vel non* in light of NHTSA's contemporaneous determination. *MEMA II* did not address this issue.

If anything, *MEMA II* supports EPA's position. The Court thought Section 209(b)(1)'s enumerated factors were not exclusive. "[T]he agency may not evaluate California's waiver application based on factors other than those Congress expressly *or impliedly* intended the agency to consider." *Id.* at 467 (internal quotation marks omitted; emphasis added). Congress said in EPCA that states may not "adopt or enforce" laws "related to fuel economy standards." 49 U.S.C. § 32919(a). Once NHTSA confirmed that EPCA preempts California's standards, EPA reasonably determined Congress intended it to act in accordance.

C. EPA reasonably concluded that portions of the 2013 waiver are inconsistent with Section 209(b)(1)(B).

Section 209(b)(1)(B) bars EPA from waiving preemption if California does not "need such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). EPA's interpretation is reasonable. And the tailpipe greenhouse-gas and zero-emission-vehicle portions of California's 2012 waiver request do not meet the standard.

1. EPA reasonably interpreted Section 209 to maintain uniform federal standards where California does not "need" its own standard "to meet compelling and extraordinary conditions."

In considering whether to withdraw the waiver under Section 209(b)(1)(B), EPA had to determine: (1) which California standards it must review, i.e., the meaning of "*such* State standards"; and (2) what finding it must make as to California's need for those standards, i.e., the meaning of "need…to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B); *see* 84 Fed. Reg. at 51,339/1.

EPA's interpretation gives reasonable effect to both phrases. Petitioners' interpretation, however, lacks a meaningful limiting principle. They would effectively read terms out of the Act. California's position is that once EPA granted California a waiver for *any* vehicle emission standard *ever*, EPA can only deny a waiver if California's total package of standards, as a whole, will not be, "in the aggregate, as least as protective" as federal standards. *See* 42 U.S.C. § 7543(b)(1), (b)(1)(A). In other words, Petitioners say EPA may no longer inquire under Section 209(b)(1)(B)

whether California actually needs any particular standards in a given waiver request. The Court should reject those atextual and unreasonable arguments.

a. "Such State standards."

In the waiver withdrawal, EPA interpreted the phrase "such State standards" as calling for an assessment of whether California needs the type of standards at issue in the waiver to address compelling and extraordinary conditions, not whether California generally needs a separate state program. 84 Fed. Reg. at 51,344/3; *see* 83 Fed. Reg. at 43,246/2-3. This reading is the best, if not only, construction of Congress's intent.

Congress enacted Section 209(b) to authorize separate California standards where California could show "compelling and extraordinary circumstances sufficiently different from the nation as a whole." S. Rep. 90-403, at 33. Congress recognized California faced exceptional air pollution "as a result of its climate and topography." 84 Fed. Reg. at 51,342/3 (internal quotation marks omitted) (compiling legislative history). But Congress sought to strike a balance between giving California latitude to address those extraordinary problems and promoting national uniformity and certainty for automakers. *See id.* at 51,347/3-348/1. The resulting compromise allowed California standards only when necessary to address California's unique local conditions. By interpreting the phrase "such State standards" to require review of California's need for the particular standards in a given waiver request, EPA ensured that California's waiver does not extend to pollution problems California merely shares with the nation at large.

EPA's reading gives full effect to the statutory text. EPA acknowledged that before 2008, it had interpreted Section 209(b)(1)(B) as asking only whether California needed its vehicle-standards program "as a whole" to meet compelling and extraordinary conditions. *Id.* at 51,345/2-3. But under that reading, "once EPA determined that California needed its very first set of submitted standards to meet extraordinary and compelling conditions, EPA would never have the discretion to determine that California did not need any subsequent standards for which it sought a successive waiver[.]" *Id.* at 51,341/3; *see id.* at 51,342/1. This effectively nullified the limitations written into Section 209(b)(1)(B), because California "long ago established a 'need' to have *some form* of its own vehicle emissions program (i.e., its criteria pollutant program…)." *Id.* at 51,339/3. Such nullification is highly disfavored. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). EPA's interpretation finalized here gives Section 209(b)(1)(B) continuing effect so that express limiting terms like "need" and "compelling and extraordinary" do not become "superfluous, void, or insignificant." *Id.*

EPA's standard-based review also accords with the operation of Section 209. Section 209(a) forbids States from "adopt[ing] or attempt[ing] to enforce any *standard* relating to the control of emissions from new motor vehicles[.]" 42 U.S.C. § 7543(a) (emphasis added). California then submits to EPA "seriatim…a standard or package of standards" under Section 209(b), *id.* § 7543(b)(1), in each instance where it seeks a preemption waiver. 84 Fed. Reg. at 51,341/3. Because EPA "considers those

submissions as it receives them, individually, not in the aggregate with all standards for which it has previously granted waivers," *id.*, it is logical that its review under Section 209(b)(1)(B) would be similarly individualized.

Reading Section 209(b)(1)(B) to require review of the standards in California's waiver request, not California's standards as a whole, also harmonizes the meaning of "such State standards" within Section 209(b)(1). The third waiver criterion, in Section 209(b)(1)(C), directs EPA to assess whether "such State standards" are "consistent with [S]ection [202(a), 42 U.S.C. §] 7521(a)." *Id.* § 7543(b)(1)(C). Section 202(a) addresses the lead times necessary before standards become effective. There is no dispute that review under Section 209(b)(1)(C) pertains to the standards proposed in a waiver request. *Id.* § 7521(a); 84 Fed. Reg. at 51,332/1. The identical phrasing in (b)(1)(B) and (b)(1)(C), which follow the same prefatory text, suggests both refer to the standards actually before EPA for review. 84 Fed. Reg. at 51,345/2.

