ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230 (consolidated with Nos. 19-1239, 19-1241, 19-1242, 19-1243, 19-1245, 19-1246, 19-1249, 20-1175, and 20-1178)

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

UNION OF CONCERNED SCIENTISTS, *et al.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*,
Respondents.

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

On Petition for Review of Final Action
of the United States Environmental Protection Agency
and the National Highway Traffic Safety Administration

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CLEAN AIR AGENCIES

IN SUPPORT OF NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* National Association of Clean Air Agencies, through undersigned counsel, hereby certifies as follows:

A. Parties and *Amici*. All parties and intervenors appearing before this Court are listed in the Brief of State and Local Government Petitioners and Public Interest Petitioners and the Brief of Petitioners National Coalition for Advanced Transportation, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Advanced Energy Economy.

On May 26, 2020, all parties in these consolidated cases consented to the filing of *amicus* briefs provided *amici* comply with Federal Rule of Appellate Procedure 29, District of Columbia Circuit Rule 29, and applicable orders of this Court. As of the time of this filing, the following have submitted briefs as *amici curiae* in support of Petitioners:

- The American Thoracic Society, American Lung Association, American Medical Association, American Public Health Association, and California Medical Association (in support of Public Interest Petitioners).
- National Parks Conservation Association and Coalition to Protect America's National Parks (in support of State and Local Government and Public Interest Petitioners).

- Prof. Leah M. Litman.
- Edison Electric Institute.
- The National League of Cities, the U.S. Conference of Mayors, and the International Municipal Lawyers Association.
- Members of Congress.
- Lyft, Inc.
- Institute for Policy Integrity at New York University School of Law.

In addition, as of the time of this filing, the following have submitted notices of intent to file briefs as *amicus curiae* in support of Petitioners:

- Climate Scientists: Profs. David Dickinson Ackerly, Maximilian Auffhammer, Allen Goldstein, John Harte, David Sedlak, Scott Lewis Stephens, and LeRoy Westerling.
- Thomas C. Jorling, Michael P. Walsh, and Margo T. Oge (in support of State and Environmental Petitioners).

B. Rulings Under Review. The consolidated petitions for review before this Court challenge actions of the U.S. Environmental Protection Agency and the National Highway Traffic Safety Administration jointly published as "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

C. Related Cases. The U.S. District Court for the District of Columbia has consolidated and stayed three cases which challenge the same action of the National Highway Traffic Safety Administration that is at issue here. *California v. Chao*, 1:19-cv-02826-KBJ (filed Sept. 20, 2019) (consolidated with Nos. 1:19-cv-02907-KBJ and 1:19-cv-03436-KBJ). *Amicus curiae* is not aware of any other related cases other than the consolidated cases before the Court.

Dated: July 6, 2020

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* National Association of Clean Air Agencies ("NACAA") states that it is a non-profit organization, has no parent companies, and has not issued shares of stock. There is no publicly held company that owns any stock in NACAA.

Dated: July 6, 2020

Respectfully submitted,

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GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act
EPA	United States Environmental Protection Agency
GHG	Greenhouse Gas
LEV	Low-Emission Vehicle
MEMA	Motor Equipment Manufacturers Association
NAAQS	National Ambient Air Quality Standard(s)
NACAA	National Association of Clean Air Agencies
PM	Particulate Matter
SIP	State Implementation Plan
ZEV	Zero-Emission Vehicle

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the addenda to the Brief of State and Local Government Petitioners and Public Interest Petitioners and the Brief of Petitioners National Coalition for Advanced Transportation, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Advanced Energy Economy.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* hereby states that no counsel for any party to this litigation authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The National Association of Clean Air Agencies ("NACAA") is a non-profit, non-partisan organization of air pollution control agencies in 41 states, including 115 local air agencies, the District of Columbia and four territories. In Section 101(a)(3) of the Clean Air Act ("CAA"), Congress established that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Given this responsibility, the air quality professionals in NACAA's member agencies have vast experience in determining and implementing the most effective regulatory measures and programs for reducing emissions into the air and attaining and sustaining clean air and other goals for the purpose of protecting human health and the environment. As a national association, NACAA's mission includes improving the capability and effectiveness of state and local air agencies. In a Notice filed May 26, 2020, all parties in these consolidated cases consented to the filing of *amicus* briefs provided *amici* comply with Federal Rule of Appellate Procedure 29, Circuit Rule 29, and applicable orders of the Court.

CIRCUIT RULE 29(d) CERTIFICATION

NACAA has a keen understanding of Clean Air Act Sections 209 and 177 and the use and impact of these authorities since their inception. This understanding was gained through decades of first-hand experience working directly with federal, state and local regulators all across the country. Therefore, NACAA is able to offer this Court an important perspective from a distinct, national vantage point.

The purpose of this *amicus* brief is not to advocate on behalf of Petitioners, Respondents or Respondent-Intervenors, whose filings represent their specific interests, but rather to provide information to the Court about matters within NACAA's unique area of expertise: the background and history of Clean Air Act Sections 209 and 177 and the critical role they play in assisting states and localities across the nation—including those that have chosen to exercise these statutory authorities and those that have not—in attaining and maintaining compliance with health-based air quality standards. NACAA recognizes that there are potentially dispositive issues in this litigation that are beyond the purview of this brief. The association takes no position on the Court's ultimate disposition of this case.

