ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, *et al.*, Petitioners, v. ANDREW R. WHEELER, *et al.*, Respondents.	No. 19-1239 (consolidated with No. 19-1230)
CITY AND COUNTY OF SAN FRANCISCO, Petitioners, v. ANDREW R. WHEELER, *et al.*, Respondents.	No. 19-1246 (consolidated with No. 19-1230)

MOTION TO HOLD CASE IN ABEYANCE

INTRODUCTION

With the support of all petitioners, the undersigned State and Municipal Petitioners move to hold all of these consolidated cases in abeyance pending: (1) final action on administrative reconsideration petitions now pending before the Environmental Protection Agency ("EPA"); and (2) resolution of a proceeding involving most of the same parties and overlapping legal issues pending in the U.S. District Court for the District of Columbia, *California, et al. v. Chao*, Case No. 19-cv-2826 (D.D.C. filed Sept. 20, 2019).

Holding the consolidated cases in abeyance would promote judicial economy and conserve resources. Allowing the administrative process to run its course before the Court takes up the cases will give EPA the opportunity to dispel existing uncertainty regarding the scope of its action and the reasons therefore. This may narrow the scope of the issues to be decided and avoid the need for the Court to weigh in on abstract disagreements. In addition, the pending district court proceeding may narrow or sharpen the issues by deciding a predicate question.

Furthermore, Respondents would not be harmed by an abeyance. The challenged actions are in effect, this case is in its early stages, the district court proceeding is already underway and will likely be resolved on summary judgment motions, this Court can consolidate any appeal of that proceeding with this case,

and EPA has control over its timeline for review and final action on the reconsideration petitions.

Counsel for the State and Municipal Petitioners sought the position of other parties and received the following responses: All petitioners stated their support for the requested abeyance; Petitioners in Case Nos. 19-1230 and 19-1243 will also be filing a motion for abeyance; Respondents stated they will oppose this motion, and on December 19, 2019 filed a motion to expedite briefing in these cases; Intervenors Coalition for Sustainable Automotive Regulation and Global Automakers also stated they will oppose this motion; Movant-Intervenor American Fuel and Petrochemical Manufacturers took no position on this motion.

BACKGROUND

These consolidated cases challenge "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," jointly promulgated by EPA and the National Highway Traffic Safety Administration ("NHTSA") (84 Fed. Reg. 51,310 (Sept. 27, 2019)) ("Final Actions").

I. THE REGULATORY FRAMEWORK AND RULEMAKING HISTORY

A. The Clean Air Act and State Vehicle Emissions Standards

The Clean Air Act directs EPA to prescribe vehicle emissions standards for new motor vehicles and engines and generally prohibits states from adopting their own standards. *See* 42 U.S.C. §§ 7521, 7543(a). Congress, however, required the

EPA Administrator to waive preemption for California to adopt and enforce its own standards if: (1) California's "standards will be, in the aggregate, at least as protective of public health and welfare" as the federal ones; (2) California "need[s] such State standards to meet compelling and extraordinary conditions"; and (3) California's standards are consistent with Clean Air Act Section 202(a), 42 U.S.C. § 7521, meaning that they provide sufficient lead time to permit manufacturers to develop and apply the necessary technology. *Id.* § 7543(b); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998).[1] Although California is the only state that qualifies for this preemption waiver, Congress added Section 177 to the Clean Air Act to permit other states to "adopt and enforce" California's standards, under certain conditions. *Chamber of Commerce v. EPA*, 642 F.3d 192, 197 (D.C. Cir. 2011) (citing 42 U.S.C. § 7507). Thus, Congress authorized a two-standard regulatory system nationwide.

California obtained its first waiver under this provision in 1968, for standards limiting exhaust emissions of hydrocarbons and carbon monoxide from model year 1969 vehicles. 33 Fed. Reg. 10,160 (Jul. 16, 1968). A year later, California

[1] The Clean Air Act permits "any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966" to apply for this preemption waiver. 42 U.S.C. § 7543(b). "California was the only state which" had done so. *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1296 (D.C. Cir. 1979).

received another waiver for additional emissions standards for oxides of nitrogen and other pollutants. 34 Fed. Reg. 7,348 (May 6, 1969). In the decades since, California has continued to adopt more stringent emissions standards. To date, the California Air Resources Board has received more than 100 waivers.[2] In the fifty years following EPA's approval of California's first waiver, EPA never sought to revoke a waiver.

On January 9, 2013, EPA granted California's request for a waiver of preemption to enforce its Advanced Clean Car program regulations for model years 2015 through 2025. 78 Fed. Reg. 2,112-01 (Jan. 9, 2013). That program comprises integrated regulations to reduce vehicle emissions of multiple pollutants. The program establishes vehicle emissions standards for manufacturers selling new motor vehicles in California. In addition, the program's zero-emission vehicle standards require that a certain number or percentage of vehicles sold or delivered in California by a manufacturer emit zero exhaust emissions.[3] The greenhouse gas

[2] Barry G. Rabe, Leveraged Federalism and the Clean Air Act, in LESSONS FROM THE CLEAN AIR ACT: BUILDING DURABILITY AND ADAPTABILITY INTO U.S. CLIMATE AND ENERGY POLICY 113, 132 (Ann Carlson & Dallas Burtraw eds., 2019).

[3] Zero-emission vehicles include passenger cars, light-duty trucks, and medium-duty vehicles that produce zero exhaust emissions of any criteria pollutant or greenhouse gas. Cal. Code Regs., tit. 13, § 1962.2. Zero emission vehicle platforms currently on the market are full battery-electric and hydrogen fuel cell vehicles.

emission standards in California's program are similar to federal standards adopted by EPA. California recognizes compliance with those federal standards as compliance with California's, thereby allowing manufacturers to comply with one set of standards nationwide.[4]

B. The Federal Agencies' Proposed Actions

On August 24, 2018, EPA and NHTSA jointly proposed significant changes to how motor vehicle pollution and fuel economy are regulated. The agencies proposed federal greenhouse gas emission and fuel economy standards for the 2021 to 2026 model years, with a preferred alternative to freeze the standards at the levels applicable to the 2020 model year. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 42,988 (Aug. 24, 2018) ("Proposal"). The Proposal would replace substantially more stringent standards that EPA and NHTSA adopted in 2012, under the Clean Air Act and the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, respectively. *Id.*

In the same Proposal, both agencies also proposed actions directed at invalidating states' greenhouse gas emission and zero-emission vehicle standards. NHTSA proposed regulatory text purporting to declare state greenhouse gas emission and zero-emission vehicle standards preempted by the Energy Policy and

[4] Cal. Code Regs., tit. 13, § 1961.3(c).

Conservation Act. EPA proposed to revoke the portion of California's 2013 waiver for its greenhouse gas emission and zero-emission vehicle standards for model years 2021 through 2025 on three grounds: (1) that NHTSA's preemption regulation warranted revoking the waiver; (2) that California did not need its greenhouse gas emission and zero-emission vehicle standards to meet compelling and extraordinary conditions under Clean Air Act Section 209(b)(1)(B); and (3) that pursuant to Section 209(b)(1)(C), California's greenhouse gas emission and zero-emission vehicle standards were not consistent with Clean Air Act Section 202(a) because they would become too costly. 83 Fed. Reg. at 42,999, 43,232. EPA relied on "costs and technological feasibility considerations," along with a change in administrations, as the "changed circumstances" justifying its proposal. 83 Fed. Reg. at 43,243. EPA also proposed a new Clean Air Act Section 177 determination that would preclude other states from adopting or implementing California's greenhouse gas standards. 83 Fed. Reg. at 43,244.

C. The Final Actions

On September 19, 2019, EPA and NHTSA signed the Final Actions, which were published on September 27, 2019. 84 Fed. Reg. 51,310. Departing substantially from the scope of actions identified in the Proposal, the Final Actions made no changes to federal standards and, instead, solely targeted state emission standards. NHTSA adopted a regulation purporting to declare, among other things,

that state greenhouse gas emission standards and zero-emission vehicle standards for light-duty vehicles (cars and certain trucks) are preempted under the Energy Policy and Conservation Act. 84 Fed. Reg. at 51,310, 51,311, 51,361-51,362. Also, EPA revoked portions of the waiver of preemption it had granted to California in 2013 under Clean Air Act Section 209(b), 42 U.S.C. § 7543(b), for the State's greenhouse gas emission and zero-emission vehicle standards. And EPA issued a determination that Clean Air Act Section 177, 42 U.S.C. § 7507, would preclude other states from adopting or implementing California's greenhouse gas standards, despite California's waiver. 84 Fed. Reg. at 51,310, 51,350.

EPA finalized only two of the three proposed grounds for its waiver revocation: (1) NHTSA's issuance of its preemption regulation; and (2) EPA's conclusion that California does not need its greenhouse gas emission and zero-emission vehicle standards to meet compelling and extraordinary conditions under Section 209(b)(1)(B). EPA did not finalize any finding that California's standards are infeasible under Section 209(b)(1)(C), declining to address the issues regarding compliance costs it had raised in the Proposal. 84 Fed. Reg. at 51,350. EPA indicated it might address those issues in a later action but provided little to no explanation for its decision to finalize only certain parts of the Proposal before it was prepared to act on the other parts. *Id.*

As noted above, neither agency finalized any changes to its own federal standards. Despite anticipating doing so "in the near future," the agencies have yet to issue revised federal standards. *See* 84 Fed. Reg. at 51,310.

II. PETITIONS FOR ADMINISTRATIVE RECONSIDERATION

Following publication of the Final Actions, several petitions for reconsideration were submitted to EPA, including two that are particularly relevant here.

On October 9, 2019, just twelve days after publication of the Final Actions, the California Air Resources Board and California Attorney General Xavier Becerra submitted an initial Petition for Clarification/Reconsideration of the Final Actions ("First Reconsideration Petition," attached as Appendix A). The First Reconsideration Petition was necessitated by contradictory statements in the Final Actions that create confusion over whether EPA revoked California's waiver for its greenhouse gas emission and zero-emission vehicle standards only for model years 2021 through 2025, as EPA had proposed, or whether EPA expanded the revocation to cover earlier model years as well. First Recon. Pet. 2. Because the California Air Resources Board has received stakeholder inquiries regarding this ambiguity, it submitted an immediate request to EPA, seeking clarification from EPA on this pressing question. EPA has not yet responded, leaving California, the

States that have adopted California's standards, and regulated parties in the dark as to whether California still has a waiver for its model year 2019 and 2020 standards.

Then, on November 26, 2019, the State and Municipal Petitioners submitted a more comprehensive second petition for reconsideration of the Final Actions to EPA ("Second Reconsideration Petition," attached as Appendix B). The Second Reconsideration Petition identified multiple grounds, falling into three general categories, meriting reconsideration of the Final Actions. First, EPA impermissibly presented many justifications for the first time in its final action, thereby denying stakeholders an adequate opportunity to comment and explain why those new justifications are erroneous and do not warrant EPA's actions. Second, EPA provided unclear and vague reasons for its action and its positions—including many of the justifications it adopted for the first time in the Final Actions. Third, EPA failed to address many comments that were submitted after the close of the comment period but well before EPA issued its final action.

III. LEGAL CHALLENGES TO THE FINAL ACTIONS

The State and Municipal Petitioners filed Petitions for Review challenging EPA's Final Actions on November 15, 2019. Those petitions have been consolidated with others challenging the Final Actions.[5]

[5] *See Union of Concerned Scientists v. NHTSA*, No. 19-1230; *South Coast Air Qual. Mgmt. Dist. v. Wheeler*, No. 19-1241; *Nat'l Coal. for Advanced Transp.*

NHTSA's preemption regulation is the subject of several suits filed in the U.S. District Court for the District of Columbia.[6] The State and Municipal Petitioners, along with all other petitioners in the consolidated cases who challenge that regulation, filed complaints seeking to vacate NHTSA's regulation. The district court consolidated those complaints. The State and Municipal Petitioners filed their complaint the day after the final rule was signed. *See California, et al. v. Chao*, Case No. 19-cv-2826 (D.D.C. filed Sept. 20, 2019). That complaint alleges that NHTSA's preemption regulation is arbitrary and capricious and otherwise unlawful because the agency lacked authority to promulgate the regulation, the agency's conclusions about preemption are erroneous, and the agency failed to follow required procedures. *Id.*[7]

NHTSA has moved to dismiss or transfer the State and Municipal Petitioners' complaint and one of the subsequently filed complaints on the grounds that

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v. EPA, No. 19-1242; *Sierra Club v. EPA*, No. 19-1243; *Calpine Corp. v. EPA*, No. 19-1245; *Advanced Energy Economy v. EPA*, No. 19-1249.

[6] *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ; *Envtl. Def. Fund v. Chao*, D.D.C. No. 1:19-cv-02907-KBJ; *South Coast Air Qual. Mgmt. Dist. v. Chao*, D.D.C. No. 1:19-cv-03436-KBJ.

[7] Out of an abundance of caution, the State and Municipal Petitioners' Petition for Review also includes a protective portion to preserve the State and Municipal Petitioners' rights to challenge NHTSA's preemption regulation if Petitioners are incorrect that the district court has initial jurisdiction over those issues.

jurisdiction is not proper in the district court. Briefing on that motion is complete and was filed with the district court on December 3, 2019.

ARGUMENT

This Court has well-established discretion to hold cases in abeyance. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). That discretion derives from the Court's inherent power to stay proceedings in control of its own docket. *Id.* In exercising its discretion, the Court is to "weigh competing interests and maintain an even balance" between judicial economy and any hardship to the parties. *Id.* at 254-255. For the reasons described below, this Court should hold these consolidated cases in abeyance until (1) EPA acts on the pending reconsideration petitions, and (2) the district court enters judgment in the actions challenging NHTSA's preemption regulation.