Petitioners claim EPA must read "such State standards" in 209(b)(1)(B) in tandem with Section 209(b)(1). Primary Br. at 42. Section 209(b)(1) requires California, as a predicate for obtaining a waiver, to "determine[] that the State standards will be, in the aggregate, at least as protective" as federal standards. 42 U.S.C. § 7543(b)(1). Congress added the quoted text in 1977 to allow California to offset some vehicle emission problems in favor of others. *See* Statement of the Case § I.C. EPA's review of California's "aggregate" determination, however, is governed by its own waiver criterion, Section 209(b)(1)(A). And the "aggregate" determination

required by the prefatory text in 209(b)(1) does not control the meaning of "such State standards" in subsection *(B)* any more than it controls the meaning of "such State standards" in subsection *(C)*.

Petitioners try to skirt this problem. They claim Section 209(b)(1)(B) and (C) can have different meanings under *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) ("*UARG*"). Primary Br. at 45 n.16. That ignores the very different context of the statutory analysis there. But even if a *UARG*-type distinction were possible within a single statutory subsection, EPA's reading is, at the very least, reasonable.

Structurally, it is perfectly sound to read "such State standards" to have the same parallel meaning in (b)(1)(B) and (C), but to be distinct from the different phrase, "the State standards…in the aggregate," used in (b)(1). *See* 84 Fed. Reg. at 51,345/2-3. In (b)(1), the additional phrase "in the aggregate" is best understood to require a distinct assessment of whether the whole program is "at least as protective … as applicable Federal standards." *See TRW*, 534 U.S. at 31 (rejecting nullification of statutory terms). That is consistent with Congress's 1977 intent to allow California some tradeoffs.

In contrast, subsections (b)(1)(B) and (C)—which jointly date to Section 208(b) of the 1967 statute, Pub. L. No. 90-148—identify particular grounds on which EPA must deny a waiver. Given the broader statutory structure, and the absence of "aggregate" language, those specific criterion are more reasonably understood to require assessment of the standards in a particular waiver request. 84 Fed. Reg. at

51,342/1. California would instead have such a review swallowed up by the program as a whole and ignored.

Petitioners also read the plural term "standards" to encompass all California standards. Primary Br. at 42. But as EPA explained, even if strictly read as plural, "such State standards" is ambiguous and need not dictate "whole program" review. 84 Fed. Reg. at 51,341/1-2. And in any case, "the variation in the use of singular and plural form of a word in the same law is often insignificant." *Id.* at 51,341/1; *e.g.*, *United States v. Oregon & C.R. Co.*, 164 U.S. 526, 541 (1896) (quoting 1 U.S.C. § 1).

Petitioners also contend that EPA's reading impermissibly requires an individualized review for greenhouse-gas standards, while retaining a programmatic review for criteria pollutants. Primary Br. at 41-42. They misunderstand EPA's interpretation. It asks, *for all types of pollutants*, whether California "needs" the standards included in its waiver request. As EPA explained, when determining what "set of standards" to review, "[i]t is reasonable to assign that total set at the level of the waiver-request package before the Agency." 84 Fed. Reg. at 51,341/2 & n.261. But EPA must further particularize its review when different "subsets" of standards address different air-quality concerns (as happened here). Those differences may change the "compelling and extraordinary conditions" against which EPA reviews California's requests. *Id.* at 51,347/2-3. Accordingly, EPA did not apply "such State standards" differently to greenhouse-gas problems than to criteria-pollutant problems when it considered these subsets of standards separately. EPA simply considered the

greenhouse-gas-related standards against the greenhouse-gas-related "conditions" said to justify adoption. EPA also compared criteria-pollutant-related standards against criteria-pollutant conditions. *See id.* The nature of this review was the same. Only the outcome was not.

Petitioners suggest *Massachusetts* prevents EPA from reading limitations in Section 209 based on pollutant type. Primary Br. at 49. This is incorrect. *Massachusetts* recognized that air "pollutant" must be read broadly to accommodate evolving science and "forestall such obsolescence." 549 U.S. at 532. But the CAA's authorization of greenhouse gas regulation by EPA does not implicitly authorize regulation by California. The constraints Congress set on EPA's authority to waive preemption do not evolve. They bar waiver except when California shows extraordinary problems distinct from the nation at large. Ironically, rather than "forestall…obsolescence," *id.*, Petitioners limitless reading renders Section 209(b)(1)(B) obsolete once EPA granted California's very first waiver.

Petitioners are also incorrect that congressional statements and this Court have cabined EPA's discretion to interpret the ambiguous phrase "such State standards." Primary Br. at 43-46. This Court has suggested that EPA's prior interpretation of 209(b)(1)(B) was "reasonable." *Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 627-28 (D.C. Cir. 2010). But that opinion does not interpret the phrase "such State standards." And it does not foreclose other reasonable interpretations. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2015).

Nor do the 1977 and 1990 amendments to Title II compel Petitioners' reading of "such State standards." Though Petitioners claim Congress in 1977 "expressly approved" EPA's interpretation of that phrase, *see* Primary Br. at 43-44, the legislative history says no such thing. The cited history states only, "In general, [EPA] has liberally construed the waiver provision so as to permit California to proceed with its own regulatory program in accordance with the intent of the 1967 Act." H.R. Rep. No. 95-294, at 301 (1977). At most, this affirms that Congress was content with the *outcome* of EPA's application of Section 209. It does not speak to, let alone "expressly approve[]," EPA's *construction* of the requirement that California demonstrate "compelling and extraordinary conditions."