SUMMARY OF ARGUMENT

At the very core of these cases is an issue on which NACAA is unwavering: preservation of states' rights. In 1967, Congress protected states' rights by preserving California's authority to regulate emissions from motor vehicles under the waiver provision of Section 209; it extended this right, on a limited basis, in 1977 by allowing

other states to adopt California standards under Section 177. Whether states choose to adopt California's standards, or wish to retain the option to do so, many state and local governments rely, directly or indirectly, on the emissions reductions available through Sections 209 and 177 to meet their statutory obligations and, ultimately, to protect human health and the environment. Congress believed that this staged, cooperative framework would augment federal regulatory capacities and, by affording them greater flexibility, enhance the effectiveness of state air quality programs. All Americans have benefitted from the resulting advances and efficiency gains, with monetizable benefits estimated by the U.S. Environmental Protection Agency ("EPA") to be in the hundreds of billions of dollars.

Virtually all of the motor-vehicle standards that have been issued waivers under Section 209 have been either adopted by other states under Section 177 or enacted as national standards by EPA. States adopting California's standards through Section 177 rely on them to meet their obligations under the CAA or to meet other state goals; other states retain the right to adopt these standards according to their needs or changed circumstances, or they simply reap the benefits of cleaner cars when California and other states exercise these CAA authorities. Withdrawing the waivers for California's light-duty vehicle greenhouse gas ("GHG") emission standards and Zero-Emission Vehicle ("ZEV") program, which were granted more than a decade ago, will deny the benefits of these programs to states and localities across the

country; this will increase regulatory burdens, negatively impact human health, and raise costs for industry and consumers.

ARGUMENT

Preservation of states' rights and inherent police powers is foundational to the CAA. The high stakes, both benefits and costs, surrounding air pollution and the diversity across states of impacts and levels of public concern have mandated this approach. Congress's intent is evident in the basic architecture of the CAA, which is built on a system of cooperative federalism that gives states principal responsibility for determining how they comply with the National Ambient Air Quality Standards ("NAAQS") established under the statute's criteria. However, beginning with the emergence of federal air programs in 1965, the status of state authority over motor vehicles has been a controversial exception to this general rule. In 1967, Congress struck a difficult balance between state and market interests by preserving California's authority to regulate motor-vehicle emissions under the waiver provision of Section 209, while preempting it in all other states. *Motor Equipment Mfrs. Ass'n v. EPA* ("*MEMA*"), 627 F.2d 1095, 1109 (1979) (Congress sought to balance preserving states' inherent pollution-control authorities and automakers' concerns about "having to meet fifty-one separate sets of emissions control standards").

In short order, it became clear to Congress that the difficulties of reducing emissions from motor vehicles were impacting states far more than it had anticipated. Motor vehicle emissions are often the primary source of severe air pollution, and the

combination of practical and federal limits on state authority has caused intense conflict, particularly early on, over NAAQS compliance. This experience impressed upon Congress the truism that management of air quality is a zero-sum proposition; the decision is not whether but what to regulate. If state regulation of motor vehicles is preempted, states must reduce emissions from other sources, such as major industrial or other facilities. Moreover, these tradeoffs are heightened by contributions from natural and external sources that states have no direct capacity to control. Recognizing the significance of these constraints, Congress relaxed federal preemption further in 1977 by allowing states, under Section 177, to freely adopt motor-vehicle standards issued under the Section 209 waiver.

The Section 209 waiver and Section 177 extension are, if anything, more important today than they were when Congress first adopted them. A single national standard for emissions from motor vehicles was viable early on because significant emissions reductions were needed almost everywhere. However, as emissions from motor vehicles have declined, areas in nonattainment for one or more NAAQS have become concentrated around large urban areas; this clustering has caused the averaging inherent in national standards to systematically fall short where they are most needed. The delayed use of Section 177, which states first began to utilize in the 1990s, tracks this divergence between urban and rural areas. The growing divergence in local impacts of, as well as public concerns about, air pollution makes it all the

more important that states' rights are preserved consistently with bedrock principles of federalism.

The implications of withdrawing the waivers for California's GHG and ZEV standards are no different than those for conventional pollutants. All states—including California and the thirteen Section 177 states that have adopted them—will be seriously impacted. The decision will disrupt state efforts to mitigate GHG emissions in the transportation sector, and in many cases will force states to identify alternative measures for meeting the ozone NAAQS and to engage in the costly process of altering State Implementation Plans ("SIPs"). The importance to states of the GHG and ZEV standards is elevated further by the limits of emissions controls on motor vehicles, which are approaching their technological ceilings, whereas vehicle efficiency and alternative-engine technologies are becoming more economic and widely available. The high stakes—namely, the protection of human health and the environment—and diverse impacts at issue reinforce the importance of preserving states' autonomy to balance competing interests across source categories in a manner that is consistent with their values, economic priorities, and administrative capabilities.