I. THIS COURT SHOULD HOLD THE CONSOLIDATED CASES IN ABEYANCE UNTIL EPA HAS DECIDED THE PENDING RECONSIDERATION PETITIONS.

This Court has often held challenges to Clean Air Act actions in abeyance pending agency review of reconsideration petitions and completion of reconsideration proceedings. *See, e.g.*, *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008); *New York v. EPA*, No. 02-1387, 2003 WL 22326398, at *1 (D.C. Cir. 2003); *see also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87, 389 (D.C. Cir. 2012) (holding case in abeyance pending completion of related EPA

rulemaking proceedings). Those cases include instances of abeyance where EPA had not yet agreed to convene reconsideration proceedings and opposed abeyance. *See, e.g.*, *Am. Trucking Ass'n, Inc. v. EPA*, No. 97-1440, 1998 WL 65651, at *1 (D.C. Cir. 1998); *New York v. EPA*, 2003 WL 22326398, at *1.

Postponing review during administrative reconsideration conserves judicial resources. *Am. Petroleum Inst.*, 683 F.3d at 386-87. Abeyance gives the agency "an opportunity to correct its own mistakes" and may solidify or simplify the factual context and narrow the legal issues at play. *Id.* at 387 (quoting *Pub. Citizen Health Research Group v. FDA*, 740 F.2d 21, 30-31 (D.C. Cir. 1984)).

These principles strongly support abeyance here.

A. Reconsideration would likely dispel the confusion EPA created about the scope of its action.

In its haste to revoke portions of California's 2013 waiver, EPA failed to describe or explain several key aspects of its action, creating confusion regarding the scope of the waiver revocation and the reasons and bases for it. The reconsideration petitions seek clarification on these points. Going forward with briefing prior to EPA resolving these ambiguities could lead to inefficient and unnecessary briefing and judicial review lacking the benefit of a fully developed record.

Most importantly, contradictory statements in the Final Actions have created confusion over whether EPA withdrew California's waiver for its greenhouse gas

emission and zero-emission vehicle standards only for model years 2021 through 2025, as EPA had proposed, or whether EPA expanded the revocation to cover earlier model years as well. First Recon. Pet. at 2. EPA's proposal could not have been clearer on this point. 83 Fed. Reg. at 43,240, 43,243, 43,250 (proposing to withdraw California's waiver for model years 2021-2025). In contrast, EPA's Final Action could hardly be less clear—expressly stating in some places that EPA finalized what it proposed, 84 Fed. Reg. at 51,328, and restating that the action encompasses only model years 2021-2025, 84 Fed. Reg. at 51,329, 51,337, but elsewhere stating, without reference to model years, that the grant of the waiver for these California standards "was invalid, null, and void" effective November 26, 2019, 84 Fed. Reg. at 51,328. *See also* 84 Fed. Reg. at 51,338 (describing EPA's "finding" based on NHTSA's determination as "separate and apart from findings with respect to EPA's [withdrawal of the] 2013 waiver for CARB's Advanced Clean Car Program as it pertains to its 2021 through 2025 MY"); 84 Fed. Reg. at 51,350 (distinguishing "withdrawal" for model years 2021 through 2025 from "determination" concerning "valid[ity]" of the waiver).

The lack of clarity also infects EPA's assertion of its authority to act because "EPA's discussion of [that issue] does not purport to provide grounds for any withdrawal for model years prior to 2021." First Recon. Pet. at 8. If EPA's waiver revocation includes model years earlier than 2021, that would raise different issues

about EPA's asserted revocation authority than would a revocation only covering model years 2021 to 2025. EPA should clarify the scope of, and support for, its actions before the parties brief these cases.

The confusion that stems from these ambiguities is widespread and extends beyond the petitioners to the regulated community, as evident from the inquiries California has received. For obvious reasons, neither states nor the regulated community should be left wondering which model years are encompassed within EPA's waiver revocation action. Aside from the practical uncertainty created on the ground, the lack of clarity on this point leaves petitioners with uncertainty as to the scope of the action they are challenging. Petitioners should not be forced to wait until the agency files its opposition brief to obtain that understanding, particularly when EPA could act, at any time, on the reconsideration petition that has now been pending before it for two-and-a-half months.

Ambiguities regarding the scope of EPA's action should be answered by EPA. *See, e.g.*, *Am. Petroleum Inst.*, 101 F.3d at 1431 (stating that courts should avoid "entangling themselves in abstract disagreements over administrative policies"); *Noble Energy, Inc. v. Salazar*, 671 F.3d 1241, 1245-46 (D.C. Cir. 2012) (explaining that when it is not clear what an agency has done, the agency should construe its regulation in the first instance). The agency should clarify what it

purported to do before this Court considers arguments regarding the propriety of that action.

Proceeding with the consolidated cases before EPA has clarified the scope of its action would inject a number of issues into the litigation that would only be present if EPA expanded the revocation to cover earlier model years, *e.g.*, inadequate notice of such expansion in the proposed rule, absence of any support for authority to revoke, disruption of settled expectations, and unauthorized retroactive agency action. If EPA clarifies that it did not expand the withdrawal to cover earlier model years, those issues would be eliminated, thereby streamlining the issues to be decided by this Court.

B. Reconsideration would likely clarify the new justifications EPA announced in the Final Actions without opportunity for public comment.

As detailed in the Second Reconsideration Petition, EPA announced many justifications and positions for the first time in the Final Actions. The State and Municipal Petitioners requested that EPA reconsider and take public comment on those new positions.

Reconsideration is especially important with respect to new positions that form the sole or primary support for a part of EPA's action. For example, for the first time in the Final Actions, EPA purports to have discovered statutory text supporting its asserted authority to revoke a previously granted waiver; in the

Proposal, EPA relied exclusively on authority "implicit" in Clean Air Act Section 209(b)(1). Second Recon. Pet. 8-12. Put simply, EPA's sole textual bases for its authority to take the Final Actions was never presented for public comment. Other examples of new positions include: the new assertion that no one could have reliance interests in California's standards because EPA committed itself to a Mid-Term Evaluation of the later-model-year-federal standards, *id.* at 13-15; EPA's position that it can limit its review of a prior action to the record before it at that time, disregarding the new record generated through the process of public participation, *id.* at 23; and multiple new arguments, based on statutory text and precedent, that purportedly support EPA's interpretation of one of the waiver criteria, *id.* at 19-23.

In light of the new positions, the interests animating the Clean Air Act (and administrative law more generally) would be best served by deferring litigation over the agency's authority and actions until the agency process has reached its end. EPA may provide for notice and comment on its previously unaired positions, or decline to do so and explain why. The former may obviate litigation on these issues; the latter would provide petitioners and the Court with a clearer picture of EPA's position on the alleged violations of notice and comment and reasoned decisionmaking requirements. Either way, an abeyance pending EPA's decision on the reconsideration petitions would promote judicial economy.

C. Reconsideration would likely clarify EPA's reasons for revoking California's waiver.

EPA's purported reasons for revoking California's waiver are also muddled, as raised in the Second Reconsideration Petition. EPA's proposal "pointed to 'costs and technological feasibility considerations,' along with a change in administrations as the 'changed circumstances' that purportedly supported its decision to reconsider its previous waiver grant." Second Recon. Pet. at 28 (quoting 83 Fed. Reg. at 43,243). In the Final Actions, however, EPA declined to make any findings about "feasibility considerations." EPA also appeared to recognize that a change in administrations is insufficient justification for its actions. *See* 84 Fed. Reg. at 51,334.

At the same time, EPA confusingly expressed disapproval of two "recent actions taken by California," suggesting that these actions are the reason for EPA's final action, 84 Fed. Reg. at 51,311, and asserted that California's actions were not "necessary predicates" for EPA's action. 84 Fed. Reg. at 51,334. At a minimum, EPA's true reason for acting is unclear. The Second Reconsideration Petition requests that EPA clarify its true reasons for its unprecedented revocation of the State's six-year-old waiver. With agency clarification, the legal issues surrounding EPA's reasons for acting would become more concrete, leading to more focused and efficient briefing and judicial review. Indeed, the litigation over the Final

Actions could then focus on EPA's clearly stated reasons instead of requiring the parties to chase strawmen.

Because EPA's action on the reconsideration petitions may resolve ambiguity regarding the basic scope of the Final Actions and may narrow the issues to be considered by this Court, it is in the interest of judicial economy to hold this case in abeyance until EPA acts.[8]

II. THE COURT SHOULD HOLD THESE CASES IN ABEYANCE UNTIL THE DISTRICT COURT DETERMINES THE VALIDITY OF THE PREEMPTION REGULATION.

"In the exercise of sound discretion [a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937); *see also* D.C. Cir. Handbook at 55. This Court has multiple times held cases in abeyance where parallel court proceedings could affect the case at bar. *See, e.g.*, *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008); *Pub. Serv. Elec. & Gas Co. v. FERC*, 783 F.3d 1270, 1273 (D.C. Cir. 2015). In *Basardh*, this Court held a

[8] Additionally, although the certified index has not yet been filed, there may well be disputes regarding the administrative record in this case. EPA's action on the reconsideration petitions has the potential to narrow, or even avoid, those disputes before they reach this Court. As noted in the Second Reconsideration Petition, EPA failed to respond to numerous comments submitted after the close of the public comment period. Second Recon. Pet. at 37–42. Those comments, and related materials, should be in the record, and EPA's action on the Second Reconsideration Petition would presumably either resolve that issue or clarify the scope of any dispute.

petition for direct review in abeyance pending resolution of a district court case that was brought by the same party and raised common legal issues. *Basardh*, 545 F.3d at 1069.

Here too the existence of parallel proceedings involving the same parties and overlapping legal issues weighs strongly in favor of abeyance. The consolidated cases filed in this Court challenge EPA's revocation of parts of the waiver it had previously granted California pursuant to the Clean Air Act. As a basis for that revocation, EPA expressly relies on NHTSA's preemption regulation. 84 Fed. Reg. 51,328; 84 Fed. Reg. 51,338. Even the federal agencies describe their actions as "interrelated." Respondents' Motion to Expedite at 3 (filed 12/18/19).

NHTSA's preemption regulation is already the subject of multiple challenges pending in district court. If NHTSA's regulation is unlawful, as alleged in those district court challenges, then EPA cannot rely on it as a basis for its waiver revocation. Until the district court decides the predicate question of whether NHTSA's preemption regulation is invalid, this Court should hold the consolidated cases in abeyance.[9] The district court's decision regarding the validity of the

[9] Respondents may argue that this Court should not hold these cases in abeyance because, in their view, this Court, not the district court, has jurisdiction over the challenges to NHTSA's regulation. Respondents are incorrect, as State and Municipal Petitioners have explained in their brief on Respondents' motion to dismiss their district court challenge. *California v. Chao*, 1:19-cv-02826-KBJ, ECF Doc. No. 43. Of course, Respondents' jurisdictional arguments are not before

preemption regulation could remove one of the two rationales for EPA's waiver revocation, narrowing or sharpening the issues concerning that regulation before they reach this Court. *See Green v. Dep't of Commerce*, 618 F.2d 836, 842 (D.C. Cir. 1980). That would be particularly useful in this case given that the parties' briefing will address, and the Court will decide, a large number of substantial and complex issues. Further, any appeal of the district court's decision to this Court could be consolidated with this case. The alternative—proceeding simultaneously with the consolidated cases and the district court proceeding—would lead to piecemeal review of overlapping legal issues in separate courts, and duplicative review by this Court if and when the district court's judgment is appealed. Accordingly, this Court should exercise its discretion to hold the consolidated cases in abeyance pending resolution of the district court proceedings challenging NHTSA's preemption regulation.

III. THE BENEFITS OF DEFERRING REVIEW OUTWEIGH ANY COSTS.

"To outweigh these institutional interests in the deferral of review, any hardship caused by that deferral must be 'immediate and significant.'" *Am. Petroleum Inst.*, 683 F.3d at 389 (quoting *Devia v. Nuclear Regulatory Comm'n*,

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this Court on this motion for abeyance, and Respondents' resort to such arguments would only underscore that, at a minimum, this Court should hold these cases in abeyance until the district court determines whether it has jurisdiction by deciding the fully briefed and pending motion before it.

492 F.3d 421, 427 (D.C. Cir. 2007)). When considering potential hardship, the courts usually focus on hardship to a plaintiff or petitioner rather than a defendant or respondent. *See Devia*, 492 F.3d at 427 (holding petition for review in abeyance and finding "no case in which a court actually considered the hardship to a respondent (or an intervenor-respondent) of deferring a decision on a challenger's petition"). Here, all petitioners support the abeyance, and that abeyance will cause no hardship to Respondents.

The consolidated cases are in their early stages, and neither the parties nor the Court have devoted significant resources to them yet. *See, e.g.*, *B.J. Alan Co. v. ICC*, 897 F.2d 561, 563 n.1 (R.B. Ginsburg, J.)(D.C. Cir. 1990)(noting the Court "had not yet taken up the case for preparation and argument" when one of the parties asked that it be held in abeyance).

Meanwhile, the Final Actions are currently in effect and will remain so while the consolidated cases are held in abeyance. With respect to the reconsideration petitions, EPA has complete control over how quickly it reviews and addresses them. Any challenge to EPA's actions on the reconsideration petitions can be consolidated with this proceeding. But at that point, EPA may have clarified the purported scope and basis for its actions, as well as the scope of the record, in such a way as to limit the issues that must be litigated in this Court. The streamlining of issues to be litigated and solidifying of the factual record benefits *all* parties—

including Respondents. Thus, the benefits of holding these cases in abeyance pending EPA's decision on the reconsideration petitions far outweigh any costs.