The 1990 amendments also made no relevant changes. Though in 1990 Section 209(b)(1)(B)'s text was duplicated to create Section 209(e)(2), this action does not indicate that Congress meant to constrain EPA to a "whole program" interpretation of 209(b)(1)(B). Until then, California only ever sought waivers for criteria pollution, whose nexus to local conditions is beyond dispute. *See* 84 Fed. Reg. at 51,345/2-3. It is not plausible to presume Congress expressed in 1990 a view on an interpretive issue that had not yet even materially arisen. Regardless, Congress did not amend Section 209(b).

Drafters' statements about California's "broad" discretion do not foreclose EPA's interpretation either. *See* Primary Br. at 6-7, 9, 35, 54. To be sure, Congress wanted EPA to defer to California's policy choices about how to resolve state air-

quality concerns—specifically with regard to California's ability to make tradeoffs between different pollution controls. That does not override the Act's specific conditions or EPA's authority to interpret a statute it administers. *See* 84 Fed. Reg. at 51,344/2 n.268. Acknowledging California as a "laboratory for innovation" is similarly irrelevant. Primary Br. at 7. California's experimentation, like its exercise of policy choice, must operate within the limits Congress set in Section 209(b). EPA "does defer to California's policy choices" concerning appropriate standards "*to the extent* that the State standards at issue will actually address pollution and its consequences that are particular to California." 84 Fed. Reg. at 51,344/2 n.268 (emphasis in original). But whether California's standards meet that predicate statutory criterion is a question that EPA must answer. *Id.*

b. "Compelling and extraordinary conditions."

EPA also addressed *how* to assess the submitted standards. It clarified the meaning of "compelling and extraordinary conditions." This phrase got little attention when EPA reviewed California's program as a whole. Given California's persistent nonattainment of air quality standards, *see* 40 C.F.R. § 81.305, California's criteria-pollutant problems are "compelling and extraordinary conditions." *See, e.g.*, 84 Fed. Reg. at 51,346/1, 51,330/3. But in considering California's specific need for particular standards, EPA reanalyzed the congressional intent behind this phrase.

EPA reasonably determined that, with respect to *any* type of pollutant, "'compelling and extraordinary conditions' mean environmental conditions with

causes and effects particular or unique to California." *Id.* at 51,344/1; *see* 83 Fed. Reg. at 43,247/1-2. EPA thus looked for a "particularized causal link between the standards under review, emissions in California, and conditions in California." 84 Fed. Reg. at 51,343/1. This is a reasonable reading of the statutory text.

First, EPA's reading gives force and effect to the statutory text. Petitioners allege that EPA's reading of Section 209(b)(1)(B) is atextual because the statute does not use the terms "'local,' 'particularized,' 'state-specific,' 'global,' or 'national.'" Primary Br. at 48. But that ignores the language that Congress *did* use. "[C]ompelling and extraordinary" are atypically emphatic adjectives. *See* 84 Fed. Reg. at 51,339/1 n.258. Importantly, these adjectives modify "conditions," not "need." It is not enough for California to need separate standards; the standards must relate to extraordinary—*beyond the usual or exceptional*—conditions. *See* "Extraordinary," Merriam-Webster Dictionary.[22] EPA reasonably interpreted this to require a particularized nexus to California sources, pollution, and impacts, distinct from the nation at large.

EPA's reading avoids surplusage. California must demonstrate not only a significant air-quality problem ("compelling"), but one distinct from other states ("extraordinary"). *See* 84 Fed. Reg. at 51,341/2, 51,347/2. Reading "extraordinary" merely to indicate a significant problem would give that word the same meaning as

[22] Available at: https://www.merriam-webster.com/dictionary/extraordinary.

"compelling," reading it out of the statute. *Id.* at 51,345/1 n.270. Notably, Petitioners admit that "extraordinary" refers to conditions that are "out of the ordinary." Primary Br. at 55. Yet Petitioners read Section 209 to allow California to regulate any vehicle emissions at all—even where California has no unique need. So long as California's criteria pollutant problems persist—and its program in the aggregate meets the stringency of federal standards—California offers no limiting principle. That is inconsistent with Congress' emphatic modifiers.

Second, EPA's interpretation aligns with the structure of Title II more broadly and Congress's mandate in Section 202(a), 42 U.S.C. § 7521(a). 84 Fed. Reg. at 51,339/1. Under Section 202(a), EPA regulates vehicle emissions only upon making an endangerment finding that "links (1) emissions of pollutants from sources; to (2) air pollution; and (3) resulting endangerment to health and welfare." *Id.* at 51,339/1; *see* 42 U.S.C. § 7521(a)(1).[23] Congress then unmistakably intended to preempt states from regulating these emissions, *see* 42 U.S.C. § 7543(a). So under the narrow provision permitting California's waiver, this structure implies Congress intended a similar regulatory threshold. Section 209(b)(1)(B) should "require[] a pollution problem at the local level that corresponds in a state-specific particularized manner to

[23] "The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to [1] the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, [2] which in his judgment cause, or contribute to, air pollution [3] which may reasonably be anticipated to endanger public health or welfare."

the type of pollution problem that Congress required as the predicate for federal regulation." 84 Fed. Reg. at 51,340/1.

Third, only EPA's reading accords with the history of the waiver provision. Section 209(b) was enacted to address California's "peculiar" and "unique" criteria-pollutant problems. S. Rep. 90-403, at 33. These were directly related to its many vehicles and exacerbating effects of local climate and geography. *See* 84 Fed. Reg. at 51,343/2-3; *MEMA I*, 627 F.2d at 1109-1110; *see also* 113 Cong. Rec. 30,948 (bound ed. Nov. 2, 1967), Statement of Representative Harley Staggers; *id.* at 30,950, Remarks of Rep. Corman; *see also* 83 Fed. Reg. at 43,247. The Senate Report specifically tied these localized concerns to the statute's design. It explained California needs "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards" that diverge from the national program. S. Rep. 90-403, at 33.