I. THE CLEAN AIR ACT IS THE PRINCIPAL LEGAL FRAMEWORK UNDER WHICH STATE AND LOCAL AIR POLLUTION CONTROL AGENCIES OPERATE

Air pollution emerged as an issue of national importance in the 1960s. While severe smog events first occurred in Los Angeles,[1] New York City and other major urban areas also began to experience them by the early 1960s.[2] The worst of these events occurred in November 1966 during a three-day smog event that killed almost 170 people in New York City.[3] By the mid-1960s, it was widely recognized that "air pollution is a metropolitan problem. Any city or metropolitan area with a population of 50,000 or more ha[d] an air pollution problem,"[4] and a 1967 report issued by the U.S. Public Health Service found that "[a]mong the hardest hit areas, New York city was ranked first, followed by Chicago, Philadelphia, Los Angeles, and Cleveland."[5] Thus, while certain criteria air pollutants (*i.e.*, ground-level ozone or photochemical smog) are particularly widespread and persistent in California, air pollution was

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[1] James E. Krier & Edmund Ursin, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940-1975 41 (1977) (observing that "[f]or some time Southern California's physical environment was considered unique insofar as air pollution is concerned; later it became clear that it is simply an extreme case of condition more or less common to many major metropolitan areas currently beset with pollution problems").

[2] Edmund S. Muskie, *The Clean Air Act: A Commitment to Public Health*, ENVTL. FORUM 13, 13-14 (Jan./Feb. 1990).

[3] John Bachmann, *Will the Circle Be Unbroken: A history of the U.S. National Ambient Air Quality Standards*, 57 J. AIR WASTE MGMT. ASS'N. 652, 662 (2007).

[4] John E. O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROBS. 278, 286 (1968).

[5] Jeffrey Fromson, *A History of Federal Air Pollution Control*, 30 OHIO ST. L.J. 516, 534 (1969).

pervasive in urban areas throughout the country into the early 2000s, and it remains a significant issue in many large urban areas, as well as some less-populated areas, today.

Congress recognized the importance of emissions from motor vehicles when it established the first federal controls on air pollution in 1965 with legislation regulating them. The interstate movement of motor vehicles compelled congressional action, but Congress was reluctant to override state police powers. *See* 42 U.S.C. § 7401(a)(3) ("[A]ir pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments"). In 1967, Congress resolved this dilemma by adopting a novel framework that preempted state regulation in all but California. The legislation required California standards to be at least as stringent as their federal counterparts, but otherwise broadly preserved California's regulatory authority. *MEMA v. EPA*, 627 F.2d at 1108 n.22 ("Congress intended California to enjoy the broadest possible discretion in selecting a complete program of emissions control").

Continued deterioration of air quality throughout the country prompted Congress to act again in 1970 with comprehensive legislation that created the modern CAA. The heart of the statute is the NAAQS program, which sets minimum health- and welfare-based standards that apply everywhere, and the procedures and federal oversight of SIPs for meeting them. The 1970 CAA also established extraordinarily aggressive goals for reducing emissions from new motor vehicles—mandating an overall 90-percent reduction in emissions by 1975. 42 U.S.C. § 7521(b). These goals

reflected the anticipated demands of meeting the NAAQS, which Congress acknowledged could require "as much as 75 percent of traffic [] to be restricted in certain large metropolitan areas."[6] At the time, motor vehicles accounted for 50 to 80 percent of smog-causing pollutants in urban areas and their emissions were projected to more than double by 1985 without federal action.[7]

A. Congress Added Section 177 in Response to Conflicts with States over Federal Interventions Compelled by NAAQS Compliance Obligations

Despite many good intentions, it was clear by 1974 that at least 27 regions of the country would require transportation control plans, and that 10 major metropolitan areas would not be able to meet the 1977 air quality standards without severe rationing of gasoline.[8] EPA's efforts to enforce the often draconian plans required to comply with the NAAQS triggered a backlash from officials in major cities that were most impacted, including Boston, Philadelphia, Chicago, and Los Angeles.[9] At the same time, federal motor-vehicle standards were subject to intense opposition from industry and similar delays.[10] Predictably, as the 1977 deadline

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[6] Pete Domenici, *Clean Air Act Amendments of 1977*, 19 NAT. RESOURCES J. 475, 477 (1979).

[7] Fromson, *supra* note 5, at 526-27.

[8] Krier & Ursin, *supra* note 1, at 239.

[9] Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1547, 1552 (1995-96).

[10] Domenici, *supra* note 6, at 477.

approached for attaining the NAAQS, "nearly all of the most heavily polluted urban areas in the country were far out of attainment."[11]

The 1977 Amendments to the CAA followed these politically charged initial efforts to implement the NAAQS. Among other lessons, this early experience revealed that preemption of state regulation under Section 209 was having a much greater and widespread impact on local and state air programs than Congress had anticipated. In the legislative history of the 1977 Amendments, Congress concluded that preemption under Section 209 "interferes with legitimate policy powers of states, prevents effective protection of public health, and limits economic growth and employment opportunities in nonattainment areas for automotive pollutants." H.R. Rep. No. 95-294, 309 (1977).