With respect to the district court proceedings, there is no reason to anticipate that an abeyance will lead to any protracted delay. The State and Municipal Petitioners filed their challenge to NHTSA's preemption regulation in district court the day after NHTSA and EPA issued the Final Actions and have diligently pursued the litigation to date. Briefing on defendants' motion to dismiss, asserting the absence of jurisdiction, is complete. The district court may issue a decision at any time. Assuming the State and Municipal Petitioners prevail on the jurisdictional question, they anticipate the merits of the case will be litigated relatively quickly by way of a motion or cross-motions for summary judgment. This Court could consolidate any appeal with these consolidated cases.

Respondents have moved to expedite these cases, arguing there is uncertainty in the regulated community while this litigation is pending. However, that argument fails to distinguish this case from any other challenge to an agency action. In any case where a final action will be invalidated if petitioners prevail, there is uncertainty. Here, the uncertainty is caused by EPA's unprecedented action, and its refusal to clarify the scope of that action, not by states taking issue with it. And it is considerably diminished where the challenged actions are in effect.

Thus, no potential hardship to Respondents exists that might outweigh the strong institutional interests in deferring review pending resolution of the district court proceeding and EPA's final actions on the pending reconsideration petitions.

CONCLUSION

For the foregoing reasons, the State and Municipal Petitioners request that these consolidated cases be held in abeyance. The parties should be directed to file motions to govern future proceedings in this case within 30 days of the latest of: (1) EPA's final action on the First Reconsideration Petition; (2) EPA's final action on the Second Reconsideration Petition; and (3) resolution of *California, et al. v. Chao*, Case No. 19-cv-2826 (D.D.C. filed Sept. 20, 2019).

Dated: December 26, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and D.C. Circuit Rule 27(a)(2), I hereby certify that the foregoing complies with all applicable format and length requirements, and contains 5,194 words as calculated by Microsoft Word, exclusive of the caption, signature block, and certificates of counsel.

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APPENDIX A

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RE: Petition for Clarification/Reconsideration of the Safer, Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019)

Dear Administrator Wheeler and Mr. Lieske:

Please find attached a Petition for Clarification/Reconsideration submitted on behalf of the California Air Resources Board and the California Attorney General Xavier Becerra with respect to the above reference action(s), Docket ID EPA-HQ-OAR-2018-0283.

Sincerely,

M. Elaine Meckenstock

M. ELAINE MECKENSTOCK
Deputy Attorney General

(Attachment)

BEFORE THE HONORABLE ANDREW WHEELER, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE PETITION FOR CLARIFICATION/RECONSIDERATION OF THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE PART ONE: ONE NATIONAL PROGRAM, 84 Fed. Reg. 51,310 (Sept. 27, 2019)

SUBMITTED BY THE CALIFORNIA AIR RESOURCES BOARD AND CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA

On August 24, 2018, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) published a joint proposal in the Federal Register. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018) (hereafter, Proposal). On September 19, 2019, EPA and NHTSA issued a document finalizing some of the actions they had proposed, including EPA's withdrawal of parts of a preemption waiver it issued to California in 2013 (hereafter, Final Actions). On September 27, 2019, the Final Actions were published in the Federal Register. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

We are deeply troubled by the agencies' Final Actions, which undermine important public health and environmental protection programs while creating unnecessary and harmful uncertainty for States, as well as for auto manufacturers and related industries. We believe the Final Actions are not only harmful, but also unlawful: neither agency has authority for the actions taken, and, indeed, the agencies' actions fly in the face of the relevant statutes and the cooperative federalism model that Congress established decades ago and that it has strengthened and reaffirmed many times since. The multiple legal infirmities with the Final Actions will be decided by the courts.

But there is an issue causing significant and unnecessary uncertainty now that EPA can and should resolve quickly, without the need for litigation.[1] Specifically, CARB and California Attorney General Xavier Becerra petition EPA for clarification and reconsideration of the scope

[1] This petition does not reflect all issues with the Final Actions on which California, CARB, or the California Attorney General may seek reconsideration or other administrative remedies. Rather, we are submitting this single-issue petition now in an attempt to quickly reduce or eliminate confusion concerning the scope of EPA's action(s). In addition, we note that, while the exhaustion requirements of Section 307(d)(7) of the Clean Air Act do not apply here, Section 307(b) indicates that EPA must consider petitions for reconsideration such as this one.

of EPA's action(s) purporting to withdraw portions of the waiver EPA granted to California in 2013. As discussed below, contradictory statements in the Final Actions have created confusion over whether EPA withdrew California's waiver for its GHG and Zero Emission Vehicle (ZEV) standards only for model years 2021 through 2025, as EPA had proposed, or whether EPA expanded the withdrawal to cover earlier model years as well.

CARB has received inquiries about this issue from regulated parties and other stakeholders, and we respectfully ask that EPA clarify and reconsider the statements that are creating this confusion. CARB and the public are entitled to know, promptly and unambiguously, the temporal scope of EPA's waiver withdrawal. Indeed, "elementary fairness compels clarity in the statements … setting forth actions with which the agency expects the public to comply." *General Electric v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal quotation omitted).

I. EPA'S STATEMENTS IN THE FINAL ACTIONS HAVE CREATED CONFUSION ABOUT THE MODEL YEARS COVERED BY THE PURPORTED WITHDRAWAL OF CALIFORNIA'S WAIVER FOR ITS GHG AND ZEV STANDARDS

In the Final Actions, EPA makes statements that are creating confusion, and, indeed, appear contradictory, concerning the temporal scope of its action(s)—specifically, which model years are covered by the purported withdrawal of California's waiver for its GHG and ZEV standards. In some places, EPA's statements indicate that it has limited its action(s) to the model years for which it proposed to withdraw and for which it now claims to have authority to withdraw—namely model years 2021 through 2025. In other places, however, EPA's statements suggest action(s) with a broader scope—one that would include earlier model years. As discussed below, these statements are difficult to reconcile and are creating untenable uncertainty that EPA must resolve.

A. EPA Proposed to Withdraw California's Waiver for GHG and ZEV Standards Only for Model Years 2021 through 2025

In the Proposal, EPA expressly "propos[ed] to withdraw the January 9, 2013 waiver of preemption" for California's GHG and ZEV standards "that are *applicable to new model year (MY) 2021 through 2025*." 83 Fed. Reg. at 43,240 (emphasis added); *see also* 83 Fed. Reg. at 43,243 ("EPA is proposing to withdraw the grant of a waiver of preemption for California to enforce the GHG and ZEV standards … *for MY 2021–2025*.") (emphasis added); 83 Fed. Reg. at 43,245 ("EPA is proposing to withdraw the grant of waiver of preemption for CARB's GHG and ZEV standards *for 2021 MY through 2025 MY*…") (emphasis added); 83 Fed. Reg. 43,250 ("EPA is proposing to withdraw the waiver of preemption for the GHG and ZEV requirements *for MYs 2021 through 2025*.") (emphasis added). The scope of EPA's proposed waiver withdrawal was the same (model years 2021 through 2025) in the part of the Proposal that was based on NHTSA's proposed action concerning preemption under the Energy Policy Conservation Act (EPCA). 83 Fed. Reg. at 43,240 (articulating this scope of proposed action for all of the "multiple grounds" on which EPA proposed to withdraw); *id.* at 43,240 n.522 ("EPA proposes to withdraw the waiver for these model years because these are the model years at issue in NHTSA's proposal.").[2]

[2] EPA solicited comment on "whether one or more grounds supporting the proposed withdrawal of this waiver would also support withdrawing other waivers that it has previously granted." 83 Fed. Reg. at 43,240 n.552. This reference to "other waivers" can only reasonably be read as meaning waivers other than the 2013 waiver for California's Advanced Clean Cars program, which includes the GHG and ZEV standards. This is plain from the distinction between "this waiver"—that is, the 2013 waiver—and "other waivers," and from the distinction in the preceding footnote between the waiver "granted with respect to California's GHG and ZEV program." and "other waivers." 83 Fed. Reg. at 43,240 n.551. EPA also makes clear, elsewhere, that it granted a *single* waiver in January 2013 for California's Advanced Clean Cars program and that "aspects of" that single waiver involve California's GHG and ZEV standards. 84 Fed. Reg. at 51,323. EPA's solicitation of comments on potential withdrawals of "other waivers" was not, therefore, a request for comments on withdrawing *other model years of the 2013 waiver*. Moreover, EPA has not identified, and cannot identify, any comment asking EPA to withdraw the GHG and ZEV portions of California's 2013 waiver for model years before 2021.

In the Proposal, EPA also indicated that it understood that a waiver withdrawal involving model years before 2021 would be problematic. EPA found that "a late modification [to standards] carries attendant hardships for technologically advanced manufacturers who might have made major investment commitments." 83 Fed. Reg. at 43,252. Connecting this concern to the scope of the proposed withdrawal, EPA then stated its conclusion that "today's proposal, when finalized, would be sufficiently ahead of the compliance deadline for MY 2021 through 2025 and thus, manufacturers would not incur any hardships. Indeed, the expectation is that the proposed withdrawal would provide notice to manufacturers of the intended compliance deadline modifications for MYs 2021 through 2025." *Id.*

There is, thus, no question as to the scope of withdrawal action proposed by EPA. That scope was expressly, unequivocally, and repeatedly limited to model years 2021 through 2025.

B. In the Final Actions, EPA Confirms that the Proposed Withdrawal Was Limited to Model Years 2021 through 2025 and Indicates EPA Has Finalized What It Proposed

In the Final Actions, EPA expressly states that it has finalized what it proposed and confirms the temporal scope of the proposal as limited to model years 2021 through 2025, thereby indicating that the waiver withdrawal covers only those model years.

Specifically, EPA asserts that it has finalized "EPA's proposed determination." 84 Fed. Reg. at 51,331 (describing EPA as "finaliz[ing] its proposed determination"). And it makes this assertion as to all purported grounds for EPA's action(s), including its reliance on NHTSA's action as a basis for waiver withdrawal. 84 Fed. Reg. at 51,328.

EPA also correctly restates the scope of the action it proposed as involving only model years 2021 through 2025. 84 Fed. Reg. at 51,329 ("On August 24, 2018, EPA proposed to withdraw this waiver of preemption with regard to the GHG and ZEV standards of its Advanced

Clean Car (ACC) program *for MY 2021–2025*.") (emphasis added); *see also id.* at 84 Fed. Reg. at 51,337 (acknowledging "proposed withdrawal of the waiver [was for] *for MY 2021–2025*") (emphasis added).

EPA's statements that it has finalized what it proposed lead naturally to the conclusion that EPA has not withdrawn California's waiver for GHG and ZEV standards for model years other than 2021 through 2025.

C. In the Final Actions, EPA Only Asserts Authority to Withdraw for Model Years 2021 through 2025

EPA's discussion of its purported authority to withdraw California's waiver is likewise limited to model years 2021 through 2025. In the Final Actions, EPA concludes the discussion of its withdrawal authority by stating that "it has authority under [Clean Air Act] section 209 to reconsider its prior grant of the [Advanced Clean Cars] waiver and to withdraw the waiver *for MY 2021–2025* GHG and ZEV standards, consistent with the SAFE proposal." 84 Fed. Reg. at 51,377 (emphasis added). There is no such conclusion concerning EPA's authority to withdraw California's waiver for earlier model years. Nor is there any indication, in the Final Actions, that EPA has reconsidered, let alone departed from, its conclusion in the Proposal that a withdrawal for earlier model years could would cause hardships to manufacturers and their investment commitments.

EPA does contend that it generally has authority to withdraw a previously granted waiver "in appropriate circumstances," 84 Fed. Reg at 51,331, but it never asserted in the Proposal and never asserts in the Final Actions that model years earlier than 2021 present such circumstances here. *See also* 84 Fed. Reg. at 51,332 (similarly asserting authority to withdraw "under appropriate circumstances"). Indeed, much of EPA's discussion of potentially "appropriate"

circumstances involves hypothetical scenarios in which "predictions" about future model years, made at the time of the waiver request, "may have been inaccurate." 84 Fed. Reg. at 51,332; *see also id.* (asserting authority to reconsider "where leadtime concerns arise after the grant of an initial waiver"). Hypothetical scenarios concerning *future* requirements, and related lead time concerns, do not speak to authority to withdraw a waiver for *prior, current, or even imminent* model years. This discussion of "appropriate" circumstances, thus, does not expand EPA's clear conclusion, quoted above, that its authority to withdraw here is limited to model years 2021 through 2025.

EPA's discussion and conclusion about the scope of its authority, like its assertion that it finalized the action it proposed, indicate that EPA has withdrawn California's waiver for its GHG and ZEV standards only for model years 2021 through 2025.

D. Yet, in the Final Actions, EPA Also Makes Statements that at Least Arguably Suggest a Withdrawal for Earlier Model Years

However, other EPA statements in the Final Actions create confusion by suggesting a broader scope to EPA's waiver withdrawal. For example, while EPA states that it has "finalize[d] EPA's proposed determination," it also states that its "January 2013 grant of a waiver of CAA preemption for [the GHG and ZEV standards] was invalid, null, and void" and "is hereby withdrawn on that basis, effective on the effective date of this joint action." 84 Fed. Reg. at 51,328. These statements are ambiguous and confusing. EPA simultaneously asserts that it is finalizing its "proposed determination," the scope of which was plainly limited to model years 2021 through 2025 (as discussed above), *and* uses language suggesting EPA is withdrawing California's waiver for its GHG and ZEV standards for all model years at issue in the 2013 waiver grant (including those before 2021).