Fourth, EPA's interpretation is supported by the doctrine of equal sovereignty. This presumes that national laws will not favor or disfavor the different states. *See* 84 Fed. Reg. at 51,347/2. The Supreme Court says disparate state treatment is permissible only after "a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets"—the type of showing EPA demands here. *Nw. Austin Mun. Util. Dist. No. One. v. Holder,* 557 U.S. 193, 203 (2009). In *Northwest Austin*, the Court rejected the imposition of "preclearance" requirements for certain states under the Voting Rights Act. *Id.* The equal sovereignty concern

here is arguably more substantial. Unlike the Voting Rights Act, which gave burdened states a pathway to obtaining parity, *id.* at 199, Section 209 *permanently* bars states other than California from regulating vehicle emissions—making justification of inequitable treatment paramount. Critically, only a year before Section 209(b) was adopted, the Supreme Court specifically explained that diversions from equal sovereignty require "exceptional conditions." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). That is strikingly parallel to the language used by Congress the next year to authorize exceptional treatment for California.

Petitioners claim this doctrine is inapplicable because Section 209(b) "does not impose *any* burden on *any* State," and other states may adopt California's standards under CAA Section 177. Primary Br. at 52 (emphasis in original). First, they offer no logical basis for a distinction between benefits and burdens when it comes to equal sovereignty. Second, a boon given one state—and denied others—does burden other states. California is the only state that may set its own emission standards. While other states may adopt them, those states are denied equal sovereignty to weigh competing problems and design state standards. EPA's interpretation avoids Constitutional concerns by harmonizing its interpretation with these holdings of the Supreme Court. *See Nw. Austin*, 557 U.S. at 203.

Petitioners' remaining attacks are similarly unsuccessful. They note EPA's interpretation conflicts with its previous interpretation. Primary Br. at 48, 50. But *Fox* only requires that an agency give a "reasoned explanation" for the change. *See*

556 U.S. at 516. EPA did here. Petitioners claim the distinction between "local" and other problems is "illusory." Primary Br. at 49 n.17. But the record has ample evidence to distinguish the local nexus attributable to criteria pollutants from the global nature of greenhouse gases. *See infra* Argument § II.C.2.a. And they claim incorrectly that EPA's reading conflicts with a provision on federal procurement, Primary Br. at 50 (citing 42 U.S.C. § 13212(f)(3)). That is incorrect. *See supra* Argument § I.C.4.b.

Petitioners also claim EPA impermissibly distinguished between pollutants where Congress did not. Primary Br. at 48-49. But, as explained above, the fact that a particularized nexus "is present in the case of California's criteria vehicle emissions programs but lacking in the case of its [greenhouse-gas] and [zero-emission-vehicle] ones," *see* 84 Fed. Reg. at 51,349/1 n.279, does not make EPA's interpretation unreasonable. *See UARG*, 573 U.S. at 320 (explaining CAA provisions may not yield identical results for greenhouse gases as for traditional pollutants) ("*Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme.").

Petitioners further claim Section 209(b) must provide a waiver for greenhouse-gas standards because "whatever is preempted [by Section 209(a)] is subject to waiver under subsection (b)." Primary Br. at 50 (quoting *MEMA I*, 627 F.2d at 1106). But the phrase "subject to waiver" does not mean "entitled to waiver." *See* "Subject to,"

Merriam-Webster Dictionary (defined as "affected by or possibly affected by (something)").[24] California can request a waiver for any standard preempted by Section 209(a). But to have that request granted, the request must meet the additional waiver limitations Congress imposed—and EPA must deny it if it does not. *See* 84 Fed. Reg. at 51,343/1 n.266.

Petitioners strain to claim that requiring a particularized, state-specific nexus conflicts with Congress's decision to allow Section 177 states to adopt California's vehicle standards. Primary Br. at 49. This relies on a faulty premise. EPA's interpretation does not require California to show that these problems appear nowhere else in any magnitude at all. But it does require that California's problems be, at least, extraordinary. Congress's decision to allow other states to then piggyback on California standards, once adopted, does not alter application of Section 209(b)'s conditions in the first instance.

At heart, Petitioners claim California cannot be denied a waiver to set any standard for any pollutant problem it wants, so long as California continues to have criteria-pollutant problems. *See* Primary Br. at 46. If Congress intended to give California such a *de facto* exemption, it had much plainer means to do so—as Congress did with respect to California's fuel controls. *See* 42 U.S.C. § 7545(c)(4)(B) (providing California authority to set fuel or fuel additive controls if Section 209(a) preemption

[24] Available at: https://www.merriam-webster.com/dictionary/subject%20to.

"has *at any time* been waived under [Section 209(b)]" (emphasis added)). Congress pointedly did not provide a blanket waiver here. It provided a limited one. EPA has reasonably interpreted those limits; Petitioners' interpretation ignores them.

2. EPA reasonably determined California's greenhouse-gas and zero-emission-vehicle standards fail to qualify for waiver.

California's 2012 waiver request does not satisfy Section 209(b)(1)(B)'s demand that California "need" separate greenhouse-gas standards "to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). California cannot fix this by relying on its unusual criteria-pollutant problems. For these reasons, EPA reasonably determined that California's waiver should be withdrawn.

a. California's greenhouse-gas conditions do not justify a waiver.

California adopted its tailpipe greenhouse-gas standards and zero-emission-vehicle mandate to address climate change. *See* Waiver Request at 1, JAxxxx; 84 Fed. Reg. at 51,344/1 (explaining California's greenhouse-gas-related standards "are designed to address global air pollution and its consequences"). This lacks the necessary "particularized nexus" to conditions specific to California.