These early setbacks put immense pressure on Congress to include in the 1977 Amendments a legislative solution to these tensions.[12] Towards this end, Congress sought "to increase the involvement of state and local governments and the public in determining how best to achieve the health-based standards."[13] The addition of Section 177 was central to this effort; it allowed other states to adopt California's standards, so long as they were "identical" to them and the states provided two years of lead time. H.R. Rep. No. 95-294, 310 (1977). Further, through the limiting

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[11] McGarity, *supra* note 9, at 1553.

[12] Domenici, *supra* note 6, at 483.

[13] Bruce Kramer, *The 1977 Clean Air Act Amendments: A Tactical Retreat from the Technology-Forcing Strategy?*, 15 URB. L. ANN. 103, 125 (1978).

"identity" condition, Congress believed that Section 177 "[w]ould not place an undue burden on vehicle manufacturers who will be required, in any event, to produce vehicles meeting the California standards for sale in California." *Id.* In large part because of this, Congress gave states exclusive authority over determining whether to adopt California standards under Section 177 and strictly limited EPA's role to defining when a vehicle's model year commences for purposes of setting the start date for the statutory two-year lead time requirement. *Motor Vehicle Mfrs. Ass'n v. NYSDEC*, 17 F.3d 521, 535 (2d Cir. 1994); *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1298 (D.C. Cir. 1979).

The addition of Section 177 expanded the options available to states for meeting the NAAQS and other state objectives. The added flexibility afforded by Section 177, even though strictly limited to standards issued by California, empowered states to adopt the policies that most effectively address sources contributing substantially to their air quality problems, or that more closely matched local concerns about the impacts from air pollution on human health or the environment. This flexibility remains important today because 130 million people live in areas that exceed at least one NAAQS, and 122 million people (almost 90 million of them outside of California) live in areas where ozone levels exceed the 2015 NAAQS.[14]

[14] *See* EPA, National Emissions Inventory (2014), *available at* https://www.epa.gov/air-emissions-inventories/2014-national-emissions-inventory-nei-data.

Twelve states and the District of Columbia have independently exercised their Section 177 authority to adopt California's emission standards for GHGs and criteria pollutants issued under its Advanced Clean Cars program; nine of the 12 states have adopted the ZEV regulations. California and the Section 177 states together represent 113 million Americans and comprise one-third of the new-car sales market in the U.S. These programs are vitally important to the Section 177 states, and they benefit non-Section 177 states when California and Section 177 states lead the way and EPA later nationalizes, as it initially did here for GHG emissions, standards issued under a Section 209 waiver.

B. Preserving State Regulatory Authority over Sources of Air Pollution that They Can Control Is Critically Important Because NAAQS Compliance Is Impacted Significantly by Natural and External Sources

The federal government plays a central role under the CAA despite the variety of needs and interests that exist across states. Compliance with the NAAQS is complicated by natural sources and the geographic scales over which criteria pollutants are transported. Criteria air pollutants, which are emitted by "numerous and diverse" sources, almost by definition transcend jurisdictional boundaries. Local ambient concentrations of most criteria pollutants are impacted by sources across multiple spatial scales, and this is particularly true of the criteria pollutants that have the greatest impacts on human health, particulate matter ("PM") and ground-level ozone. Congress recognized the inevitability of such extra-jurisdictional impacts

explicitly in Sections 114 and 109. 42 U.S.C. §§ 7402(a), 7415 & 7426. Thus, while the CAA's framework of cooperative federalism is premised on state and local pollution management through SIPs, their geographic scale fits imperfectly with air pollutants that can travel continental distances.

The challenges of local control are complicated further by sources of criteria pollutants that are biogenic or impacted by climactic conditions. These external sources—often referred to as "noncontrollable sources"—are ubiquitous.[15] For example, volatile organic compounds, one of two chemical precursors to ground-level ozone, are emitted by forests; PM is often released in large quantities by forest fires; and biogenic sources of both PM and ground-level ozone are sensitive to weather conditions. As a consequence, ambient levels of conventional criteria pollutants will increase in many areas as climate change progresses.[16] Air pollutants therefore exist on a continuum, and few are exclusively local or anthropogenic, or fully manageable at the state or local level. State and local regulators must work around such external sources of air pollution; further restrictions on their authority through federal law exacerbate these challenges and limit state options.

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[15] Daniel A. Jaffe, *Scientific Assessment of Background Ozone over the U.S.: Implications for Air Quality Management*, 6 ELEMENTA 56 (2018).

[16] Arlene M. Fiore et al., *Air Quality and Climate Connections*, 65 J. AIR WASTE MGMT. ASSOC. 645 (2015); Daniel J. Jacob, *Effect of Climate Change on Air Quality*, 43 ATMOS. ENV'T 51 (2009).