Exacerbating the ambiguity, EPA states that its "finding that California's GHG and ZEV standards are preempted as a result of NHTSA's finalized determinations, issued in this joint action, with respect to EPCA's preemptive effect on State GHG and ZEV standards, is effective upon the effective date of this joint action." 84 Fed. Reg. at 51,338. EPA then goes on to say that "[t]his finding is separate and apart from findings with respect to EPA's 2013 waiver for CARB's Advanced Clean Car Program as it pertains to its 2021 through 2025 MY relating to GHG and ZEV standards and accompanying withdrawal of the waiver, pursuant to CAA section 209(b)(1)." *Id.* It is unclear from these statements whether EPA intends its purported separation of these two "findings" to have implications for the scope of its waiver withdrawal, in part because EPA only references withdrawal in the second sentence. But this text at least arguably suggests that EPA is withdrawing California's waiver for model years prior to 2021, pursuant to its reliance on NHTSA's action.

EPA sows further confusion by stating, on the one hand, that "EPA's 2013 waiver for CARB's Advanced Clean Car Program (*as it pertains to its 2021 through 2025 MY* relating to greenhouse gas emissions and the ZEV mandate) is withdrawn," and, on the other hand, that "[t]his is separate and apart from EPA's determination that it cannot and did not validly grant a waiver with respect to those California State measures which are preempted under NHTSA's determination in this document that EPCA preempts State GHG and ZEV programs, *which, as explained above, is effective on the effective date of this joint action*." 84 Fed. Reg. at 51,350 (emphasis added). Again, it is unclear what significance, if any, EPA intends to impart by its use of the word "withdrawn" with respect to model years 2021 through 2025 and its failure to use that word with respect to its ambiguously described "determination" concerning the "valid[ity]" of the waiver.

The challenges in understanding these statements are magnified when they are read in the context of the entire document in which EPA claims to be taking only the action it proposed—an action that included only model years 2021 through 2025 *even in the context of EPA's consideration of NHTSA's action.* This confusion is only increased by EPA's discussion of its authority to withdraw, which, as discussed above, does not purport to provide grounds for any withdrawal for model years prior to 2021. In the end, then, the Final Actions contain a collection of statements concerning the model years covered by EPA's action(s) that are impossible to reconcile.

II. CARB AND THE CALIFORNIA ATTORNEY GENERAL REQUEST THAT EPA IMMEDIATELY CLARIFY AND RECONSIDER ITS CONFUSING STATEMENTS

The uncertainty created by EPA's statements concerning the model years affected by EPA's action(s) is untenable for California, the regulated community, and other stakeholders, including other States that have adopted California's standards. Regulated parties and other stakeholders have been seeking guidance from CARB as to these questions, but the State's ability to provide such guidance is limited because the statements that are causing the confusion are EPA's. Accordingly, we seek clarification and reconsideration of EPA's perplexing collection of statements regarding the model years covered by the withdrawal of California's waiver for its GHG and ZEV standards. EPA should explain the intended meaning of these statements, revising them as necessary, and clarify exactly which model years are implicated in its waiver withdrawal action(s), quickly, officially, and publicly.[3] To be clear, we are seeking

[3] CARB/California notes that EPA has, in the past, sought to clarify confusing, ambiguous, or erroneous language in Federal Register notices via later, additional Federal Register notices. *See, e.g.,* 76 Fed. Reg. 79,574 (Dec. 22, 2011) (seeking to "revise minor misstatements" and "clarify" prior Federal Register notice); 73 Fed. Reg. 6,962 (Feb. 6, 2008) (clarifying scope of prior order published in the Federal Register); 70 Fed. Reg. 13,195 (March 18, 2005) (clarifying solicitation previously published in the Federal Register); 54 Fed. Reg. 13,740 (Apr. 5, 1989) (clarifying and providing more detail about prior Federal Register notice); 43 Fed. Reg. 53,817 (Nov. 17, 1978) (clarifying EPA's procedures in response to questions).

clarification from EPA as to the scope of its *waiver withdrawal action(s)*, not as to any position EPA holds concerning the lawfulness of California's GHG and ZEV standards (e.g., whether they are preempted by EPCA).

To the extent that EPA's response to this petition would result in final action(s) beyond the scope of what EPA proposed, or would contain analyses or justifications not included in the Proposal (such as purported justifications for broader withdrawal authority), then EPA must withdraw at least the portion of the Final Actions that extend beyond the Proposal, issue a revised proposal, and accept and consider public comment before taking any final action.

Dated: October 9, 2019

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November 26, 2019

Via Overnight Mail and Email

Andrew Wheeler, Administrator
Office of the Administrator
U.S. Environmental Protection Agency
WJC South Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Christopher Lieske
Office of Transportation and Air Quality
U.S. Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105

RE: Petition for Reconsideration of the Safer, Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019)

Dear Administrator Wheeler and Mr. Lieske:

Please find attached a Petition for Reconsideration submitted on behalf of the States of California, by and through Attorney General Xavier Becerra and the California Air Resources Board, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the People of the State of Michigan, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, and the Cities of Los Angeles, New York, San Francisco, and San Jose, with respect to the above referenced action(s), Docket ID EPA-HQ-OAR-2018-0283.

The Exhibits to this Petition are provided in the enclosed CD.

Sincerely,

Julia K. Forgie

JULIA K. FORGIE
Deputy Attorney General

(Attachment)

BEFORE THE HONORABLE ANDREW WHEELER, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE PETITION FOR RECONSIDERATION OF THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE PART ONE: ONE NATIONAL PROGRAM, 84 FED. REG. 51,310 (Sept. 27, 2019)

Submitted by:

The States of California, by and through Attorney General Xavier Becerra and the California Air Resources Board, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the People of the State of Michigan, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, and the Cities of Los Angeles, New York, San Francisco, and San Jose.

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INTRODUCTION

On September 27, 2019, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) jointly published the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019) ("Final Action"). In the Final Action, NHTSA adopted a regulation purporting to declare state greenhouse gas (GHG) and Zero Emission Vehicle (ZEV) standards for light-duty vehicles preempted under the Energy Policy and Conservation Act (EPCA). For its part, EPA withdrew in part California's 2013 waiver for its GHG and ZEV standards for light-duty vehicles and finalized an interpretation of Section 177 of the Clean Air Act that prohibits other states from adopting California GHG standards even where California has a waiver for them.

Pursuant to Clean Air Act Section 307(b), and for the reasons set forth below, the States of California, by and through Attorney General Xavier Becerra and the California Air Resources Board, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the People of the State of Michigan, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, and the Cities of Los Angeles, New York, San Francisco, and San Jose (collectively, "States and Cities" or "Petitioners") hereby petition EPA for reconsideration of its Final Action.

EPA has impermissibly presented many positions for the first time in its Final Action, thereby denying the States and Cities an adequate opportunity to comment and explain why those new positions do not justify EPA's actions. In addition, EPA has provided no clear and credible explanations for some of its new positions, including its decision to take this Final Action when and how it did. At a minimum, EPA should grant this Petition to clarify its positions and the

bases for them.[1] EPA has also failed to address many comments submitted by CARB, many of the States and Cities, and other stakeholders after the close of the comment period but well before EPA issued its Final Action. As a result, EPA's Final Action is arbitrary and unlawful. These flaws are particularly egregious in light of EPA's and the Administration's failures to consult the states regarding the rationale for the Final Action and its federalism impacts.

Reopening the proceeding for reconsideration of these issues would not only provide necessary clarity about EPA's positions and the required opportunity to comment on EPA's newly announced positions. It would also facilitate a fully informed decision by EPA. The States and Cities intend to raise these fatal flaws in EPA's procedures and positions in their recently filed petition for review (D.C. Cir. Case No. 19-1239). They observe, in this regard, that Section 307(d)'s exhaustion requirements do not apply to objections to EPA's Final Action because it is not a Section 307(d) rulemaking. Yet, out of an abundance of caution and in the interest of additional clarity, the States and Cities submit this Petition to bring these issues to EPA's attention before briefing on the merits proceeds. Notably, although Section 307(d)'s requirements do not apply here, reconsideration is nonetheless available and warranted because EPA impermissibly announced numerous significant positions for the first time in its Final Action and did so without sufficient explanation or any consultation with the States directly impacted by the Final Action.

For these reasons, the States and Cities respectfully request that EPA reconsider its Final Action.

[1] CARB and the California Attorney General previously submitted a petition for reconsideration that likewise identified an issue that demands clarification—namely the scope of the waiver withdrawal. Petition for Reconsideration of the Safer, Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One, submitted Oct. 9, 2019.

BACKGROUND AND PROCEDURAL HISTORY

On August 24, 2018, EPA and NHTSA jointly proposed multiple actions to weaken federal GHG emission and fuel economy standards for light-duty vehicles. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("SAFE Proposal").

In the same Proposal, both agencies proposed actions directed at invalidating states' GHG and ZEV standards. NHTSA proposed regulatory text purporting to declare state GHG and ZEV standards preempted under EPCA. EPA proposed to revoke portions of California's 2013 waiver on three grounds: 1) that NHTSA's EPCA preemption regulation warranted revoking the waiver; 2) that California did not need its GHG and ZEV standards to meet compelling and extraordinary conditions under Section 209(b)(1)(B) of the Clean Air Act; and 3) that, pursuant to Section 209(b)(1)(C), California's GHG and ZEV standards were not consistent with Section 202(a) of the Clean Air Act because they would become too costly. EPA also proposed a new interpretation of Section 177 of the Clean Air Act that would preclude other states from adopting California's GHG standards.

The California Air Resources Board (CARB), a coalition of 26 states and cities, a number of non-governmental organizations, and many other stakeholders all submitted comments on this joint SAFE Proposal by October 24, 2018. Since that date, a number of developments arising after the close of the noticed comment period prompted stakeholders to submit supplemental comments addressing issues of central relevance to the Proposal.

On September 27, 2019, EPA and NHTSA jointly published their Final Action on only certain parts of the Proposal while leaving the remainder for a possible, subsequent final action. 84 Fed. Reg. 51,310. Specifically, in the September 2019 Final Action, NHTSA finalized its

regulatory text purporting to declare state GHG and ZEV standards preempted.[2] EPA withdrew parts of California's waiver, finalizing two of the three determinations it had proposed as bases for such a withdrawal. And EPA finalized its interpretation of Section 177, purporting to prohibit other states from adopting California's GHG standards. Neither agency adopted or revised any federal fuel economy or emissions standards.

EPA's part of the Final Action presents multiple new analyses and positions that EPA did not provide or even discuss in its Proposal. Therefore, Petitioners have had no opportunity to comment on them. In addition, the Final Action presents multiple arguments or positions that are facially unclear and require clarification.

LEGAL STANDARD

EPA's withdrawal of parts of the waiver it granted in 2013 is not a "rulemaking" within the meaning of Section 307(d) of the Clean Air Act. *See* 42 U.S.C. § 7607(d)(1) (defining rulemaking actions to which Section 307(d) applies); *see also* 84 Fed. Reg. at 51,352 ("EPA's action is not a rule."). Accordingly, the exhaustion requirements of Section 307(d)(7)(B) do not apply to any objections to the waiver withdrawal. Thus, identifying issues in this Petition for Reconsideration does not limit Petitioners' ability to litigate those issues directly in their petition for review challenging EPA's actions. 42 U.S.C. § 7607(b) ("The filing of a petition for reconsideration by the Administrator … shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of

[2] Many of the States and Cities have challenged NHTSA's action in the federal district court for the District of Columbia. *California, et al. v. Chao, et al.*, No. 19-cv-2826 (D.D.C. filed Sept. 20, 2019). They have also filed a protective petition challenging NHTSA's action in the U.S. Court of Appeals for the District of Columbia Circuit. *State of California, et al. v. Wheeler, et al.*, No. 19-1239 (D.C. Cir. filed Nov. 15, 2019).

such rule or action."); *see also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1078-79 (D.C. Cir. 2009) (agreeing that courts are "bar[red] from imposing an exhaustion requirement where agency action has become final under the APA"). Indeed, Petitioners may, and likely will, raise the issues identified herein in the pending petition for review of the Final Action. Nevertheless, EPA still may reconsider these issues before merits briefing proceeds. Doing so would accord with principles of reasoned decisionmaking and could also clarify the scope and nature of issues to be litigated, conserving judicial and party resources.

While the reconsideration standard laid out in Section 307(d)(7)(B) does not apply to this Petition, EPA has indicated that the criteria for evaluating reconsideration petitions under the Administrative Procedure Act are comparable. Thus, in EPA's view, petitions for reconsideration should be granted where they are based on new evidence or changed circumstances, *see, e.g.*, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 841 F.3d 509, 512-13 (D.C. Cir. 2016), or issues that could not practically have been raised during the comment period and that are of "central relevance to the outcome," *see* 42 U.S.C. § 7607(d)(7)(B). The issues discussed below are new, could not practically have been raised during the noticed comment period, and are of central relevance to the outcome here. EPA should grant reconsideration.

ARGUMENT

I. EPA HAS FAILED TO ARTICULATE ANY VALID RATIONALE TO SUPPORT ITS AUTHORITY TO REVOKE, BUT INSTEAD RELIES ON FACIALLY UNCLEAR THEORIES NOT PREVIOUSLY PROPOSED OR MADE AVAILABLE FOR PUBLIC COMMENT

A. EPA Has Not Provided an Opportunity to Comment on Its New Statutory Construction Arguments to Support Its Authority to Revoke

In its Final Action, EPA presents three statutory construction arguments to support its position that it has authority to revoke California's waiver. Because EPA presents these arguments for the first time in its Final Action, the public has had no opportunity to comment on

any of them. Moreover, these arguments are centrally relevant because they are the only statutory authority that EPA cites in support of its authority to withdraw California's waiver. None of these arguments has merit, as explained briefly below. EPA should grant reconsideration, withdraw the Final Action, and accept and consider comments before finalizing any positions on these points.