California does not have heightened local concentrations of greenhouse gases attributable to in-state emissions or local features that trap or exacerbate pollution. *Id.* at 51,346/3, 51,348/2. Unlike criteria-pollutant emissions, *see id.* at 51,346/1, California's greenhouse-gas emissions "bear no particular relation" to "California-specific circumstances" like thermal inversions resulting from local geography and

wind patterns (which Congress specifically identified when enacting Section 209). *Id.* at 51,341/2, 51,343/2-3. Greenhouse gases globally mix in the upper atmosphere, leaving the same concentration over California as over the rest of the country and, indeed, the whole world. *Id.* at 51,346/3. Consequently, California's tailpipe emissions are "not more relevant to the pollution problem at issue (i.e., climate change) as it impacts California than are the [greenhouse-gas] emissions from cars being driven in New York, London, Johannesburg, or Tokyo." *Id.* at 51,339/2. Thus, there is no particularized connection between California tailpipe greenhouse-gas emissions and California greenhouse-gas concentrations or climate harms (which are "not extraordinary to that state and to its particular characteristics"). 84 Fed. Reg. at 51,339/2.

Nor are California's harms unique. Other regions of the United States also face climate-related harms. *Id.* at 51,348/2-3; 83 Fed. Reg. at 43,249/1. So "while effects related to climate change in California could be substantial, they are not sufficiently different from the conditions in the nation as a whole to justify separate State standards under…section 209(b)(1)(B)." 84 Fed. Reg. at 51,344/1, 51,342/3-343/1 & n.265; *see* 83 Fed. Reg. at 43,248-50.

Desperate to combat these conclusions, Petitioners assert a local nexus is present because greenhouse-gas concentrations can impact local ocean acidification. Primary Br. at 58. But they admit they did not raise this argument during the comment period. *See id.* at 56 n.19. The late comment—and related argument—is

not properly before this Court. Petitioners have not shown EPA was obligated to either consider that comment or make a "finding of impracticability"; nor have they shown that EPA actually considered this comment. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) (proper to exclude documents not considered); *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 543 (D.C. Cir. 1995) (no obligation to consider untimely comments). Petitioners have also failed to make a "substantial showing" that the record is deficient. *NRDC, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975). Their only "showing" is a citation to an earlier motion. But the Court barred parties from "incorporat[ing] those arguments by reference." ECF No. 1843712.[25]

In any event, EPA specifically determined that California's standards "would result in an indistinguishable change in global temperatures and…likely no change in temperatures or physical impacts resulting from anthropogenic climate change in California." *Id.* at 51,341/1, 51,340/3 (explaining that "even standards much more

[25] Moreover, even if considered, the untimely comment does not indicate that local greenhouse-gas emissions from California impact local greenhouse-gas concentrations or ocean acidification in any extraordinary way, as Petitioners suggest. Primary Br. at 58. The submitted article states, "The atmospheric CO_2 anomalies described above *should occur anywhere* that urban or agricultural areas are found near the coast, and the winds are such that they carry terrestrial sources over the marine environment." It further explains these are "*widespread phenomenon worldwide*." Devron Northcott, *Impacts of urban carbon dioxide emissions on sea-air flux and ocean acidification in nearshore waters*, Mar. 27, 2019, at 6/9 (emphasis added), JAxxxx (as part of NHTSA's administrative record).

stringent than either the 2012 Federal standards or California's [greenhouse-gas standards] would only reduce global temperature by 0.02 degrees Celsius in 2100").[26] California does not "need" a measure to "meet" a problem where that measure will have no material effect on the problem. *See id.* at 51,347/3, 51,349/2.

Petitioners' various arguments that California's standards will effect "incremental progress" do not justify waiver. *See* Primary Br. at 53, 58-59; Industry Br. at 5. The claimed progress is "indistinguishable" on a global level. This is a far cry from "marginal" improvement, *see* Primary Br. at 53, or *Massachusetts*'s conclusion that EPA could not refuse to regulate greenhouse gases merely because its efforts would "slow or reduce," but not "reverse," climate change. *See* 549 U.S. at 497; Primary Br. at 58.

More crucially, Section 209 does not ask whether California's standards will reduce the nation's contribution to a global problem. It asks whether California "need[s]" standards to "meet" compelling and extraordinary conditions. And because California's standards only apply to certain states, which can be averaged against emissions in other states by manufacturers to meet the federal standards, they will "lead[] to little to no change in either fuel use or [greenhouse-gas] emissions at a

[26] This is distinguishable from EPA's 2009 waiver review where the record indicated there was "some evidence" of a "specific level of reduction in temperature resulting from California's regulations." *Id.* at 51,340/3.

national level," 84 Fed. Reg. at 51,354/1—and therefore all the more so at a global one.

EPA did not withdraw the waiver because climate change poses no risks in California. EPA withdrew the waiver because Congress enacted Section 209 to establish national uniformity, allowing deviation only for extraordinary local pollution problems . *See supra* Argument § II.C.1.b. California's climate harms (*even if* more acute than some other states') are instead "issues of national, indeed international, concern." 83 Fed. Reg. at 43,249. These are not conditions where Congress allows waiver.

b. California's criteria-pollutant conditions do not justify a waiver.

Petitioners assert that California's standards are authorized because rising temperatures caused by climate change exacerbate the formation of ground-level ozone, a criteria pollutant. Primary Br. at 62. This connection is insufficient under Section 209(b)(1)(B). The required nexus is absent here because, inasmuch as California's ozone problems are exacerbated by high temperatures generally, they are not sensitive to *local* greenhouse-gas emissions that lead to elevated *local* concentrations of greenhouse gases and *local* temperature changes. Rather, they are, at most, sensitive to *global* concentrations of greenhouse gases, which are properly the subject of federal standards. *See supra* Argument § II.C.2.a.