II. THE CLEAN AIR ACT IS BUILT UPON SHARED AUTHORITY BETWEEN STATE, LOCAL, AND FEDERAL GOVERNMENTS

The CAA is built on a framework of cooperative federalism that facilitates synergies across state, local, and federal authorities. Congress recognized that the virtue of national emission standards is that they provide equal treatment and consistency across the country. However, Congress also understood that because pollution levels and local impacts vary widely across the country, national standards will provide inadequate reductions in many states and localities and more than what is required for attainment and maintenance in others; background variability therefore precludes any single standard from striking a safe and efficient balance everywhere. By authorizing a parallel set of standards to evolve and any state to adopt them, Sections 209 and 177 mitigate the regulatory inefficiencies and potential conflicts with state and local agencies that arise with uniform national standards.

A. Sections 209 and 177 Preserve State Authority, on a Limited Basis, to Address the Diverse Impacts of and Public Concerns About Air Pollution

In the early years of implementing the CAA, many urban areas and other parts of the country were violating one or more NAAQS, and emissions from motor vehicles were often the primary source of air pollution. A single national standard for emissions from motor vehicles was viable at this stage because significant emissions reductions were needed almost everywhere. However, as emissions from motor vehicles have declined, nonattainment areas have increasingly clustered around the

largest urban centers or areas with adverse meteorological or topographic conditions. Emissions from motor vehicles, which scale with population, have often been the common denominator that distinguishes attainment from nonattainment areas. This bimodal pattern causes the averaging inherent in a national motor-vehicle standard to result in systematic regulatory deficits for states and localities in which the impacts from, or public sensitivity to, air pollution fall within the large-urban mode of the distribution.

The importance of the Section 209 waiver is consequently greater today than it was earlier in the evolution of implementing the CAA. The impacts of and public concerns about air quality have diverged over time, and these differences are often most pronounced in the divisions we commonly observe between urban and rural areas. California is an apt proxy in both its vulnerability to poor air quality and its public values, and thus offers regulatory options that are aligned with urban communities throughout the country. This role, based on relative impacts and local priorities, is consistent with the bedrock of our federal system, as well as the framework of cooperative federalism on which the CAA is grounded.

B. General Principles of Federalism Favor a Broad Reading of Sections 209 and 177 that Preserves State Autonomy

A cleaner, low-emissions transportation sector is essential to achieving state and local climate goals and to meeting and sustaining federal air quality standards. States and localities will be challenged in meeting these goals and standards if the

federal government denies them access to more protective GHG vehicle emission standards and the ZEV program. Moreover, revoking the authorities granted to states in Sections 209 and 177 not only disempowers and harms the states that have already exercised their rights under Section 177, it forecloses other states from exercising these rights in the future. Sections 209 and 177 reflect Congress's adherence to the Founders' ideal of robust federalism by giving states the flexibility to adopt alternative policies consistent with their regulatory needs and values. As amply borne out over fifty years, this two-tiered framework for cooperative state and federal regulation strikes a careful balance between preserving state police powers and protecting distinctive state interests, while minimizing disruptions to national markets for motor vehicles.

In view of the Constitution's text and history preserving a vibrant federal system, the Supreme Court applies a presumption against preemption in Supremacy Clause cases. *See, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("[W]e assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'") (internal citations omitted). This presumption applies with equal force in cases involving anti-preemption savings clauses, such as the Section 209(a) waiver provision, by requiring that any ambiguity be resolved in favor of state authority. Congress was also clear that limiting the statute to the blanket preemption in Section 209(a) would "interfere with legitimate

police powers of States, prevent[ing] effective protection of public health." H.R. Rep. No. 95-294 at 309.

These principles are reinforced by the long-standing recognition that regulation of air pollution falls squarely within traditional state police powers. *See Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000); *Associated Indus. v. Snow*, 898 F.2d 274, 282 (1st Cir. 1990); *Oxygenated Fuels Ass'n, Inc. v. Davis*, 163 F. Supp. 2d 1182, 1188 (E.D. Cal. 2001). Accordingly, Congress did not confer the powers "saved" to the states under the CAA—such as regulating used car emissions and stationary sources—because those powers predated the CAA and were left undisturbed. *See* 42 U.S.C. § 7416. In analogous divisions of authority, courts have held that "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

Courts have also held that if specific congressional intent to override state authority is absent in the statute, this argues strongly against federal preemption. The U.S. Supreme Court has emphasized that "[t]he presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985). Further, if Congress must make its intent "unmistakably clear" when "alter[ing] the usual constitutional balance between the States and the federal Government," the

need for an express grant of authority is even greater where the adjudication over granting a waiver occurred six years ago. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also MEMA*, 627 F.2d at 1119 ("The EPA Administrator does not have authority to regulate … [states] under a broad charter to advance the public interest.").

III. THE FLEXIBILITY AFFORDED BY SECTIONS 209 AND 177 TO ADOPT ALTERNATIVE STANDARDS HAS BEEN ESSENTIAL TO THE SUCCESS OF MANY STATE AND LOCAL AIR PROGRAMS

The CAA's two-tiered system of state and federal regulators working in tandem has delivered dramatic improvements in air quality and enormous benefits across the country. Between 1970 and 1990, emissions of criteria pollutants declined by 30 to 99 percent, with new emissions controls on motor vehicles accounting for the majority of emissions reductions for ozone precursors (volatile organ compounds, nitrogen oxides), carbon monoxide, and lead.[17] Overall monetizable benefits were estimated to be $6.8 trillion in 1990 versus costs of $436 billion.[18] More recent projections for the period 1990 through 2020 are similarly lopsided towards benefits, which are estimated to be $1 trillion to $35 trillion in 2006 and 4 to 92 times greater than the costs.[19] These estimates demonstrate that the stakes for state and local government are extremely high throughout much of the country.