1. EPA has not provided an opportunity to comment on its unfounded "attempt to enforce" argument

First, EPA claims that the text of Section 209(a) indicates that EPA must have authority to reconsider previous waiver grants. 84 Fed. Reg. at 51,332 n.220. Section 209(a), EPA points out, "forbids states from 'adop[ting] or attempt[ing] to enforce' vehicle emission standards." *Id.* EPA argues that the presence of the phrase "attempt to enforce" "suggest[s] some ability on EPA's part to consider actions on the state's part separate from the state's 'adopt[ion]' of statutory or regulatory provisions and submission to EPA of a waiver request for those provisions." *Id.* Specifically, EPA claims this language supports the agency's authority to reconsider waiver grants "in light of activity later in time than or outside the authorized scope of a waiver once granted." *Id.*

This argument is inconsistent with the plain text of Section 209(a) and (b) and with decades of EPA interpretation and practice. For instance, a waiver granted under Section 209(b) waives Section 209(a) preemption, thereby sanctioning California's adoption *and* enforcement of state standards, in one fell swoop. Also, EPA's argument conflates standards with enforcement proceedings, arguing that the ongoing nature of the latter somehow grants it authority to revoke a waiver for the former. But, as the statute requires, "[t]he Administrator has consistently treated standards differently than enforcement procedures in waiver proceedings," a fact EPA fails to acknowledge, let alone reconcile with its newfound position. *See Motor & Equip. Mfrs. Ass'n*

Inc. v. EPA ("MEMA I"), 627 F.2d 1095, 1113-14 (D.C. Cir. 1979). Nothing in the text of the statute, or in its legislative history, suggests Congress intended to provide EPA with an ongoing supervisory role over the State's enforcement, let alone the ability to revoke a waiver. *See, e.g.*, H.R. Rep. No. 95-294 at 301 (1967) (congressional goal "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare").

EPA must reconsider and withdraw its Final Action and give stakeholders, including Petitioners, an opportunity to comment on EPA's novel and flawed reading of Section 209(a) and (b).

2. EPA's distinction between Section 209(b) and Section 211(c)(4)(B) does not support its authority to revoke and was not made available for comment

Second, EPA contends that Section 209(b) does not provide California an unlimited ability to obtain a waiver and contrasts that provision with Section 211(c)(4)(B)'s exemption from preemption for California fuel controls and prohibitions. 84 Fed. Reg. at 51,331. This distinction, EPA suggests, supports the conclusion that the absence of explicit withdrawal language in Section 209(b) does not foreclose agency reconsideration of a waiver. *Id.* Because EPA relies on this argument in concluding that it has authority to withdraw California's waiver, it is of central relevance.

Yet, EPA has not explained why or how the distinction between Section 209(b) and Section 211(c)(4)(B) has any effect on EPA's authority to withdraw a waiver. In fact, it has none. The distinction simply indicates that Congress intended California to check in with EPA before proceeding with its vehicle standards, whereas Congress did not require such a check-in before California regulates vehicle fuels. Congress' decision to require a one-time check-in with

EPA in the form of a waiver request does not suggest that Congress intended EPA to serve as an ongoing supervisor of California's standards after it grants a waiver.

3. EPA has not provided an opportunity to comment on its misplaced reliance on the cross-reference to Section 202(a) in Section 209(b)(1)(C)

Third, EPA argues that the cross-reference in Section 209(b)(1)(C) to Section 202(a) indicates that EPA has authority to revisit past predictions and decisions "with regard to rules promulgated under [Clean Air Act] section 202(a), the requirements of that section, and their relation to the California standards at issue in a waiver request, and, on review, withdraw a previously granted waiver where those predictions proved to be inaccurate." 84 Fed. Reg. at 51,332. EPA claims that "[i]t cannot be that EPA has the inherent authority to revisit and revise its own determinations under [Clean Air Act] section 202(a), but it lacks authority to revisit those same determinations under [Clean Air Act] section 209(b)." *Id.* For these reasons, EPA concludes, "the structure of the statute—where State standards may only be granted a waiver under [Clean Air Act] section 209(b) to the extent that they are consistent with [Clean Air Act] section 202(a)—confirms that EPA has inherent authority to reconsider its prior determination that a request for a waiver for California standards met the criteria of [Clean Air Act] section 209(b)." *Id.*

Had Petitioners been provided the opportunity to comment on EPA's position, they would have pointed out numerous, fundamental flaws with EPA's interpretation and analysis. For example, nothing in either Section 202(a) or Section 209(b) establishes the relationship EPA now claims exists between the federal standards that *EPA* sets and the state standards that *California* sets. Indeed, Section 209(b)(1) contemplates that California's standards may be *unrelated* to federal standards—such as when California establishes an emission standard for a pollutant that EPA is not yet regulating under the Clean Air Act. The consistency analysis under

Section 209(b)(1)(C) does not, as EPA seems to assume, connect California's standards to EPA's, such that EPA's authority to reconsider *its own* standards is transformed into authority to reconsider *California's* standards. Rather, Congress intended *California*, not EPA, to have discretion as to how and when the State's own standards would be set. *See MEMA I*, 627 F.2d at 1110-11 ("The history of congressional consideration of the California waiver provision … indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program….").

Also, Petitioners would have pointed to the myriad state laws that are necessarily established based on projections of costs, availability of technology, and other similar factors. Federal intervention in those programs is not warranted or necessary if and when those projections prove to be inaccurate, and there is no reason to believe such intervention is warranted, or should be implied into a statute, here.

Finally, even if this flawed interpretation were valid, it would mean only that EPA might have authority to reconsider a waiver under Section 209(b)(1)(C). It would not give EPA broader authority to reconsider under Section 209(b)(1)(B) or outside of the plain language of Section 209, which is the authority EPA purports to exercise in this Final Action. In other words, EPA's gratuitous expansion of its view of its authority under Section 209(b)(1)(C) does and cannot support the action it took here.

For these reasons, EPA must reconsider its Final Action and permit the States and Cities to comment on its new arguments.

B. EPA Has Not Provided an Opportunity to Comment on Its Claim that the Mid-Term Evaluation Rendered the States' Reliance Interests in the Waiver Unreasonable

EPA admits that, in reaching its revocation decision, it wholly discounted the substantial and ongoing reliance interests that California and the Section 177 States have in the waiver. 84 Fed. Reg. at 51,335. EPA contends that such reliance interests were not "reasonable" because "all parties were provided ample notice that EPA would be revisiting [the] *federal* standards" for model years 2022 to 2025 during the Mid-Term Evaluation process. *Id.* (emphasis added). According to EPA, the Mid-Term Evaluation "put California and others on notice that [the] standards were in flux such that they could not give rise to reasonable reliance interests." *Id.* at 51,336. On that basis, EPA further concludes that states depending on California's GHG and ZEV standards to support their National Ambient Air Quality Standards (NAAQS) programs "would also not have any reliance interests" in the waiver. *Id.* at 51,335.

Because EPA's claim that the Mid-Term Evaluation requirement rendered the States' reliance interests unreasonable provides EPA's *only* consideration of the States' reliance interests vis-à-vis the revocation decision, it is centrally relevant to EPA's decision to revoke the waiver. Yet this idea appeared *nowhere* in the SAFE Proposal; accordingly, EPA failed to provide Petitioners *any* opportunity to comment on it. Had they been provided that opportunity, the States and Cities would have brought to EPA's attention several critical facts that firmly establish the reasonableness of California and the Section 177 States' reliance on the waiver. These facts include (but are not limited to):

- The Mid-Term Evaluation was always expressly an evaluation of the *federal* standards, contrary to EPA's claim that the Mid-Term Evaluation meant that "both California and national standards would, or at least could, be revised" and thus were "in flux" and not the proper object of reasonable reliance. *See id.* at 51,336; 40 C.F.R. § 86.1818-12(h).

EPA does not explain how the process it established to reconsider *its* standards undermines California's and Section 177 States' reliance on *California's* standards;

- The Mid-Term Evaluation was designed to be a process "as robust and comprehensive as that in the original setting of the [model year] 2017-2025 standards," 77 Fed. Reg. 62,623, 62,784 (Oct. 15, 2012). And both CARB and EPA expressly stated that California would participate in the Mid-Term Evaluation. *See* Exh. 1 (Letter from Mary D. Nichols to Ray LaHood and Lisa Jackson at 2-3 (July 28, 2011)); *see also* Exh. 2 (State of California, Air Resources Board, Resolution 12-11, January 26, 2012, Agenda Item No. 12-1-2 (Board directing Executive Officer to participate in EPA's Mid-Term Evaluation)); 77 Fed. Reg. at 62,784 (EPA and NHTSA stating that they "fully expect to conduct the mid-term evaluation in close coordination with" CARB and that "any adjustments to the standards" will "ensure[] continued harmonization of state and Federal vehicle standards"); and,
- Thus, even if the Mid-Term Evaluation had some direct connection to California's standards (which it does not), its existence does not undermine California's and the Section 177 States' reliance on California's own technically-grounded standards or authorize EPA to revoke parts of California's waiver, especially given the requirements for the Mid-Term Evaluation to be a robust technical review in which CARB would actively participate.

Given these facts—none of which was addressed by EPA in its consideration of reliance—the States' reliance on EPA's waiver grant was not only reasonable but natural and foreseeable.

As multiple commenters noted, the substantial reliance interests in California's waiver preclude EPA from reopening its more than six-year-old decision to grant the waiver, which the

agency itself has characterized as an adjudicatory decision. *See, e.g.*, *Consol. Rail Corp. v. Surface Transp. Bd.*, 93 F.3d 793, 801 (D.C. Cir. 1996); *Coteau Properties Co. v. Dep't of Interior*, 53 F.3d 1466, 1479 (8th Cir. 1995); *Upjohn Co. v. Penn. R. Co.*, 381 F.2d 4, 5 (6th Cir. 1967); *see also Moncrief v. U.S. Dep't of Interior*, No. 17-cv-609, 2018 WL 4567136, at *6 (D.D.C. Sept. 24, 2018) (invalidating agency's reconsideration of oil and gas drilling lease "because of the failure to consider the substantial reliance interests at play"). Reliance interests are also factors agencies must take into account when considering a change in policy via rulemakings. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). EPA's position—that the possibility of a standard being changed renders reliance unreasonable—cannot be reconciled with these bedrock principles of administrative law, particularly given that EPA itself stated in its brief in *State of California v. EPA*, No. 18-1114 (D.C. Cir. Oct. 25, 2019), that standards adopted by EPA under Section 202 of the Clean Air Act are generally subject to future reconsideration and possible change. Final Brief for Respondents EPA at 33, 56 (May 28, 2019). Put simply, the logical extension of EPA's arguments is the absurd position that reliance interests can rarely attach to an agency decision, especially given EPA's own assertions of broad reconsideration authority. EPA should reconsider this unsustainable position.

C. EPA Has Not Clearly Explained Its Position Concerning the Applicable Burden of Proof and Has Deprived the Public of an Opportunity to Comment

In the Final Action, EPA asserts for the first time that the burden of proof applicable to its revocation of a waiver is "distinguishable" from the burden applicable to third-party opponents of a waiver request:

> EPA notes that it has previously taken the position that "the burden of proof [lies] on the party opposing a waiver"…. EPA notes that this previous discussion is distinguishable from the current context…. EPA was in 2013 analyzing *third*

> *parties' opposition* to a waiver, rather than conducting *its own analysis* of whether a previously granted waiver was appropriately granted.

84 Fed. Reg. at 51,344 n.268 (emphasis added).

However, the Final Action does not explain what EPA means by these statements. Specifically, EPA's statements could be read as suggesting that *California* would bear the burden of showing that its waiver should not be revoked. EPA's later statement that revocation is appropriate "regardless of whether a preponderance of the evidence or clear and compelling evidence standard is applied" does not clarify this issue because it sheds no light on *who* met or failed to meet their burden. *See* 84 Fed. Reg. at 51,344 n.268. Nor does EPA explain how or why the burden of proof for the revocation of a previously granted waiver is different from the burden of proof for denial of a waiver request.

At a minimum, EPA should grant this Petition and clarify its position regarding who bears the burden of proof and how or why this burden of proof differs from that which applies to those seeking denial of a waiver request. And, if EPA takes the position that the burden rests on someone other than EPA (the waiver opponent here), it must withdraw the Final Action to permit comment on that position, which was not suggested in the Proposal. During that comment period, Petitioners and other stakeholders could inform EPA of the many reasons it would be unlawful to place the burden of proof on California, or anyone other than EPA, especially when EPA seeks to undo a six-year-old decision on which the State has relied. *See MEMA I*, 627 F.2d at 1121 ("Congress specifically declined to adopt a provision which would have imposed on California the burden to demonstrate that it met the waiver requirements").

II. EPA HAS UNLAWFULLY DEPRIVED THE PUBLIC OF THE OPPORTUNITY TO COMMENT ON ITS NEWLY ARTICULATED AND FATALLY FLAWED RATIONALE FOR CHANGING COURSE AND CONSIDERING FACTORS OUTSIDE SECTION 209(B)

As EPA noted in its Final Action (84 Fed. Reg. at 51,337-38), its previous interpretation of Section 209(b) did not permit it to look beyond the scope of that Section in determining whether to grant a waiver: "Evaluation of whether California's GHG standards are preempted, either explicitly or implicitly, under EPCA, is not among the criteria listed under section 209(b). EPA may only deny waiver requests based on the criteria in section 209(b), and inconsistency with EPCA is not one of those criteria." 78 Fed. Reg. 2,111, 2,145 (Jan. 9, 2013). In the SAFE Proposal, though, EPA announced its intention to deviate from past practice in evaluating waiver requests under Section 209(b)(1): while the SAFE Proposal made clear EPA's intent to deviate from its prior Section 209(b) interpretation, it did not identify or discuss EPA's rationale for doing so. As a result, the States and Cities had no opportunity to comment on its rationale.