EPA's recognition that federal tailpipe greenhouse-gas standards will reduce criteria-pollutant emissions that are co-emitted with greenhouse gases also does not alter the nexus analysis. *See* Primary Br. at 60 (citing 77 Fed. Reg. at 62,899 & 83 Fed. Reg. at 16,085). Those co-benefits were discussed in the context of national regulations. As EPA noted, these are estimated to be of limited scope, even on a 50-state basis. *See* 83 Fed. Reg. at 16,085/2. And the general fact of co-benefits does not establish any particular *nexus* between California's local standards, conditions, and impacts.

Nor is California's need proven by the presence of tailpipe greenhouse-gas standards in state implementation plans addressing criteria pollutants. *See* Primary Br. at 60. Notably, California's *own* plan does *not* include its tailpipe greenhouse-gas standards. 81 Fed. Reg. at 39,427; *see* 84 Fed. Reg. at 51,335/2. The CAA requires that California's plan include "all emission limitations, control measures, means, and techniques on which the state relies to assure compliance with the [Act]." *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1175-78 (9th Cir. 2015) (discussing 42 U.S.C. § 7410(a)(2)(A)). If California needed its tailpipe standards to address the Act's criteria-pollutant standards, it would have included those standards in its plan. The fact that *other* states have included these standards in their plans cannot show *California's* need.

California also fails to establish that it needs its zero-emission-vehicle mandate in particular to address criteria-pollution problems attributable to vehicle emissions. 84 Fed. Reg. at 51,337/2. In the past, California has used zero-emission vehicles to

compel criteria-pollutant reductions. *Id.* at 51,329/3. But California's waiver request explained that the reductions in the fleet's criteria emissions expected under the submitted standards could be fully achieved by California's criteria-pollutant standards alone. That is, "[t]here is no criteria emissions benefit from including the [zero-emission-vehicle] proposal in terms of vehicle (tank-to-wheel or TTW) emissions," because "[t]he [low-emission-vehicle] III criteria pollutant fleet standard is responsible for those emission reductions in the fleet." Waiver Request at 15, JAxxxx.

Petitioners now disavow those representations. They say California was merely trying to allocate emission reductions among standards covered by the waiver. Primary Br. at 62-63. It would be "preposterous," they claim, to say that selling zero-emission vehicles does not reduce emissions. *Id.* at 63. But it is irrelevant that the presence of the mandate would mean more automakers meet California's criteria-pollutant standards with zero-emission rather than low-emission vehicles. The relevant fact is that California said in its waiver request that "the fleet would become cleaner regardless of the [zero-emission-vehicle] regulation because manufacturers would adjust their compliance response to the standard by making less polluting conventional vehicles." Waiver Request at 15-16, JAxxxx-xxxx. Because automakers will achieve the same criteria-pollutant reductions with or without the zero-emission-vehicle mandate, EPA fairly took California at its word: the zero-emission-vehicle mandate will not reduce vehicle emissions of criteria pollutants.

Petitioners point to EPA's 2013 statement that California's supplemental comments supporting its waiver request "reasonably refute[d]" arguments that the mandate had no criteria benefit. Primary Br. at 62-63 (quoting 78 Fed. Reg. at 2,125). They say these vehicles are "technology-forcing" and that California ostensibly quantified indirect, upstream criteria reductions from the oil-and-gas sector resulting from the mandate. Primary Br. at 61. But those comments merely affirm that California does not anticipate any *vehicle* emission reductions from the mandate "above and beyond the [criteria pollutant] program." *See* Calif. Suppl. Comments at 3-4, JAxxxx. And California further acknowledged that its interest in zero-emission vehicles is about (unspecified) "long term goals" after 2025. *Id.* Moreover, the "exact" level of "indirect" upstream reductions is "uncertain." *Id.* These vague and ancillary gestures do not establish grounds for a waiver.

As with tailpipe standards, the mandate's inclusion in state NAAQS plans is irrelevant. *See* Primary Br. at 60. Though California's plan does include the zero-emission-vehicle mandate, *see* 84 Fed. Reg. at 51,337/1, as previously explained, the mandate is an alternative but superfluous means of compliance with California's planned limits on vehicle criteria-pollutant emissions. Again, actions in other states do not bear on whether *California* needs this mandate in the first instance.

3. EPA was not required to make a general conformity determination.

Petitioners assert EPA violated the CAA's "conformity" requirement. Primary Br. at 64-65. A federal agency must make a general conformity determination (i.e., of conformity with relevant, approved state implementation plans for criteria pollutants) when a federal action increases the "total of direct and indirect emissions" of criteria pollutants above a certain threshold in areas currently or previously designated as in nonattainment with air-quality standards.[27] 40 C.F.R. §§ 93.153(b), 93.158. Petitioners' argument is unavailing.

First, general conformity decisions are not required for rulemaking or policy development. 40 C.F.R. § 93.153(c)(2)(iii). The Ninth Circuit recently held that an administrative adjudication fell outside of this exception, but this hinged on lack of evidence that the adjudication was "a type of rulemaking," including that it was "not issued pursuant to rulemaking requirements and procedures under the APA." *See Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1166 (9th Cir. 2020). By contrast, EPA's action conforms with the rulemaking procedures cited by the *Stand Up* court. It was proposed in the Federal Register and finalized only "after a public hearing and comment period." *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 197 (D.C. Cir. 2011); *see* 84 Fed. Reg. at 51,311/3; *cf.* 5 U.S.C. § 553. Moreover,

[27] The conformity requirement does not apply to greenhouse gases, which are not criteria pollutants. *See* 40 C.F.R. § 93.152; *supra* Introduction.

grant or denial of a Section 209 waiver only adjudicates whether California or EPA will have rulemaking authority to set vehicle emission standards. Either way, any vehicle emissions result from those rulemakings, not EPA's waiver review. Section 209(b) waivers thus fall within the "rulemaking" exception.