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[17] EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970 – 1990 x (1997).

[18] *Id.* at xvii.

[19] EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1990 – 2020 xvii (2011).

Federal standards, often nationalizing California programs, have accounted for "the vast majority of reductions in transportation-related emissions."[20] Accordingly, most of the benefits associated with allowing California to set its own standards have derived from direct EPA adoption. For example, EPA's most recent Tier 3 standards, which mirror California's Low-Emission Vehicle ("LEV") III standards, will have annual monetizable benefits in 2030 of $6.7 to $19 billion versus annual costs of $1.5 billion.[21] The direct benefits, however, ignore avoided costs; specifically, that without the Tier 3 standards "nonattainment areas in about half the states would need to impose more controls on stationary sources of ozone precursors and particulates (e.g., power plants and factories)."[22]

Since its first use, Section 177 has provided critically important flexibility for states to comply with the NAAQS and other state standards. This flexibility has allowed states to avoid alternatives for reducing emissions that were more costly, administratively burdensome, or politically contentious. Section 177 gives states the option of reducing emissions further from motor vehicles, which are often still the single largest anthropogenic contributors to ground-level ozone.[23] In doing so, it

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[20] Arnold M. Howitt & Alan Altshuler, *The Politics of Controlling Auto Air Pollution*, *in* ESSAYS IN TRANSPORTATION ECONOMICS & POLICY (Jose Gomez-Ibanez et al., eds.; 1999).

[21] Congressional Research Service, TIER 3 MOTOR VEHICLE EMISSION AND FUEL STANDARDS 9 (2014).

[22] *Id.* at 7.

[23] EPA, *supra* note 14.

allows states to strike an appropriate balance among the major sources—mobile, industrial, and nonpoint—of smog-producing emissions within their jurisdictions. If states could not reduce motor vehicle emissions through Section 177, they would have to reduce emissions from a different class of sources, such as power plants or refineries, assuming additional reductions were feasible or even available in the jurisdiction. When determining what reductions are necessary to meet the federally established public health standards, the decisions are unavoidably zero-sum; the issue is never whether but what to regulate.

A. Virtually All of the Motor-Vehicle Standards Issued by California Under Section 209 Were Nationalized by EPA or Adopted by Other States Under Section 177

The evolution of state and federal standards for motor vehicles under the CAA has operated just as Congress intended. Congress sought to strike a balance between allowing state-level innovation and adoption of alternative standards versus overburdening the market for motor vehicles with conflicting regulations. In practice, the coexistence of two sets of regulations has been short-lived, as EPA has almost invariably adopted California's standards. This framework has facilitated rapid technological advances and dramatic declines in emissions, which have had enormous benefits for human health and the environment. The accelerated progress has demonstrated the value of Congress's decisions to preserve California's authority to set motor-vehicle standards under Section 209 and to allow other states to adopt them freely under Section 177. The remarkable gains made over half a century also

underline the importance of precluding restrictions on California's authority, and derivatively the authority of other states under Section 177, that are not based on express statutory language.

Prior to 1990, EPA adopted virtually all of the standards California issued for motor vehicles, but this was driven by the 90-percent emissions-reduction target for motor vehicles that Congress mandated in the 1970 CAA. It was only after 1990 that California's standards were dictated by compliance considerations associated with the NAAQS or separate state standards. Nevertheless, despite the absence of a controlling federal mandate, virtually all of the standards California promulgated after 1990 were adopted by other states under Section 177 or nationalized by EPA, albeit typically on a slower implementation schedule.

Section 177 was not utilized by other states until the early 1990s in large part due to the 1970 federal mandate. Northeastern states, which were often still struggling to meet the ozone NAAQS, were the first to exercise it.[24] New York and Massachusetts led the way, with Maine and Vermont following several years later.[25] As Congress intended, these states adopted the California standards "to achieve emissions reductions that would help [them] to meet their air quality goals," whether those were required by the NAAQS or by more stringent state objectives.[26] The

[24] National Academy of Sciences, STATE AND FEDERAL STANDARDS FOR MOTOR VEHICLES 9 (2006).

[25] *Id.* at 113, 207.

[26] *Id.* at 176.

emissions reductions associated with the LEV I program, for example, were an integral part of the SIPs for both New York and Massachusetts.[27] By contrast, Vermont's decision was guided by state goals. This was implicit in Vermont's decision to avoid the burdens of EPA oversight by declining to include the emissions reductions achieved by the LEV I standards in its SIP for the ozone NAAQS.

Adoption of the California LEV I standards by other states prompted car manufacturers to offer, on a voluntary basis, to sell low-emitting cars that exceeded federal standards in all 49 non-California states, but only if the four Section 177 states abandoned the LEV I program.[28] Although the four states did not drop the LEV I standards, car manufacturers nevertheless implemented the voluntary standards in collaboration with EPA—presumably to dissuade other states from adopting the LEV I standards. EPA issued the voluntary standards in 1998 under the National Low Emission Vehicle ("NLEV") Program, which went beyond the requirements of the CAA, but followed a slower implementation schedule than California's LEV I program and omitted its ZEV mandate altogether. 63 Fed. Reg. 926 (Jan. 7, 1998).

California's second round of regulations, the LEV II standards scheduled for model-year 2004, triggered a similar response. The four existing Section 177 states adopted the LEV II standards, and they were eventually joined by six other

[27] *Id.* at 213-14.

[28] Taly L. Jolish, *Negotiating Smog Away*, 18 VA. ENVTL. L.J. 305, 329-30 (1999).

northeastern states along with Oregon and Washington.[29] Similar to the experience with the LEV I standards, this wave of adoptions prompted EPA to enact largely identical Tier 2 standards, albeit again on a slower implementation schedule and with several other secondary modifications.[30] California's most recent round of standards, LEV III, were finalized in 2012 and developed in collaboration with EPA, which issued parallel Tier 3 standards in 2014. The LEV III and Tier 3 programs were also coordinated with EPA's GHG standards for motor vehicles and California's existing GHG standards. *See* 77 Fed. Reg. 62,624, 62,637 (Oct. 15, 2012). EPA and California worked together to harmonize the California GHG standards with EPA's national standards; EPA granted a waiver for California's GHG and ZEV standards in 2013, JA__[R-7839_2115], and all of the standards were finalized in 2015.

B. States Rely on the GHG and ZEV Standards to Meet Their Obligations Under the Health-Based NAAQS

State planning processes for attaining and maintaining the NAAQS are notoriously complex, costly, and time consuming. Even small changes to a SIP or the rules governing NAAQS compliance can cause substantial increases in costs and delays in NAAQS compliance. This has led to what one commentator has referred to as "the tyranny of the status quo," and deep aversion on the part of state regulators to

[29] National Academy, *supra* note 24, at 206. The six other states included Connecticut, Delaware, Maryland, New Jersey, Pennsylvania, and Rhode Island.

[30] National Academy, *supra* note 24, at 96.

make even minor changes in their SIPs under the NAAQS program.[31] Retroactively nullifying state compliance options available through Sections 209 and 177, particularly six years after the waiver was granted, will disrupt SIPs for meeting the ozone NAAQS and upend substantial state reliance interests. *See Chapman v. El Paso Nat. Gas Co.*, 204 F.2d 46, 53-54 (D.C. Cir. 1953) (rejecting the reversal of an earlier adjudication based on a "change in administrative policy, particularly where" reliance interests exist); *see also United States v. Seatrain Lines Inc.*, 329 U.S. 424, 429 (1947). EPA is required to consider the reliance interests of California and the Section 177 states. *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 591 U.S. _ (2020) (slip op. at 24-25) (holding that even when a federal regulation states that it "confer[s] no substantive rights," reliance interests are not foreclosed and must be considered by a federal agency altering an established rule). Yet, EPA conceded in the SAFE Vehicles rulemaking that it has not identified alternative measures that Section 177 states could use as replacements for the GHG and ZEV standards in their SIPs for meeting the health-based ozone NAAQS. 83 Fed. Reg. 42,986, 43,244 (Aug. 24, 2018).

Even states that have not yet adopted standards under Section 177 depend on them to address clean air goals and regulatory compliance needs. For example, in Colorado, which will not begin implementing GHG standards and ZEV program until 2022 and 2023, respectively, the waiver denial "would expose Coloradans to

[31] National Academy, *supra* note 24, at 173.

substantial additional amounts of [ozone] and result in serious health harms," as well as "lead to 286 heart-disease-related and 234 lung-disease-related hospital admissions, and up to 304 more premature deaths by 2050."[32] The magnitude of these impacts is attributable to "motor vehicles, together with oil and gas operations, [being] the largest local contributors to unhealthy ozone levels along the northern front range," where most of the state's population in concentrated.[33]

As this example illustrates, reducing emissions from motor vehicles continues to be essential to attaining and maintaining compliance with the health-based ozone NAAQS and, in other settings, the PM NAAQS.[34] Motor vehicles are the single largest source of nitrogen oxides in ozone nonattainment areas, accounting, on average, for roughly 50 percent of the emissions. Reductions in criteria pollutants, as well as air toxics, are also achieved through controls on emissions from fuel production and distribution. Improvements in vehicle efficiency driven by the GHG standards and ZEV mandates, which each lower fuel demand, will indirectly reduce upstream emissions from petroleum extraction, oil refining, and distribution of motor vehicle fuels. The GHG and ZEV programs therefore have a double dividend in downstream emissions reductions of nitrogen oxides and other pollutants directly

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[32] Richard Rykowski, COLORADO ZERO EMISSION VEHICLE PROGRAM WILL DELIVER EXTENSIVE ECONOMIC, HEALTH AND ENVIRONMENTAL BENEFITS 14 (July 2019).

[33] *Id.* at 13-14.

[34] Margaret Zawacki, *Mobile source contributions to ambient ozone and particulate matter in 2025*, 188 ATMOS. ENV'T. 129, 139 (2020).

from motor vehicles as well as upstream emissions from the fuel cycle and oil production.

The value of the GHG and ZEV standards are elevated further by the increasing difficulty of improving regulatory compliance and emissions control technologies. For example, more than 90 percent of the emissions of nitrogen oxides from newer light-duty vehicles with advanced emissions-control systems are generated during the time it takes (typically a few seconds) for control systems to warm up.[35] Tradeoffs also exist between controlling emissions of PM versus reducing emissions of GHGs, hydrocarbons, and nitrogen oxides.[36] Further, light-duty vehicles in the top quintile for emissions of nitrogen oxides—so called high emitters that are poorly maintained, illegally altered, or simply older vehicles—can account for "well over 50 percent" of emissions from the light-duty fleet.[37] Emissions control systems are therefore approaching their technological limits, while addressing high emitters is subject to resource and administrative constraints. By contrast, vehicle efficiency and new engine technologies are increasingly economic, more widely available, and relatively simple to oversee administratively.

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[35] California Air Resources Board, CALIFORNIA'S ADVANCED CLEAN CARS MIDTERM REVIEW: SUMMARY REPORT FOR THE TECHNICAL ANALYSIS OF THE LIGHT DUTY VEHICLE STANDARDS ES-30 (2017).

[36] *Id.*

[37] California Air Resources Board, MOBILE SOURCE STRATEGY 70 (2016).

Withdrawal of the waivers for California's GHG and ZEV standards, and indirectly nullification of states' rights under Section 177, will lead to higher costs for consumers purchasing new motor vehicles. Either states will adopt a new, stricter California emissions-control standard for conventional pollutants issued pursuant to Section 209 in the future or EPA will issue one, or they will have to impose stricter standards on other sources. As noted above, reducing emissions is a zero-sum proposition; if federal preemption precludes states from adopting policies to reduce emissions from motor-vehicles, the reductions must come from another sector of the economy. Withdrawal of the California waiver will therefore limit the freedom of states to balance competing interests across source categories in a manner that is consistent with their values, economic priorities, and administrative capabilities.

All states—including California and the thirteen Section 177 states that have adopted the GHG or ZEV standards—will be affected by EPA's waiver withdrawal. The decision will disrupt the efforts of a number of states to mitigate GHG emissions from the transportation sector, and in many cases it will force states to identify alternative measures for meeting the ozone NAAQS and to engage in the costly process of altering their SIPs. California has made, and is continuing to make, decisions about other regulatory actions, particularly those associated with the PM and ozone NAAQS,[38] in reliance on the emissions reductions achieved through its GHG

[38] CALIFORNIA'S FOURTH CLIMATE CHANGE ASSESSMENT, CALIFORNIA'S CHANGING CLIMATE 2018: STATEWIDE SUMMARY REPORT 40 (2018).

and ZEV programs.[39] Similarly, the SIPs for meeting the ozone NAAQS in Connecticut, Maine, and Maryland also rely substantially on the emissions reductions associated with these standards.[40] Other states and localities receive indirect environmental, economic, and regulatory benefits from the advances, both technological and regulatory, achieved when action is taken under Sections 209 and 177. States and localities benefit from the freedom to adopt the standards as associated impacts and public awareness evolve.

CONCLUSION

Congress believed that the two-stage, cooperative framework established by Sections 209 and 177 would augment federal regulatory capacities and, by affording them greater flexibility, enhance the effectiveness of state air quality programs. The high stakes, both benefits and costs, surrounding air pollution and the diversity across states of impacts and levels of public concern mandated this approach. The Section 209 waivers for the GHG and ZEV standards, and derivatively the freedom of states to adopt them through Section 177, remain as critically valuable options for states in addressing the most persistent forms of air pollution. This is self-evident from the contrasting trends of the relevant technologies; in particular, alternative-engine

[39] CALIFORNIA'S 2017 CLIMATE CHANGE SCOPING PLAN ES-4 (2017).

[40] *See* 82 Fed. Reg. 42,233 (Sept. 7, 2017) (Maine); 80 Fed. Reg. 40,917 (July 14, 2015) (Maryland); 80 Fed. Reg. 13,768 (Mar. 17, 2015) (Connecticut).

technologies—often with no direct emissions—are becoming more economic and widely available.

Without the waivers for California's light-duty vehicle GHG emission standards and ZEV program, states and localities across the country will face increased regulatory burdens, negative impacts on human health, and higher costs for industry and consumers. Of particular importance to NACAA is avoiding a precedent that would undermine states' rights and restrict their freedom to balance competing interests in a manner that is consistent with their values, economic priorities, and administrative capabilities.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations set forth in this Court's order dated May 20, 2020 because the brief contains 6,376 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which served a copy of the document on all counsel of record in the case.

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