Only in its Final Action does EPA elaborate some on its purported reason for its change of course, stating: "the unique situation in which EPA and NHTSA, coordinating their actions to avoid inconsistency between their administration of their respective statutory tasks, address in a joint administrative action the issues of the preemptive effect of EPCA and its implications for EPA's waivers, has no readily evident analogue. EPA will not dodge this question here." 84 Fed. Reg. at 51,338. In fact, EPA states, it "will not disregard" NHTSA's conclusion that EPCA preempts California's GHG and ZEV standards because doing so "would place the United States Government 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.*

EPA does not acknowledge that the agencies themselves have created the self-justifying "unique" context here. EPA also does not explain how its position that "EPA is not the agency

that Congress has tasked with administering and interpreting EPCA" and its position that "'[t]he waiver proceeding produces a forum ill-suited to the resolution of constitutional claims'" can be reconciled with its decision to use that very waiver proceeding to deem a constitutional issue resolved. *Id.* And EPA cannot reconcile its decision here with its past position, particularly given that it is relying on a decision by NHTSA that conflicts with the decisions of two federal district courts and with the facts on the ground.[3]

Further, and contrary to EPA's claims, *Massachusetts v. EPA* does not support its position, as reflected in the very quotation that EPA cites in its Final Action: "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." 84 Fed. Reg. at 51,338 (quoting *Mass. v. EPA*, 549 U.S. 497, 532 (2007)). The Court recognized that the agencies have different obligations to set federal standards under their respective statutes. It did not suggest that every action of each agency must be identical, or that, if an agency makes a determination under a statute that it purports to implement, another agency must (or even can) use that determination as the basis for its separate action purportedly taken pursuant to another statute.

Thus, EPA's proffered rationale does not support the position it adopts here. It also fails to provide any sufficient basis for EPA's complete policy reversal with respect to its consideration of factors outside those in Section 209(b)(1). *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

[3] EPA's own recent webinar reported substantial increases in sales of ZEVs and described state mandates for EV deployment without noting any conflict with federal fuel economy standards. U.S. EPA, Electric Vehicle Trends and Projections, U.S. EPA's State and Local Energy and Environment Webinar Series, Oct. 23, 2019, attached as Exhibit 3.

Finally, because EPA has identified these arguments for the first time in its Final Action, neither Petitioners nor any other interested party has had an opportunity to consider and comment on them. EPA's rationale is centrally relevant to the Final Action because EPA contends it is one of the "two separate and independent grounds" that EPA relied on to support its decision to partially withdraw California's waiver. 84 Fed. Reg. at 51,356.

For these reasons, EPA should reconsider its Final Action, clarify and provide an opportunity to comment on its rationale for considering factors outside of Section 209(b), and consider those comments before taking any further action.

III. EPA HAS NOT PROVIDED AN OPPORTUNITY FOR THE PUBLIC TO COMMENT ON ITS NEW ARGUMENTS PURPORTEDLY SUPPORTING WAIVER REVOCATION UNDER SECTION 209(b)(1)(B)

In its Final Action, EPA adopts several new arguments in support of its Section 209(b)(1)(B) interpretation. Because these arguments did not appear in the SAFE Proposal, the public had no opportunity to comment on them. Moreover, these arguments are centrally relevant because EPA relies on them both individually and as a collective group to support its novel interpretation of Section 209(b)(1)(B) and its revocation of parts of California's waiver.

A. EPA's New Reliance on the Endangerment Provision in Section 202(a) Does Not Support Its Section 209(b)(1)(B) Interpretation or Conclusion

In its Final Action, for the first time EPA relies on the Section 202(a) endangerment provision to justify its interpretation of Section 209(b)(1)(B). Specifically, EPA argues that the endangerment finding that is required to precede federal regulation under Section 202(a) "links: (1) emission of pollutants from sources; to (2) air pollution; and (3) resulting endangerment to health and welfare." 84 Fed. Reg. at 51,339. EPA then concludes that Section 209(b)(1)(B) should be read as "requir[ing] a pollution problem at the local level that corresponds in a state-

specific particularized manner to the type of pollution problem that Congress required as the predicate for federal regulation." *Id.* at 51,340; *see also id*. at 51,349 n.280.

Because EPA takes this position for the first time in its Final Action, the States and Cities have had no opportunity to comment on it. In addition, EPA relies on the endangerment provision for its "particularized nexus" interpretation of Section 209(b)(1)(B) which, in turn, underpins EPA's decision to partially withdraw California's waiver. Therefore, this is an issue of central relevance.

Had Petitioners been provided the opportunity to comment on EPA's position, Petitioners would have pointed out the numerous, serious flaws in EPA's argument. As an initial matter, Congress both recognized that California has often led the federal government in regulating new pollutants and established Section 209(b) as a way for California to continue to do so. *See* CARB Comments at 363-66 (Oct. 24, 2018) (Docket #EPA-HQ-OAR-2018-0283-5054) ("CARB Comments"). The endangerment finding is a necessary predicate only of *federal* regulation and, thus, cannot be read to limit California's ability to obtain a waiver. Further, EPA fails to explain how Section 202's endangerment language—which the Supreme Court and EPA have interpreted as encompassing greenhouse gases—permits EPA to read Section 209(b)(1)(B) as excluding those pollutants.

EPA must reconsider its Final Action and allow public comment on its new reliance on the endangerment provision for its Section 209(b)(1)(B) interpretation.

B. EPA's Equal Sovereignty Argument Is Unfounded and Has Not Been Presented for Public Comment

In its Final Action, EPA attempts to support its reading of "extraordinary" within Section 209(b)(1)(B) by arguing for the first time that a "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is

sufficiently related to the problem that it targets." 84 Fed. Reg. at 51,347 (quoting *Nw. Austin Mun. Util. Dist. No. One. v. Holder*, 557 U.S. 193, 203 (2009)); *see also id.* at 51,340, 51,349 n.281. This principle, EPA argues, supports a conclusion that Congress did not intend Section 209(b) to be applied in the context of "pollution problems of a national or global nature, as opposed to conditions that are 'extraordinary' with respect to California in particular[.]" *Id.* at 51,347.

Because EPA has raised this equal sovereignty principle for the first time in its Final Action, the States and Cities have had no opportunity to comment on it. It is also centrally relevant because EPA relies on this principle to support its "particularized nexus" test under Section 209(b)(1)(B) and its conclusion that GHG standards are "not part of the compromise envisioned by Congress in passing [Clean Air Act] section 209(b)." *Id.* at 51,349; *see also id.* at 51,340, 51,347, 51,349 n.281.

Yet, EPA's reliance on this principle is misplaced. The waiver provision preserves California's inherent police power to choose to take on regulatory work. And Congress enacted this provision with the intent that California's work would drive developments in emission control technologies from which the nation as a whole could ultimately benefit. *See* S. Rep. No. 90-403 at 33 (1967) ("The Nation will have the benefit of California's experience with lower standards, which will require new control systems and design."); *MEMA I*, 627 F.2d at 1110-11 ("Congress intended [California] to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation."). Moreover, Section 177 allows other states to enforce the same standards that California enforces.

These circumstances are distinct from those in *Northwest Austin* and raise none of the concerns expressed in that case.

EPA should reconsider and withdraw its Final Action, provide an opportunity for full comment on this new and erroneous argument, and consider such comments before finalizing any action.

C. EPA Has Presented New, Unsupported Justifications for Its Interpretation of "Such State Standards" Without Providing an Opportunity for Comment

EPA also raises several new arguments to support its interpretation of "such State standards" within Section 209(b)(1)(B). The States and Cities have had no opportunity to comment on these arguments. They are also centrally relevant because they underpin EPA's interpretation of the scope of "such State standards." That interpretation, in turn, is fundamental to EPA's determination that California does not need its GHG and ZEV standards to meet compelling and extraordinary conditions.

For the first time, EPA claims that *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), supports EPA's position that the agency may read the same phrase ("such State standards") in the *same provision* (Section 209(b)(1)(B)) differently depending on the pollutant at issue. *See* 84 Fed. Reg. at 51,340 (arguing that *UARG* "instructs that Clean Air Act provisions cannot necessarily rationally be applied identically to GHG as they are to traditional pollutants"); *see also id.* at 51,349. EPA's reliance on *UARG* is misplaced. *UARG* stands for the proposition that the same word or phrase, appearing in *multiple places in the same statute*, need not be read the same way in each of those *different* provisions. It does not speak to whether a phrase within a single provision may be read differently in different applications. Regardless, EPA was required to accept and consider comment on this purported support for its interpretation of "such

State standards." Having failed to do so, EPA must reconsider and withdraw its decision to revoke part of California's GHG and ZEV waiver.

EPA also asserts for the first time in its Final Action that, because "such State standards" appears in both Section 209(b)(1)(B) and Section 209(b)(1)(C), the phrase must have the same meaning in both provisions. 84 Fed. Reg. at 51,345. But EPA provides no explanation for its position. Nor does EPA reconcile its position—that the same phrase must have the same meaning in *different* provisions—with its assertion that "such State standards" within the *same* provision (Section 209(b)(1)(B)) should have different and inconsistent meanings for different air pollutants. *See id.* at 51,344-45.

D. EPA Failed to Make Available for Comment Its Erroneous Claim That CARB's Waiver Stands or Falls on Its 2012 Waiver Request

In its Final Action, EPA argues that, because its withdrawal action is "premised on CARB's 2012 [Advanced Clean Cars] program waiver request," it is inappropriate to look at data and analyses outside of that request. *Id.* at 51,349 n.284. EPA's newly announced position is centrally relevant because it underpins EPA's finding that CARB's GHG and ZEV standards provide no criteria pollutant benefits (e.g., reductions in emissions of criteria air pollutants like particulate matter and ground-level ozone). And that, EPA argues, supports the withdrawal of California's waiver for those standards. *Id.*

EPA's position is wrong, as CARB explained in its comments. CARB's 2012 waiver request did, in fact, identify criteria benefits from its GHG and ZEV standards. *See* CARB Comments at 371-72.

EPA's position also flies in the face of black-letter administrative law. The agency must consider the entire record before taking its Final Action. It may not simply ignore evidence submitted to it, including the evidence submitted here by CARB, the States and Cities, and other

stakeholders that proves EPA's position is factually unsupported. *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("an agency cannot ignore evidence that undercuts its judgment"); *NRDC, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) ("an agency rule is arbitrary and capricious if the agency … ignores important arguments or evidence"). The evidence is unambiguous that the GHG and ZEV standards do provide important criteria benefits. *See* CARB Comments at 371-72.

In addition, as also discussed below, on June 17, 2019, CARB submitted a letter to the docket for this action regarding conformity requirements and transportation planning. This letter provided further evidence of the significance of the ZEV program in reducing criteria pollutants. CARB Letter, June 17, 2019 (Docket #EPA-HQ-OAR-2018-0283-7573).

In short, EPA has unlawfully limited its analysis of CARB's waiver to EPA's mischaracterization of a statement in CARB's waiver request taken out of context. And it has done so without first permitting public comment on its position that it may ignore evidence in the record. The illegality of EPA's position demands reconsideration.

E. Without Explanation or Providing Opportunity for Comment, EPA Departs From Its Prior Position Regarding the Effect of Climate Change on Ozone Levels

In its Final Action, EPA also expressly departs from its previous finding that the effects of climate change on ozone levels were relevant. 84 Fed. Reg. at 51,340. Now, instead, it asserts that those effects are insufficient to establish the "particularized nexus" EPA claims is necessary to satisfy Section 209(b)(1)(B). *Id.* EPA relies on this position to conclude that, under Section 209(b)(1)(B), California does not need its GHG and ZEV standards.

Yet, EPA has not provided sufficient justification for its change in position. *See Fox Television*, 556 U.S. at 515; *see also* CARB Comments at 371-72 (documenting the connection between climate change and increasing concentrations of ground-level ozone). In fact, the only

basis EPA provides for this new position is that its previous position would undermine its newly adopted statutory interpretation. 84 Fed. Reg. at 51,340. That is hardly a sufficient basis for an agency about-face. Nor has EPA provided any opportunity for the States and Cities to comment on this abrupt departure, since it appeared first in EPA's Final Action. Reconsideration is warranted and necessary.

F. EPA Erroneously Relies on a Single Study Regarding Certain Economic Effects of Climate Change Without Providing Opportunity for Comment

To support its position that the effects of climate change in California are insufficiently unique to support California's waiver for its GHG and ZEV standards, EPA cites S. Hsiang et al., "Estimating Economic Damage from Climate Change in the United States," 356 SCIENCE 1362 (2017). *See* 84 Fed. Reg. at 51,348 n.278 ("At least one recent analysis, cited by a number of commenters, has produced estimates of climate change damage that project that with respect to such matters as coastal damage, agricultural yields, energy expenditures, and mortality, California is not worse-positioned in relation to certain other areas of the U.S., and indeed is estimated to be better-positioned, particularly as regards the Southeast region of the country. *See* S. Hsiang, *et al*. "Estimating Economic Damage from Climate Change in the United States," 356 Science 1362 (2017).").

EPA's citation to the Hsiang article is of central relevance because EPA relies on it to support its position that California's climate impacts are not extraordinary. *Id.* at 51,348. The States and Cities never had an opportunity to comment on this study or EPA's reliance on it.

If the States and Cities had had the opportunity to comment, they would have noted that a single article is insufficient support for EPA's position in light of other evidence in the record and explained, moreover, that the Hsiang article does not support EPA's position. The authors assessed only the costs associated with a select set of impacts, including agriculture, crime,

coastal storms, energy, human mortality, and labor. In so doing, they excluded several impacts that are critical to California, including wildfires, droughts, ground-level ozone, coastal damage from sea-level rise and winter storms, and more. This study, then, does not present the full extent of climate impacts in California.