Second, even if they did not, the challenged action does not cause "direct" or "indirect" emissions. No emissions will "occur at the same time and place as the action." *See* 84 Fed. Reg. at 51,355; 40 C.F.R. § 93.152.[28] Emissions are also not "reasonably foreseeable." *See* 40 C.F.R. § 93.152. The action here did not change criteria-pollutant standards for vehicles under either federal or state programs. 84 Fed. Reg. at 51,355/3-356/1. And EPA's power to take an "approving action" (like granting or denying waivers) that is a "required initial step for a subsequent activity that causes emissions" does not mean that the agency "practically control[s] any resulting emissions." 40 C.F.R. § 93.152. In any case, state implementation plans remain enforceable until they are amended. *See* 84 Fed. Reg. at 51,338/3 n.256.

[28] NHTSA conducted the conformity analysis in the joint action, but EPA may "adopt the analysis of another Federal agency" where the two have "jurisdiction for various aspects of a project." 40 C.F.R. § 93.154.

III. The Court should dismiss or, alternatively, deny the petitions as to EPA's Section 177 interpretation.

If the Court upholds either the preemption regulations or the waiver withdrawal, it need not reach EPA's interpretation of Section 177. That provision does not apply if no legal California greenhouse-gas standards exist.

As an initial matter, the Court has no jurisdiction to review the Section 177 interpretation. It is not a "final action." *See* 42 U.S.C. § 7607(b)(1); *Sierra Club v. EPA*, 955 F.3d 56, 61 (D.C. Cir. 2020). An agency action is not final if it has no "direct and appreciable legal consequences." *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019) (internal quotation marks omitted).

EPA interpreted Section 177 to exclude California's emission standards for greenhouse gases. Nothing in that interpretation says it would undo, or have any other effect on, either existing approvals of state plans or the plans themselves for criteria pollutants. Nor does it require anyone to take or refrain from action. *See Cal. Cmtys.*, 934 F.3d at 637. It puts nobody "to the choice between costly compliance and the risk of a penalty of any sort." *Id.* That distinguishes EPA's interpretation from the guidance that this Court recently held to be final action in *POET Biorefining, LLC v. EPA*, No. 19-1139, 2020 WL 4745274 (D.C. Cir. Aug. 14, 2020).

In addition, before EPA applies its interpretation to state implementation plans, it would invite public comment on its proposed actions. *See, e.g.*, 79 Fed. Reg. 55,637, 55,638/2 (Sept. 17, 2014); 73 Fed. Reg. 17,896, 17,896/3 (Apr. 2, 2008); 64

Fed. Reg. 67,787, 67,787/2 (Dec. 3, 1999); 42 U.S.C. § 7410(k)(5). And EPA action on a state plan (including application of Section 177) is subject to judicial review. 42 U.S.C. § 7607(b)(1).

A. EPA has authority to interpret Section 177.

As the federal agency administering the CAA, EPA has broad authority to interpret its provisions, including Section 177. *See* 42 U.S.C. § 7601 (providing for CAA administration); 84 Fed. Reg. at 51,351/2. In particular, Congress gave EPA exclusive authority to review and approve state implementation plans. 42 U.S.C. § 7410(a). Nonattainment plans must describe emission controls and other tools that states will use to come into attainment. *See id.* § 7502. "[E]nforceable emission limitations"—like tailpipe-emission standards—are one such control. *Id.* § 7502(c)(6). Enter Section 177, which gives states with nonattainment areas a choice between sticking with federal tailpipe-emission standards, or adopting California's. *Id.* § 7507.

In reviewing state plans, EPA necessarily considers states' authority to adopt the proposed emission controls—including any California standards they adopt as their own. So by authorizing EPA to approve state implementation plans, Congress also authorized EPA to interpret Section 177. *See Chevron*, 467 U.S. at 843.

EPA's extensive role in administering the CAA also distinguishes this case from *Gonzalez v. Oregon*, 546 U.S. 243 (2006). There, the Controlled Substances Act "narrowly" cabined the Attorney General's role. 546 U.S. at 264; *see id.* at 259. That role did not reach the legitimacy of using controlled drugs in physician-assisted

suicides. *Id.* at 258. The court recognized the Attorney General has no medical expertise whatsoever. *See id.* at 265-66.

The opposite is true here. The CAA gives EPA broad authority. And EPA has the precise expertise needed to interpret Section 177, a provision about, as its title says, "New motor vehicle emission standards in nonattainment areas." 42 U.S.C. § 7507.

B. EPA reasonably construed an ambiguity in Section 177.

Section 177 allows qualifying states to adopt and enforce certain California "standards relating to control of emissions" from new motor vehicles. 42 U.S.C. § 7507. But it is ambiguous what emission "standards" can be so adopted.

That ambiguity leads to *Chevron* step two. *See* 467 U.S. at 843. EPA's reading of Section 177—that "standards" means emission standards for criteria pollutants, not greenhouse gases—is reasonable. *Id.* at 843-44; *see* 84 Fed. Reg. at 51,350/2.[29]

Structurally, Section 177 is located in Title I of the CAA, in a part that addresses only criteria pollutants. *See* 42 U.S.C. §§ 7501-7515.

Then, there is Section 177's text. Titles of legal provisions "function as guides—to enable the reader to decide whether he must slog through the whole

[29] EPA's Section 177 interpretation applies to standards that were not adopted to address criteria-pollutant attainment planning. 84 Fed. Reg. at 51,351/1; Primary Br. at 68 n.22. So when a zero-emission-vehicle mandate is adopted for the purpose of greenhouse-gas controls, it is subject to EPA's Section 177 interpretation.