By relying only on this study, EPA has ignored the severity of California's climate impacts documented in other studies in the docket. California's Fourth Climate Change Assessment Report, for instance, projects costs to the State of $48 billion from 4.6 feet of sea-level rise and $47 million annual damage costs from wildfires on utility grid infrastructure. *See* Bedsworth, et al., *California's Fourth Climate Change Assessment: Statewide Summary* at 95-96 (2018). Other articles published since Hsiang et al. (2017) further illustrate the severity of the "compelling and extraordinary" conditions that plague California. *See, e.g.*, CARB Letter, May 31, 2019 (Docket #NHTSA-2018-0067-12411) (submitting Northcott, et al. (2019) on localized carbon dioxide impacts on ocean acidification, and Gleason, et al. (2019) on the interactions between wildfires and climate change); CARB Letter, Aug. 21, 2019 (Docket #EPA-HQ-OAR-2018-0283-7594) (submitting Williams, et al. (2019) on the connection between wildfires and climate change). Barnard, et al. (2019), for instance, addresses the consequences of sea-level rise, storms, and flooding in California. *See* NGO Letter, Apr. 5, 2019 (Docket #EPA-HQ-OAR-2018-0283-7452) (submitting to the docket Patrick L. Barnard, et al., "Dynamic Flood Modeling Essential to Assess the Coastal Impacts of Climate Change," 9 SCIENTIFIC REPORTS 4309 (Mar. 13, 2019)). They find that prior studies underestimated these impacts because the prior studies looked only at long-term sea-level rise with a static tide level and did not account for dynamic effects such as tidal non-linearity storms, short-term climate variability, erosion response, and the effects of these forces in combination with flooding. EPA must reconsider its reliance on a

single, incomplete study and consider all the evidence in the record regarding the impacts of climate change in California.

IV. EPA SHOULD RECONSIDER AND WITHDRAW ITS DETERMINATION THAT STATES CANNOT ADOPT CALIFORNIA'S GHG STANDARDS UNDER SECTION 177

In adopting as final its proposed interpretation of Section 177, EPA relies on information and reasoning not presented in the SAFE Proposal and therefore not available to stakeholders for analysis and comment. Specifically, EPA identifies a superseded version of Section 172 of the Clean Air Act (42 U.S.C. § 7502), and legislative history for that outdated provision, as a basis for concluding that "the text, placement in Title I, and relevant legislative history are all indicative that [Clean Air Act] section 177 is in fact intended for NAAQS attainment planning and not to address global air pollution." 84 Fed. Reg. at 51,351. However, neither the superseded (or current) version of Section 172 nor the legislative history for that superseded version is referenced in EPA's SAFE Proposal. *See* 83 Fed. Reg. at 43,253. On the contrary, EPA relied exclusively on "the text, context, and purpose of section 177" for its proposal. *Id.* Because EPA has adopted its proposal without revealing and allowing comment on the full basis for its decision, EPA should withdraw and reconsider its finalization of the Section 177 interpretation and allow for full and fair public comment before proceeding further.

V. EPA'S DECISION TO FINALIZE ONLY SOME OF ITS PROPOSED ACTIONS CREATES SEVERAL ISSUES WARRANTING EPA'S RECONSIDERATION

A. EPA's Action Appears to Be Driven by Improper Motives, Namely Hostility Toward California

Several factors suggest that EPA's Final Action was driven not by any substantive need to take that action or by any reason grounded in the text or purpose of the Clean Air Act, but, rather, by hostility toward California. The timing and nature of EPA's Final Action, the absence of any credible explanation for this action, and contemporaneous statements and other actions by

Administration officials all point to this conclusion. Of course, any such motive would be impermissible. Accordingly, EPA should withdraw its Final Action, reconsider and provide legally valid reasons for acting, allow an opportunity for comment on those reasons, and then consider those comments as part of making any future final decision.

1. EPA's unclear and inadequate explanation for finalizing its Part 1 action when and how it did was only provided in the Final Action, depriving the public of an opportunity to meaningfully comment on this explanation

As described above, EPA and NHTSA finalized only a subset of the actions they originally proposed as parts of a broader suite of actions. Specifically, the agencies did not finalize any action on their respective federal standards, and EPA did not finalize its proposed determination concerning the feasibility of California's GHG and ZEV standards—a determination it had proposed as a basis for the waiver withdrawal. Put simply, EPA and NHTSA both took actions to invalidate *state* standards that are, in the agencies' own words, "harmonize[d]" with the *federal* standards the agencies left in place. *See* 77 Fed. Reg. at 62,632; *see also id.* at 62,637, 62,784. And EPA withdrew parts of California's waiver without reaching any conclusion concerning the feasibility of the affected California standards.

EPA has an obligation to explain its actions. "'[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). But EPA has not done so. Indeed, EPA's decision to finalize this subset of proposed actions is entirely inconsistent with the rationale it provided in the SAFE Proposal. EPA pointed to "costs and technological feasibility considerations," along with a change in administrations as the "changed circumstances" that purportedly supported its decision to reconsider its previous waiver grant. *See* 83 Fed. Reg. at

43,243. EPA now seems to recognize that a change in administrations is insufficient justification for its actions. *See* 84 Fed. Reg. at 51,334. But, having declined to finalize any determination regarding costs and feasibility, a change in administrations is the only purportedly justifying "changed circumstance[]" left from the Proposal. In other words, the rationales EPA provided in the Proposal do not suffice to support EPA's Final Action.

The Final Action itself does not solve this problem. In fact, EPA essentially provides no explanation for its decision to act at this time and in this way. EPA points to a "divergence in the type of comments received" concerning the proposed changes to the federal standards and the proposed actions concerning state standards. *See* 84 Fed. Reg. at 51,311. But any such "divergence" explains neither EPA's decision to split up its actions nor EPA's decision to take the first set of actions when it did. In fact, any "divergence" in comments on the proposed changes to the *federal standards* and the withdrawal of parts of *California's waiver* would have been fully anticipated by EPA at the time of proposal, given that these are different actions proposed under different statutory provisions. A wholly unsurprising "divergence" in comments is not a reason to change course or to take a particular set of actions at a particular time.

The only other explanation EPA even arguably provides involves "recent actions taken by California"—specifically, California's clarification of its "deemed to comply" provision (by which compliance with EPA's existing GHG standards is deemed compliance with California's GHG standards) and the announcement that California and several automakers voluntarily agreed to principles that could support a new National Program agreement. 84 Fed. Reg. at 51,334. But EPA speaks out of both sides of its mouth on whether California's "recent actions" are, in fact, a reason EPA acted how and when it did. On the one hand, EPA says it "does not view [California's "recent actions"] as necessary predicates for [EPA's] action." *Id.* But then

EPA concludes its discussion of California's "recent actions" by stating "[t]hus…reconsideration of the grant of the waiver, and EPA's proposal to withdraw the waiver, was not solely motivated by a change in Presidential administration." *Id.* This suggests that EPA was motivated by California's "recent actions," an impression that is underscored by the absence of any discussion of other plausible motivations in the Final Action.

California's "recent actions" do not support EPA's decisions here, as Petitioners and other stakeholders could have explained had EPA properly taken comment on this as a supporting rationale. The first "recent action[]" to which EPA refers—California's clarification of its "deemed to comply" provision—will not be triggered unless and until EPA takes the very action EPA declined to take here, i.e., finalizing changes to the federal GHG standards. Put simply, California's clarification cannot have had any impact on EPA or on the auto manufacturers' compliance with California's or EPA's standards. It provides no justification, then, for taking action now on California's standards, and EPA provides no argument or evidence to the contrary. The second "recent action[]" to which EPA points—the announcement that California and several automakers voluntarily agreed to principles that could support a new National Program agreement—likewise does not justify EPA's withdrawal of parts of California's waiver. Indeed, EPA provides neither an explanation for how *voluntary* conduct by auto manufacturers could support that withdrawal nor any evidence of on-the-ground effects of this voluntary "framework." Thus, neither of the "recent actions" EPA identifies provides a basis for EPA's actions here—a fact that California and the public should have a chance to explain in comments on the justification for EPA's actions.

In sum, EPA has not explained the reason for its Final Action here. It expressly declined to finalize a determination on what EPA itself deemed a primary driver of the proposed waiver

withdrawal—namely, EPA's view that California's standards would become infeasible. And EPA provided no clear and proper reason in the Final Action. EPA should grant this Petition to explain its reasons, including clarifying whether California's "recent actions" are or are not part, or all, of that explanation, and to accept and consider public comment on its explanation.

2. The absence of any clear and proper explanation for EPA's actions, combined with other actions and statements by the Administration, suggests an improper motive—namely, hostility to California

In light of EPA's awareness of its obligation to explain its actions, the agency's failure to provide an explanation for finalizing its Part 1 Final Action suggests the presence of other, impermissible motivations. Indeed, given that Executive Order 13132 (with which EPA claims to have complied) would permit EPA's actions here only in "the presence of a problem of national significance," EPA's failure to identify any such problem as a reason for its decision to take these actions now speaks volumes. *See* 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999) (Executive Order 13132); *see also* 84 Fed. Reg. at 51,361 ("The agencies complied with Order's requirements….").[4]

Put simply, what little explanation EPA does attempt to provide in its Final Action appears to be pretextual. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (finding pretextual motive where agency decision "cannot be adequately explained" by purported reasoning and "a significant mismatch [exists] between the decision…and the rationale…provided"). Other recent actions taken by the Administration (including EPA) that appear to be motivated by political animus toward California only heighten this impression.

[4] As several Petitioners here pointed out, EPA did not, in fact, comply with Executive Order 13132's requirements that agencies consult with states before proposing or taking actions that implicate federalism concerns. *See* Attorneys General of New York, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Vermont, and Washington Letter, July 23, 2019 (Docket #EPA-HQ-OAR-2018-0283-7589).

These actions and statements include the following:

- At the press conference to announce the Final Action, Administrator Wheeler took aim at California with statements such as "CAFE does not stand for California Assumes Federal Empowerment," as well as inaccurate and hostile depictions of California's standards as "trying to set fuel economy standards for the entire country."[5] Department of Transportation Secretary Chao likewise expressed hostility toward California that inaccurately described California's standards, stating, "[w]e won't let political agendas in a single state be forced onto the other forty-nine."[6]
- In the lead up to the Final Action, on August 28, 2019, US DOJ's Antitrust Division Chief sent a threatening letter to the automakers who agreed to the "framework" principles described above and in the Final Action.[7] Anti-trust experts have observed that this threat has no basis in anti-trust law and, thus, "seem[ed] designed to intimidate California and the automakers that signed onto the deal."[8]

[5] Andrew R. Wheeler, *News Conference on California Fuel Economy Standards*, CSPAN at 6:48-51, 10:20-43 (Sept. 19, 2019), https://www.c-span.org/video/?464472-1/epa-administrator-wheeler-secretary-chao-hold-news-conference-california-fuel-standards.
[6] Prepared Remarks for U.S. Sec'y of Transp. Elaine L. Chao, "One National Program Rule" Press Conference (Sept. 19, 2019), https://www.transportation.gov/briefing-room/one-national-program-rule-press-conference, attached as Exhibit 4.
[7] *See* Timothy Puko, *Justice Department Launches Antitrust Probe Into Four Auto Makers*, WALL ST. J., Sept. 6, 2019, attached as Exhibit 5.
[8] Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES, Sept. 6, 2019, https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html, attached as Exhibit 6; *see also Antitrust Experts Say DOJ Probe Of Auto Deal Appears Aimed At Intimidation*, INSIDEEPA (Sept. 11, 2019), https://insideepa.com/daily-news/antitrust-experts-say-doj-probe-auto-deal-appears-aimed-intimidation, attached as Exhibit 7; Tim Brennan, *When Politics Meets Antitrust*, MILKEN INSTITUTE REVIEW (Sept. 9, 2019), http://www.milkenreview.org/articles/when-politics-meets-antitrust, attached as Exhibit 8.

- Also in the lead up to the Final Action, on September 6, 2019, EPA and NHTSA sent California a letter concerning the announcement of the "framework" with several automakers and threatening "legal consequences." Exh. 9.
- The Office of Management and Budget cancelled, without explanation, meetings it had scheduled with the California Air Resources Board to discuss the SAFE Proposal.
- On September 24, 2019, just days after the Final Action was signed, EPA threatened California with the loss of federal highway funds because of a State Implementation Plan (SIP) "backlog." Exh. 10. As California noted in its response, EPA's letter was full of inaccuracies and attempted to blame California for a backlog of "SIPs *awaiting action by Regional U.S. EPA staff*." Exh. 11 (emphasis added). Additionally, no other state experiencing a backlog of SIPs received any such letter.
- Just two days later, on September 26, 2019, EPA sent yet another letter to California, this time accusing the State of failing to meet its obligations under the Clean Water Act and demanding a "remedial plan" in 30 days. Exh. 12. As observers have noted, 36 other states appear similarly situated to California with respect to federal clean water obligations, but none of them received such a letter from EPA.[9]
- On October 23, 2019, the United States filed suit against California, alleging that the linkage between California's cap-and-trade program and Quebec's program is

[9] *See* Juliet Eilperin, Brady Dennis, & Josh Dawsey, *EPA Tells California It Is 'Failing to Meet its Obligations' to Protect the Environment*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/climate-environment/epa-tells-california-it-is-failing-to-meet-its-obligations-to-stem-water-pollution/2019/09/26/b3ffca1e-dfac-11e9-8dc8-498eabc129a0_story.html, attached as Exhibit 13; *see also* CalEPA, Letter from Jared Blumenfeld to Andrew Wheeler in response to September 26 letter (Oct. 25, 2019), attached as Exhibit 14.

unconstitutional. Notably, the programs have been linked for six years, without issue, raising questions about why the lawsuit was filed now (or at all).

- In late October 2019, the White House pressured auto manufacturers, for "days," according to the New York Times, to join the litigation over this Final Action on the Administration's side.[10]
- After several auto manufacturers did as the White House had asked and joined the litigation on its side, President Trump tweeted a thank-you to them that also claimed that "California has treated the Auto Industry very poorly for many years" and that his Administration was "fixing this problem!".[11] This is one of many tweets from President Trump reflecting animosity and disdain toward California, as documented in EDF's September 11, 2019 comment letter described below (Docket #EPA-HQ-OAR-2018-0283-7601).[12]
- EPA has failed to take timely action on an Information Quality Act petition in which New York requested that EPA correct its erroneous and unsupported statement that it had complied with Executive Order 13132's requirements to consult with states. *See* Attorneys General of New York, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Vermont, and Washington Letter, July 23, 2019 (Docket #EPA-HQ-OAR-2018-0283-7589). EPA's failure to consult with

[10] *See* Coral Davenport & Hiroko Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. TIMES, Oct. 30, 2019, https://www.nytimes.com/2019/10/30/climate/general-motors-toyota-emissions-white-house.html, attached as Exhibit 15.
[11] Donald Trump (@realDonaldTrump), Twitter (Oct. 30, 2019, 10:19 AM), https://twitter.com/realDonaldTrump/status/1189592785311223815, attached as Exhibit 16.
[12] Statements by the President through his official Twitter account are official statements subject to judicial review. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017)).

> California and the Section 177 States, as required by the Executive Order and as warranted under the cooperative federalism structure Congress established in the Clean Air Act, underscores that EPA acted without appropriate concern for the impact its actions would have on the states, including California.

Petitioners are not the only ones who see a pattern of politically motivated attacks on California in these actions and statements. As the New York Times reported, many of these actions have been "widely perceived as retaliatory" actions against California.[13] And the Environmental Council of the States (ECOS) has sent a letter to Administrator Wheeler, expressing "serious[] concern[s] about a number of unilateral actions by U.S. EPA that run counter to the spirit of cooperative federalism" and demanding an urgent meeting.[14]

None of the actions or statements described above was necessary or warranted. And they all appear to be aimed at punishing or embarrassing California and its officials. These actions and EPA's inadequate and shifting explanation for taking its Final Action all point to an impermissible motive of hostilely targeting California. The Clean Air Act does not authorize EPA to act with any such motive. EPA should withdraw its Final Action, reconsider its motives, and, if it intends to take similar action, provide its legitimate reasons for doing so and accept and consider public comment on those reasons.

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[13] Davenport & Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. TIMES, Oct. 30, 2019, *supra* note 10; *see also* Comment from Dennis Wall, posted Dec. 14, 2018 (Docket #NHTSA-2018-0067-12352) (submitting a New York Times article describing "the Trump Administration's confrontational stance toward California" and attributing it to influence and efforts by the oil industry).

[14] Letter from ECOS to EPA Administrator Wheeler, Sept. 26, 2019, https://www.ecos.org/wp-content/uploads/2019/09/ECOS-Sept-26-2019-Letter-to-Adminstrator-Wheeler.pdf, attached as Exhibit 17; *see also* Ariel Wittenberg, *State Regulators, Agency Spar Over Wheeler's Calif. Threats*, E&E NEWS (Sept. 27, 2019), https://www.eenews.net/greenwire/stories/1061175163, attached as Exhibit 18.

B. EPA Has Not Provided an Opportunity to Comment on Its New and Inconsistent Position That Its Partial Waiver Revocation Was Nondiscretionary

In its Final Action, EPA has asserted for the first time that its waiver revocation is nondiscretionary. 84 Fed. Reg. at 51,357 ("these decisions are not discretionary, but rather reflect EPA's conclusion that EPCA preemption and the requirements of the Clean Air Act prohibit the granting of a waiver to California"); *cf.* SAFE Proposal, 83 Fed. Reg. at 43,244-45 ("EPA posits, therefore, that the decision to withdraw the waiver would warrant exercise of the Administrator's judgment."). Because EPA did not make this claim in its Proposal, Petitioners have had no opportunity to comment on it or its implications.

Had Petitioners been given the opportunity to comment on this new assertion, Petitioners would have pointed out that it is inconsistent with EPA's actual analysis. For example, EPA's interpretation of Section 209(b)(1)(B) in both its Proposal and Final Action relies on step 2 of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 863 (1984). Likewise, EPA admits in its Proposal and Final Action that it has chosen to depart from its long-standing interpretation of Section 209(b) that did not permit it to look beyond the criteria identified in that Section when determining whether to grant a waiver request. *See* 84 Fed. Reg. at 51,337-38. If, as EPA asserts, it is choosing one purportedly reasonable interpretation of statutory text over another, that is a discretionary act. Further, even if EPA could somehow argue that its new interpretations are nondiscretionary, EPA did not have to apply those new interpretations retroactively to a previously granted waiver. It could have applied those new interpretations only to new waiver requests. And EPA certainly did not have to take these actions now, before it has reached a conclusion as to the feasibility of California's standards or finalized new federal GHG standards. Put simply, EPA's own actions are inconsistent with its claims, advanced for the first time in the Final Action, that these actions are nondiscretionary.

In the Final Action, EPA uses its improper claim of nondiscretionary action as a shield against obligations imposed by other statutes, including the Endangered Species Act, the National Historic Preservation Act, and the Coastal Zone Management Act. Because EPA has actually exercised its discretion, the agency was obligated to assess the impact of its waiver revocation with respect to the objectives of these other statutes. Further, because EPA gave no signal in its Proposal that it might finalize the waiver revocation without changes to the federal GHG standards, the public had no opportunity to comment on the agency's failure to honor those obligations with respect to the actions actually finalized.

For these reasons, EPA should withdraw its Final Action, reconsider its nondiscretionary claim as well as its obligations under the Endangered Species Act and other statutes, permit public comment on its positions and analyses, and consider those comments before finalizing any action.

VI. EPA HAS FAILED TO RESPOND TO CERTAIN COMMENTS SUBMITTED AFTER THE CLOSE OF THE COMMENT PERIOD

A number of stakeholders, including many of the States and Cities, submitted comments after the close of the comment period for the SAFE proposal. This was due to both the inadequate period for comment on the SAFE Proposal and the time at which new evidence and other materials became available. Although the States and Cities believe that these comments are properly before the agency, out of an abundance of caution, we identify here comments relevant to EPA's waiver analysis. These comments address multiple relevant topics, including: transportation conformity issues; the criteria pollutant benefits of California's ZEV standards; EPA's failure to comply with Executive Order 13132 and consult the states on federalism; the recent growing evidence that climate impacts are worse than previously expected; the request from automakers that the Administration and the State of California resume negotiations; and,

the Administration's communications evidencing improper motives for and procedures in finalizing the Final Action.

Each of these comments, listed below, was submitted to EPA with sufficient time for the agency to have practicably considered them before publishing its Final Action. Yet, EPA has not responded to these comments in its Final Action, thereby violating its Administrative Procedure Act obligations to address all relevant considerations.[15]

The comments relevant to EPA's waiver analysis include:

1. Comments regarding transportation conformity: These letters address the impact of the SAFE Proposal on the Clean Air Act's conformity requirements and the implications for state air quality planning. They also document the criteria pollutant benefits of California's ZEV standards. EPA has inadequately addressed conformity in its Final Action, incorrectly rejected the role the ZEV standards play in reducing criteria pollutant emissions, and has failed to respond to the comments that address these issues.
    a. CARB Letter, June 17, 2019 (Docket #EPA-HQ-OAR-2018-0283-7573)
    b. San Luis Obispo Council of Governments Letter, June 19, 2019 (Docket #EPA-HQ-OAR-2018-0283-7579)
    c. Butte County Association of Governments Letter, June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7580)
    d. California Association of Councils of Government Letter, June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7581)

[15] In addition to these comments, EPA has failed to respond to other relevant comments submitted during the comment period.

e. California Transportation Commission Letter, June 26, 2019 (Docket #EPA-HQ-OAR-2018-0283-7585)

f. Stanislaus Council of Governments Letter, Aug. 22, 2019 (Docket #NHTSA-2018-0067-12438)

2. Comments regarding EPA's failure to consult states on federalism as required under E.O. 13132: Attorneys General of New York, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Vermont, and Washington Letter, July 23, 2019 (Docket #EPA-HQ-OAR-2018-0283-7589)

3. Comments regarding climate impacts, including recent studies:

   a. Letters discussing and submitting the United States Global Change Research Program's (USGCRP) Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States, Nov. 23, 2018: EPA's single mention of the Fourth National Climate Assessment in its Final Action failed to address the findings and analysis in the report or the stakeholder comments that addressed it.

      i. NGO Letter, Dec. 14, 2018 (Docket #EPA-HQ-OAR-2018-0283-7438)

      ii. Multi-state and city Letter, Dec. 11, 2018 (Docket #EPA-HQ-OAR-2018-0283-7440)

      iii. Multi-state and city Letter, Dec. 21, 2018 (Docket #EPA-HQ-OAR-2018-0283-7447)

      iv. Pennsylvania Department of Environmental Protection Letter, Jan. 29, 2019 (Docket #NHTSA-2018-0067-12370)

   b. Letters regarding additional climate studies:

i. NGO Letter, Apr. 5, 2019 (Docket #EPA-HQ-OAR-2018-0283-7452): submitting Rhodium Group study regarding climate impact on smog; Gertler & O'Gorman study on climate and rainfall; Barnard, et al. (2019) on the underestimation of sea-level rise impacts of climate change

ii. NGO Letter, May 31, 2019 (Docket #EPA-HQ-OAR-2018-0283-7566): describing the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Global Assessment Report on Biodiversity and Ecosystem Services

iii. CARB Letter, May 31, 2019 (Docket #NHTSA-2018-0067-12411): submitting Northcott, et al. (2019) study on localized carbon dioxide impacts on ocean acidification; Gleason, et al. (2019) study on feedback loop of increasingly severe wildfires in the face of climate change

iv. NGO Letter, Aug. 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7591): discussing new evidence of the impacts of rising temperatures, including ice melt, rising ozone levels, and economic impacts

v. CARB Letter, Aug. 21, 2019 (Docket #EPA-HQ-OAR-2018-0283-7594): submitting Williams, et al. (2019) study on the increasing scope and severity of wildfires in California and their link to climate change

4. Comment regarding automakers' request for resuming negotiations between the Administration and California: NGO Letter, June 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7574)

5. Comment addressing undisclosed meetings between EPA and the Alliance of Automobile Manufacturers: EDF Letter, Aug. 7, 2019 (Docket #EPA-HQ-OAR-2018-0283-7592)

6. Comment highlighting Administration actions demonstrating that the purported rationale in the preamble to SAFE Proposal is pretextual: EDF Letter, Sept. 11, 2019 (Docket #EPA-HQ-OAR-2018-0283-7601)

EPA must reconsider and withdraw its Final Action in order to consider and respond to these comments and the studies they address.

VII. NEW EVIDENCE FURTHER DEMONSTRATES CALIFORNIA'S COMPELLING AND EXTRAORDINARY CONDITIONS

CARB, the States and Cities, and other stakeholders submitted comments in October 2018 demonstrating the compelling and extraordinary conditions for which California needs its motor vehicle program and, specifically, its GHG and ZEV standards. More recent evidence only adds support. In January 2019, Pacific Gas & Electric (PG&E), California's largest utility company, filed for bankruptcy to address its liabilities stemming from the devastating fires of 2017 and 2018.[16] In the past month, millions of Californians have suffered planned power outages as PG&E attempts to avoid even more harmful fires in the face of unusually forceful and dry winds and the absence of much, if any, rain in many places in the State. Even President Trump has recognized the uniquely harmful fires California faces, tweeting, "[y]ou don't see close to the level of burn in other states...."[17] The connection between California's expanding and worsening fire seasons and climate change is well documented, as CARB identified in its

[16] Bloomberg, *PG&E Loses Exclusive Control of its Bankruptcy Recovery Plan*, LA TIMES, Oct. 9, 2019, https://www.latimes.com/business/story/2019-10-09/pge-bankruptcy-reorganization-plan-judge, attached as Exhibit 19.

[17] Vincent Wood, *Trump Vows 'No More' Federal Aid to California as Devastating Wildfires Continue to Burn*, INDEPENDENT, Nov. 3, 2019, https://www.independent.co.uk/news/world/americas/us-politics/trump-california-wildfires-twitter-gavin-newsom-federal-aid-latest-a9183216.html?utm_medium=Social&utm_source=Facebook&fbclid=IwAR3NnojC9KfBOwG5baVw3SfIrDmt-x51DPC-FAWgCmA8hA8p0obB5Z1yyCA#Echobox=1572790801, attached as Exhibit 20.

comments on the SAFE Proposal, and recent studies have cemented the connection. *See* CARB Letter, Aug. 21, 2019 (Docket #EPA-HQ-OAR-2018-0283-7594) (submitting Williams, et al. (2019) study on the increasing scope and severity of wildfires in California and their link to climate change); CARB Letter, May 31, 2019 (Docket #NHTSA-2018-0067-12411) (submitting Gleason, et al. (2019) study on feedback loop of increasingly severe wildfires in the face of climate change). EPA must consider this evidence that California is suffering from compelling and extraordinary conditions caused by GHG emissions, including emissions from vehicles sold in the State.

RELIEF REQUESTED

For the foregoing reasons, the States and Cities respectfully request that the Administrator withdraw the Final Action, convene a proceeding for reconsideration of the Final Action, and afford the interested public the procedural rights due them.

Dated: November 26, 2019

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c), I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which automatically sends a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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