[provision.]" *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 485 (D.C. Cir. 1989). They shed light on ambiguous terms in the text. *See Carter v. United States*, 530 U.S. 255, 267 (2000). Section 177's title, "New motor vehicle emission standards in nonattainment areas," limits the provisions' reach to states with nonattainment areas. The title also ties emission standards to those nonattainment areas. *See* 83 Fed. Reg. at 43,253/1.

Echoing the title, Section 177's first paragraph describes what kind of states can use the provision: any state that "has plan provisions approved under this part"—Part D, "Plan requirements for nonattainment areas." Put this together with the title, and Section 177 allows states with nonattainment areas to adopt California emission standards.

Critically, states can only be in nonattainment of the NAAQS. *See* 42 U.S.C. § 7407(d)(1)(A). No NAAQS exist, and no states are in nonattainment, for greenhouse gases. Because Section 177 is predicated on a state's nonattainment status, it was reasonable for EPA to read "standards" to mean emission standards for criteria pollutants. This reading also gives meaning to all terms in Section 177. The alternative—that Section 177 allows states to adopt California standards for pollutants that they are not and cannot be in nonattainment for—would render superfluous the words "nonattainment" and nonattainment "plan." *Id.* § 7507; *see* 83 Fed. Reg. at 43,253/1.

Nor does Section 209(e), in Title II, undercut EPA's interpretation. Primary Br. at 72; 42 U.S.C. § 7543(e). The different text and placements of Sections 177 and 209(e) signal that Congress intended for them to function differently.

Ultimately, EPA's reading at once fulfills Section 177's purpose and hews to the CAA's preemption scheme. Section 177 aims to give states with nonattainment areas another option to bring those areas into attainment with air-quality standards for criteria pollutants. Allowing states to adopt California's emission standards for criteria pollutants advances that goal. EPA's reading also honors Section 209(a)'s call for national uniformity in emission standards by limiting when states can deviate from federal standards.

C. Petitioners' responses lack merit.

Petitioners criticize EPA's reading of Section 177 on several fronts. None rebuts the reasonableness of that reading.

Petitioners say that Section 177 is "coextensive with—and applies to the same emission standards as—Section 209(b)(1)" on account of their sharing "essentially" the same words. Primary Br. at 70. That is wrong. Section 177 and Section 209(b)(1) have different texts; the latter contains no reference to nonattainment plans. *Compare* 42 U.S.C. § 7507 *with id.* § 7543(b)(1). They are also in completely different parts of the CAA that address distinct issues. Section 177 is in Title I (attainment of air-quality standards); Section 209(b)(1) is in Title II (mobile sources). Petitioners forget that "the presumption of 'consistent usage' 'readily yields' to context, and a statutory

term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'" *UARG*, 573 U.S. at 320 (quoting *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 at 574 (2007)).

Next, Petitioners argue that allowing states to adopt some but not all California's emission standards could impermissibly result in a "third vehicle." Primary Br. at 70-71; 42 U.S.C. § 7507. They are wrong.

First, Petitioners seem to think that the only way to avoid a third vehicle is for states to adopt either all of California's standards, or none of them. But, apart from the issues discussed above, this view clashes with Section 177's text allowing adoption of "any" California emission standards. 42 U.S.C. § 7507. That shows Congress's clear intent to allow other states to adopt some, but not all, of California's standards.

Second, Section 177 allows adoption only of those California standards "for which a waiver has been granted." *Id.* § 7507(1). If the Court upholds either the preemption regulations or the waiver withdrawal, there will be no California standards to adopt, and no third vehicle.

Third, even if Petitioners prevailed on preemption and waiver, their argument would still fail. No third-vehicle problem exists if states "do[] not force auto manufacturers to do something more than they already have to do[.]" *Motor Vehicle Mfrs.*, 17 F.3d at 533, 536. After all, the point of Section 177's third-vehicle prohibition is to avoid unduly burdening automakers by forcing them to create a third

vehicle. *See id.* at 527-28. Here, nothing in EPA's interpretation requires Section 177 states to limit the sale of California-compliant vehicles.

Petitioners' last argument is that because Section 177 expressly sets certain limits, Congress did not limit what "standards" it covers. Primary Br. at 71. In reality, it is not remotely clear that Congress intended to prohibit EPA's current interpretation. So the analysis falls within *Chevron* step two. And EPA reasonably interpreted Section 177.[30]

CONCLUSION

The Court should deny the petitions as to NHTSA's preemption regulations and EPA's waiver withdrawal. It should dismiss the petitions as to EPA's Section 177 interpretation for lack of jurisdiction or, alternatively, deny them.

Respectfully submitted,

DATED: September 9, 2020

JEFFREY BOSSERT CLARK
Assistant Attorney General
Environment & Natural Resources Div.
Acting Assistant Attorney General
Civil Division

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
Environment & Natural Resources Div.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

[30] Petitioners' reliance arguments are also wrong for the reasons discussed above in Argument Section II.A.2. Primary Br. at 73.

DANIEL R. DERTKE
SUE CHEN
LAURA DUNCAN
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7611
Washington, D.C. 20044
(202) 514-9277 (Kolman)
chloe.kolman@usdoj.gov

Of Counsel

MICHAEL KUPPERSMITH
National Highway Traffic Safety Administration
Washington, D.C.

WINIFRED OKOYE
U.S. Environmental Protection Agency
Washington, D.C.

CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it uses 14-point Garamond, a proportionally spaced font.

I also certify that this brief complies with the Court's May 20, 2020 Order because according to Microsoft Word's count, it has 25,949 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on September 9, 2020, I electronically filed this brief with the Court's CM/ECF system, which will serve all parties.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN