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

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF OHIO, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

ADVANCED ENERGY ECONOMY, ET AL.,
Intervenors.

On Petition for Review from the United States Environmental Protection Agency
(No. EPA-HQ-OAR-2021-0257)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, petitioners American Fuel & Petrochemical Manufacturers, Clean Fuels Development Coalition, Diamond Alternative Energy, LLC, Domestic Energy Producers Alliance, Energy Marketers of America, ICM, Inc., Illinois Corn Growers Association, Iowa Soybean Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Minnesota Soybean Growers Association, Missouri Corn Growers Association, National Association of Convenience Stores, South Dakota Soybean Association, and Valero Renewable Fuels Company, LLC respectfully submit this Certificate as to Parties, Rulings, and Related Cases.

A. Parties

All parties, intervenors, and amici appearing in this Court are listed in the brief of the State petitioners.

B. Rulings Under Review

Under review is the final action of the Administrator of the United States Environmental Protection Agency, entitled *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice*

of Decision, published in the Federal Register at 87 Fed. Reg. 14,332 (Mar. 14, 2022).

C. Related Cases

Three consolidated cases in the U.S. Court of Appeals for the District of Columbia Circuit involve challenges to the same agency action challenged here: *Iowa Soybean Assn.* v. *EPA*, No. 22-1083; *Am. Fuel & Petrochemical Mfrs.* v. *EPA*, No. 22-1084; and *Clean Fuels Dev. Coal.* v. *EPA*, No. 22-1085.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioners American Fuel & Petrochemical Manufacturers, Clean Fuels Development Coalition, Diamond Alternative Energy, LLC, Domestic Energy Producers Alliance, Energy Marketers of America, ICM, Inc., Illinois Corn Growers Association, Iowa Soybean Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Minnesota Soybean Growers Association, Missouri Corn Growers Association, National Association of Convenience Stores, South Dakota Soybean Association, and Valero Renewable Fuels Company, LLC hereby make the following disclosures:

American Fuel & Petrochemical Manufacturers is a national trade association that represents American refining and petrochemical companies. The Association has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

Clean Fuels Development Coalition is a business league organization established in a manner consistent with Section 501(c)(6) of the Internal Revenue Code. Established in 1988, the Coalition works with auto, agriculture, and biofuel interests in support of a broad range of energy and

environmental programs. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in the Coalition.

Diamond Alternative Energy, LLC, is a Delaware limited liability company. It is a wholly owned direct subsidiary of Valero Energy Corporation.

Domestic Energy Producers Alliance is a nonprofit, nonstock corporation organized under the laws of the state of Oklahoma. The Alliance has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

Energy Marketers of America is a federation of 47 state and regional trade associations representing energy marketers throughout the United States. It is incorporated under the laws of the Commonwealth of Virginia, has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

ICM, Inc. is a Kansas corporation that is a global leader in developing biorefining capabilities, especially for the production of ethanol. It is a wholly owned subsidiary of ICM Holdings, Inc., and no publicly held company has a 10% or greater ownership interest in ICM Holdings, Inc.

Illinois Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Iowa Soybean Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers and supporters of the agriculture and soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Iowa Soybean Association does not have a parent company, it has no privately or publicly held ownership interests, and no publicly held company has ownership interest in it.

Kansas Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Michigan Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

The Minnesota Soybean Growers Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers, their supporters, and members of soybean industries. It

operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Minnesota Soybean Growers Association is a not-for-profit corporation that is not a subsidiary of any corporation and that does not have any stock which can be owned by a publicly held corporation.

Missouri Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

National Association of Convenience Stores is an international trade association that represents both the convenience and fuel retailing industries with more than 1,300 retail and 1,600 supplier company members. The United States convenience industry has more than 148,000 stores across the country and had more than $705 billion in sales in 2021. The Association has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in it.

The South Dakota Soybean Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers, their supporters and members of soybean industries. It operates for the purpose of promoting the general commercial, legislative, and

other common interests of its members. The South Dakota Soybean Association is a not-for-profit corporation, is not a subsidiary of any corporation, and does not have any stock which can be owned by a publicly held corporation.

Valero Renewable Fuels Company, LLC, a Texas limited liability company, is a wholly owned direct subsidiary of Valero Energy Corporation, a Delaware corporation whose common stock is publicly traded on the New York Stock Exchange under the ticker symbol VLO.

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GLOSSARY

EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
NHTSA	National Highway Traffic Safety Administration
RFS	Renewable Fuel Standard

INTRODUCTION

In recent years, Congress has grappled with how best to address global climate change. It has embraced some regulatory approaches but not others, it has authorized federal agencies to take some actions but not others, and it has preempted States from regulating in some areas but not others. It has made difficult policy judgments about when and how to limit greenhouse-gas emissions, and when and how to regulate industries and spur economic growth. At no point, however, has Congress mandated a wholesale shift in the Nation's vehicle fleet from traditional vehicles to electric vehicles—a shift that would fundamentally transform the automobile industry, the oil and gas and petrochemical industries, motor-fuel retailing, the electric grid, and thousands of related manufacturing businesses and supply chains.

Nevertheless, the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA), in close coordination with the State of California, have embarked on a concerted effort to force electrification of the Nation's vehicle fleet. EPA and NHTSA have promulgated their own regulations—subject to separate challenges pending before this Court—that are designed to achieve a goal Congress never set: "that 50 percent of all new passenger cars and light trucks sold in 2030 be zero-

emission vehicles." *Executive Order on Strengthening American Leadership in Clean Cars and Trucks*, 86 Fed. Reg. 43,583, 43,583 (Aug. 10, 2021). EPA and NHTSA hope to achieve that *ultra vires* goal in part by embracing aggressive state-law standards enacted by California. EPA has purported to authorize those state standards by invoking an ill-fitting Clean Air Act provision that affords California a narrow waiver of federal preemption of state motor-vehicle emission standards.

That provision—Section 209 of the Clean Air Act—reflects Congress's determination that regulating emissions from new motor vehicles is generally the responsibility of the federal government. Section 209(a) broadly preempts States from adopting "any standard relating to" new motor-vehicle emissions. 42 U.S.C. § 7543(a). But when Congress enacted Section 209(a) in 1967, California's southern coastal cities faced an acute smog problem that national vehicle emission standards were unlikely to resolve. In response, Congress authorized EPA to grant California—and only California—a limited preemption waiver governed by carefully specified criteria. *Id.* § 7543(b)(1). Congress required California to demonstrate, among other things, that it "need[s]" its own emission standards "to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B).

For decades, EPA exercised its authority under Section 209(b) to grant California waivers for emission standards designed to address the State's unique *local* pollution problems. In 2005, however, California for the first time sought a waiver to establish its own emission standards not for local pollutants but for greenhouse gases that it determined contribute to global climate change. EPA denied the waiver, concluding that Section 209(b) does not authorize California to tackle diffuse national and international problems, but instead covers "air pollution problems [that] have their basic cause, and therefore their solution, locally in California." 73 Fed. Reg. 12,156, 12,163 (Mar. 6, 2008).

After a change in presidential administration, EPA flip-flopped. It reconsidered its denial and granted a greenhouse-gas waiver to California. 74 Fed. Reg. 32,744 (July 8, 2009). It followed up in 2013, granting California another waiver for the standards at issue here: greenhouse-gas emission standards and a zero-emission-vehicle mandate, both of which California has trumpeted as addressing global climate change. 78 Fed. Reg. 2,112 (Jan. 9, 2013). In 2019, EPA reconsidered and withdrew the 2013 waiver, once again explaining that standards aimed at global climate change fall outside Section 209(b)'s narrow exception to federal preemption and that, in any event,

California did not "need" its standards because they would not meaningfully address global climate change. 84 Fed. Reg. 51,310 (Sept. 27, 2019). Most recently, EPA flipped again, rescinding the 2019 withdrawal. 87 Fed. Reg. 14,332 (Mar. 14, 2022).

EPA got it right the first time (and again in 2019). Section 209(b) does not authorize a waiver for California emission standards addressing global climate change. Congress afforded California a targeted exemption from an otherwise uniform national regulatory scheme so that California could continue to address its local pollution conditions. Congress did not, and could not, authorize California, alone among the 50 States, to assume a role as a junior-varsity EPA and attempt to solve national and international issues like climate change. Any mandate to shift the Nation's automobile fleet to electric vehicles in an effort to address global climate change must come from Congress—not from federal agencies, and certainly not from a single State.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 42 U.S.C. § 7607(b)(1) to review EPA's action noticed at 87 Fed. Reg. 14,332 (March 14, 2022). EPA's action was "final action taken" under the Clean Air Act, and petitioners timely petitioned for

review on May 13, 2022, "within sixty days from the date notice of such … action … appear[ed] in the Federal Register."

STATEMENT OF THE ISSUE

Whether EPA unlawfully reinstated the preemption waiver, which had been withdrawn by EPA in 2019, for California's motor-vehicle greenhouse-gas emission standards and zero-emission-vehicle mandate.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the Addendum.

STATEMENT OF THE CASE

I. Statutory Background

Title II of the Clean Air Act makes the federal government responsible for regulating emissions from new motor vehicles. 42 U.S.C. § 7410. To effectuate federal control, Section 209(a) broadly prohibits States from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles." *Id.* § 7543(a). That preemption provision is the "cornerstone of Title II." *Motor Vehicle Mfrs. Ass'n* v. *N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 526 (2d Cir. 1994). It prevents "an

anarchic patchwork of federal and state regulatory programs." *Motor Equip. Mfrs. Ass'n, Inc.* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (*MEMA*).

Congress authorized only one exception to Section 209(a)'s broad preemption provision: Section 209(b), which allows EPA to "waive application of" Section 209(a) for California, under certain statutorily defined circumstances. 42 U.S.C. § 7543(b).[1] In the 1960s, Congress was not contemplating the impact of greenhouse-gas emissions, much less electrification of the nation's vehicles. It instead granted California this special status because the State faced "unique problems" with criteria pollutants, *i.e.*, ground-level ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and fine particulate matter. H.R. Rep. No. 90-728, at 22 (1967). In particular, the State's atypical "geography and prevailing wind patterns," together with an unusually large concentration of vehicles, made smog a more persistent problem in California than elsewhere. 49 Fed. Reg. 18,887, 18890 (May 3, 1984) (citing 113 Cong. Rec. 30,948 (Nov. 2, 1967)); *see* H.R. Rep. No. 90-728, at 22. Congress therefore empowered California to "set more

[1] Section 209(b) does not mention California by name, referring instead to "any State" that had adopted specified standards "prior to March 30, 1966." 42 U.S.C. § 7543(b). But as Congress knew, California was the only state that met this historical criterion and "is thus the only state eligible for a waiver." *MEMA*, 627 F.2d at 1101 n.1.

stringent standards to meet [these] peculiar local conditions." S. Rep. No. 90-403, at 33 (1967).

EPA, however, may grant a waiver only in limited circumstances. California must "determine[] that [its own] State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). In addition, notwithstanding California's determination, EPA must deny a waiver if it "finds that":

> (A) the determination of the State is arbitrary and capricious,
>
> (B) [California] does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with [Section 202(a)] of this title.

Id.

In 1977, Congress amended the Act—adding what is commonly known as Section 177—to permit "any State" to "adopt and enforce" California standards "for which a waiver has been granted," if the State "has plan provisions approved under" Title I. 42 U.S.C. § 7507. The referenced "plan provisions" are state programs designed to attain EPA's national ambient air-quality standards, which target criteria pollutants such as carbon monoxide and ozone. 84 Fed. Reg. at 51,330. Congress thus contemplated that the

standards California would adopt under Section 209(b) could help other States attain and maintain national ambient air-quality standards.

II. Regulatory Background

California for many years acted consistently with Section 209(b)'s history and text. The State sought waivers for standards that addressed its local air-quality conditions by regulating criteria pollutants. *See, e.g.*, 38 Fed. Reg. 10,235, 10,318-19 (Apr. 26, 1973) (standards for carbon monoxide and nitrogen oxides); 59 Fed. Reg. 48,557, 48,626 (Sept. 22, 1994) (standards for carbon monoxide, nitrogen oxides, and particulate matter).

In 2005, however, California broke new ground by seeking approval of a "landmark" regulation designed to "control greenhouse-gas emissions from new passenger vehicles." California Air Resources Board, *Low-Emission Vehicle Greenhouse Gas Program*, https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/lev-program/low-emissionvehicle-greenhouse-gas. Since that time, California has attempted to transform Section 209(b) into a tool for regulating global climate change and promoting the State's "green" technology industry.

In 2008, EPA denied California's first application for a waiver for greenhouse-gas emission standards. EPA "recognize[d] that global climate

change is a serious challenge," but determined that Section 209(b)(1)(B) is best read as permitting California to address "local or regional" pollution, not global issues like climate change. 73 Fed. Reg. at 12,156, 12,156 n.27. A year later, following a change in presidential administration, EPA reversed course, granting California a waiver for its greenhouse-gas standards. 74 Fed. Reg. at 32,744.

A. The 2013 California Waiver

In 2012, California introduced new vehicle-emissions standards known as the "Advanced Clean Cars" program. The program covers vehicles from model years 2015 through 2025, and has three components that would be preempted absent a waiver. In 2013, EPA granted California a waiver for those standards. 78 Fed. Reg. at 2,112.

As relevant here, the Advanced Clean Cars program sets greenhouse-gas standards for light-duty vehicles that are similar but not identical to the greenhouse-gas standards set by EPA in 2012. 78 Fed. Reg. at 2,137. Notably, California did not actually believe that it needed its own greenhouse-gas standards, because it initially agreed to deem compliance with EPA's regulations to be compliance with California's. *Id.* at 2,138. It eliminated that option in 2018. *See* 84 Fed. Reg. at 51,311.

California also enacted a zero-emission-vehicle mandate, which requires automakers to sell a minimum percentage of zero-emission vehicles each year (up to 22% for large manufacturers in model year 2025).[2] 78 Fed. Reg. at 2,114, 2,119. The mandate, California asserted in its waiver application, was adopted to help the State reduce greenhouse-gas emissions and "maintain California as the central location for moving advanced, low greenhouse gas … technology vehicles from the demonstration phase to commercialization." R-7 at 2.

To date, 17 States and the District of Columbia have adopted California's greenhouse-gas emission standards, its zero-emission-vehicle mandate, or both, under Section 177. These jurisdictions and California are home to over 140 million people and account for "more than 40 percent of the U.S. new car market." 87 Fed. Reg. at 14,358. And more disruption is ahead: California recently approved "Advanced Clean Cars II" standards, which are not at issue here but which will ban new gasoline-powered cars and require "100-percent electrification by 2035." California Air Resources Board, *Public Hearing to*

[2] The California Air Resources Board defines a "zero-emission-vehicle" as one that "produce[s] zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas … under any possible operational modes or conditions." 13 Cal. Code Regs. § 1962.4(b). Such vehicles include battery-electric, hydrogen-fuel-cell, and plug-in hybrid electric vehicles.

Consider the Proposed Advanced Clean Cars II Regulations 12 (Apr. 12, 2022), http://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/isor. pdf.

B. The Waiver Withdrawal

In 2019, EPA withdrew the waiver for California's greenhouse-gas standards and zero-emission-vehicle mandate. 84 Fed. Reg. at 51,310. As it had in denying California's 2008 waiver application, EPA concluded that the phrase "compelling and extraordinary conditions" in Section 209(b)(1)(B) refers to California's local pollution conditions, not conditions associated with global climate change. *Id.* at 51,339-44. Alternatively, EPA determined that California did not "need" its greenhouse-gas standards or zero-emission-vehicle mandate to "meet" climate-change conditions because the standards "will not meaningfully address" those conditions. *Id.* at 51,349. EPA found that the standards "would result in an *indistinguishable* change in global temperatures" and "likely *no change* in temperatures or physical impacts resulting from anthropogenic climate change in California." *Id.* at 51,341 (emphasis added).

C. The Challenged Action

On his first day in office, President Biden signed Executive Order 13,990, directing EPA to consider "suspending, revising, or rescinding" its

withdrawal of California's waiver. *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7,037, 7,037 (Jan. 25, 2021). While EPA was reconsidering the waiver, President Biden issued a second executive order, announcing "the policy of [the] Administration" to achieve the "goal that 50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles"—a policy never enacted by Congress. 86 Fed. Reg. 43,583, 43,583 (Aug. 10, 2021). President Biden directed EPA to "coordinate the agency's activities" with California. *Id.* at 43,584. Just a few months before, California Governor Gavin Newsom had issued an executive order calling for *100 percent* of in-state sales of new passenger cars and trucks to be zero-emission vehicles by 2035. Cal. EO-N-79-20, (Sept. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/ 9.23.20-EO-N-79-20-Climate.pdf.

In 2022, EPA reinstated California's waiver. 87 Fed. Reg. at 14,332. Rejecting the interpretation it had initially adopted in 2008 and again in 2019, EPA concluded that Section 209(b)(1)(B) authorizes waivers for California standards aimed at solving global climate change. *Id.* at 14,358-62. Although EPA did not retract its prior finding that the State's standards would have no meaningful impact on climate-change conditions in California, EPA

determined that California "need[s]" its greenhouse-gas standards and zero-emission-vehicle mandate to "meet" those conditions because the standards could potentially "whittle away at them over time." *Id.* at 14,366. EPA also concluded that reinstatement of the waiver was justified because California needs its motor-vehicle program to address its criteria-pollution problems, even if the specific standards at issue in this case were created to solve other problems. *Id.* at 14,362-64. Indeed, California's waiver application did not claim that its greenhouse-gas standards would address criteria pollution and stated that its zero-emission-vehicle mandate had no criteria-emissions benefit. *See* 84 Fed. Reg. at 51,337; R-7 at 15.

In addition, EPA raised a procedural justification for reinstating the waiver. EPA claimed that its inherent authority to revisit prior waiver grants is "narrow" and may be exercised only to correct a clerical or factual error or to account for changed factual circumstances. 87 Fed. Reg. at 14,348. Thus, according to EPA, it had exceeded its authority in 2019 by withdrawing the waiver to correct a legal error in the interpretation of Section 209(b)(1)(B)—a legal error that it no longer perceived anyway. *Id.* at 14,350.

SUMMARY OF ARGUMENT

I. EPA lacks authority under Section 209(b) to grant a waiver to California for emission standards aimed at global climate change.

A. Construing Section 209(b) to authorize California to regulate a global issue like climate change would radically alter the traditional federal-state balance and would raise issues of vast political and economic significance. EPA must therefore identify a clear statement from Congress authorizing such a waiver. There is no such clear statement in the Clean Air Act. Indeed, the Act is clear that it does *not* permit California to have its own state standards for national and international problems like climate change.

B. Section 209(b) precludes a waiver for California vehicle standards aimed at global climate change for two independent reasons. First, climate change is not an "extraordinary" condition within the meaning of Section 209(b)(1)(B). The Clean Air Act's text, structure, and history make clear that the term "extraordinary" refers to unique local conditions in California that result from local emissions and local pollution concentrations. Global climate change does not qualify. California's greenhouse-gas emissions leave the State and diffuse into worldwide emissions, and any climate-change conditions that result are not localized conditions peculiar to California.

Second, California does not "need" its own emission standards to "meet" global climate-change conditions that those emission standards will not meaningfully address. The plain statutory text commands that California's standards must do *something* to address the conditions they target. In 2019, however, EPA found that California's standards would likely have *no effect* on conditions in California related to climate change. Here, EPA did not disturb that finding, nor did it explain how California could possibly "need" standards to "meet" climate-change conditions in California when those standards will make no meaningful difference.

C. Even if the statute were ambiguous on both points, any ambiguity requires a narrow construction of Section 209(b), rather than one that raises serious constitutional questions about the equal sovereignty of States. The Constitution does not permit the federal government to give a single State the authority to regulate national and international issues, while prohibiting every other State from enacting its own regulations on those subjects. At the very least, Section 209(b) should be construed to avoid that serious constitutional question.

II. EPA's waiver-reinstatement decision also cannot be sustained based on the agency's novel and cramped view of its reconsideration authority.

EPA's analysis of its reconsideration authority is intertwined with its erroneous reading of the statute and thus does not supply an independent basis for its decision. In any event, an agency has inherent authority to reconsider a decision premised on an incorrect reading of a statute, and nothing in the Clean Air Act provides otherwise. EPA properly exercised its inherent reconsideration authority when it withdrew California's waiver in 2019.

STANDING

Petitioners include entities that produce or sell liquid fuels and the raw materials used to produce them, along with associations whose members include such entities. By design, California's greenhouse-gas standards and zero-emission-vehicle mandate reduce the demand for liquid fuels and their raw materials by forcing automakers to sell vehicles that use significantly less liquid fuel or no liquid fuel at all. As shown in the accompanying declarations, depressing the demand for those fuels injures petitioners and petitioners' members financially. California itself found that the "oil and gas industry, fuel providers, and service stations are likely to be" the industries "most adversely affected" by California's Advanced Clean Cars program and the resulting "substantial reductions in demand for gasoline" in California. R-7941 at 201;

see id. at 199; R-8158 at 68, 70. This economic injury to petitioners and petitioners' members constitutes injury-in-fact under Article III. That injury is caused by the challenged regulatory action, and this Court can redress that injury by setting aside the action. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs.* v. *EPA*, 3 F.4th 373, 379-80 (D.C. Cir. 2021); *Airlines for Am.* v. *TSA*, 780 F.3d 409, 410-411 (D.C. Cir. 2015).

The petitioners that are membership associations also have associational standing to challenge EPA's decision. *See Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-343 (1977). Their members have standing to sue in their own right, for the reasons described. The interests petitioners seek to protect are germane to their organizational purposes, which include safeguarding the viability of their members' businesses. And neither the claims asserted nor the relief requested requires the participation of individual members.

STANDARD OF REVIEW

This Court "shall hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or

"in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C).

ARGUMENT

I. EPA Exceeded Its Statutory Authority In Reinstating A Waiver For California To Set Emission Standards Meant To Address Global Climate Change.

To prevent "an anarchic patchwork of federal and state regulatory programs," the Clean Air Act establishes federal control over motor-vehicle emission standards. *MEMA*, 627 F.2d at 1109. It does so through Section 209(a)'s broad preemption provision, which provides that "[n]o State … shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). Because of California's "unique Los Angeles smog problem," however, Section 209(b) authorizes EPA to grant California a waiver to promulgate its own motor-vehicle emission standards in certain circumstances. *N.Y. Dep't Envtl. Conservation*, 17 F.3d at 526.

The Clean Air Act minimizes unnecessary deviation from the national regulatory effort by permitting a waiver only if California's proposed standards meet three criteria. *See* 42 U.S.C. § 7543(b)(1). Most relevant to this case is the second criterion: California must "need" its separate standards

"to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B). California cannot satisfy that criterion here. Section 209(b) does not authorize EPA to lift preemption for California emission standards meant to target global climate change, particularly where EPA found that those standards will not "meaningfully address global air pollution problems." 84 Fed. Reg. at 51,342. EPA's contrary reading of the statute is incorrect, and would render Section 209(b) unconstitutional or at a minimum raise a serious constitutional question.

A. Section 209(b) Cannot Be Read To Upset The Federal-State Balance And Permit California To Dictate The Direction Of Industries And Energy Markets.

"[O]ur law is full of clear-statement rules." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2625 (2022) (Gorsuch, J., concurring). Two of them—one respecting our constitutional system of federalism, the other preventing agencies from overstepping their statutory bounds—preclude EPA's current reading of Section 209(b). Notably, EPA has never claimed a clear mandate to approve California's climate-change related standards, asserting only that it has the "better" reading of the statute. 87 Fed. Reg. at 14,367. As explained below, not even that is correct. But at a minimum, Congress did not enact "exceedingly clear language" that would permit EPA to delegate to a single

State authority to address global climate change in ways that would upend the transportation and energy sectors. *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020).

1. Congress must be "unmistakably clear in the language of the statute" if it "intends to alter the 'usual constitutional balance between the States and the Federal government.'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). Courts apply that "background principl[e] of construction" in a variety of contexts implicating "the relationship between the Federal Government and the States." *Bond* v. *United States*, 572 U.S. 844, 857-858 (2014); *see, e.g.*, *Gregory*, 501 U.S. at 461 (federal preemption); *Atascadero*, 473 U.S. at 243 (state sovereign immunity).

Applying that federalism-based clear-statement rule, the Supreme Court has repeatedly rejected "broad" or "expansive" readings of statutes in favor of narrower ones when the sweeping reading would "significantly chang[e] the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349-50 (1971). That cautious approach "assures that the legislature has in fact faced, and intended to bring into issue, the[se] critical matters." *Id.* at 349. And it avoids constitutional questions by eschewing constructions that reach

the "outer limits of Congress' power." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (*SWANC*); *see* Part I.D, *infra*.

The federalism clear-statement rule applies with full force here. Construing Section 209(b) to authorize EPA to grant California a special dispensation, denied to all other States, to overhaul the *national* vehicle and fuel industries in order to tackle *global* climate change would radically depart from the "usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. The "usual constitutional balance" is that Congress either leaves state authority intact; preempts it uniformly, without playing favorites; or occasionally distinguishes among States based on truly local differences. It is one thing for Congress to allow California a unique exemption to tackle truly localized issues, like smog in Los Angeles. It is quite another for Congress to give a single State the vast authority to target an inherently global phenomenon like climate change. *See City of New York* v. *Chevron Corp.*, 993 F.3d 81, 85-86, 93 (2d Cir. 2021) ("Global warming presents a uniquely international problem of national concern" and "is therefore not well-suited to the application of state law."). To grant that type of novel and unprecedented authority, EPA must identify clear congressional authorization.

2. The major-questions doctrine also dictates that this Court should demand clarity from Congress before endorsing EPA's expansive interpretation of Section 209(b). Under that doctrine, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of 'vast economic and political significance.'" *Utility Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)); *see West Virginia*, 142 S. Ct. at 2605. "[T]he major questions doctrine" and the "federalism canon" "often travel together." *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring); *cf. Gonzales* v. *Oregon*, 546 U.S. 243, 267, 275 (2006) (questioning that Congress granted "broad and unusual authority through an implicit delegation," and finding no "far-reaching intent to alter the federal-state balance"). The two principles travel together here, and are mutually reinforcing.

The authority to determine whether and how motor-vehicle emissions should be limited to address global climate change "falls comfortably within the class of authorizations that [courts] have been reluctant to read into ambiguous statutory text." *Utility Air*, 573 U.S. at 324. The Supreme Court "'typically greet[s]' assertions of 'extravagant statutory power over the national economy' with 'skepticism,'" particularly where that power is being

wielded to combat phenomena of global cause and effect, such as greenhouse-gas emissions. *West Virginia*, 142 S. Ct. at 2609 (quoting *Utility Air*, 573 U.S. at 324).

In *West Virginia*, the Supreme Court indicated that the major-questions doctrine applies where an agency claims that a statutory provision "empowers it to substantially restructure the American energy market." 142 S. Ct. at 2610. Here, EPA asserts the authority to allow California to substantially restructure the American automobile market, petroleum industry, agricultural sectors, and the electric grid, at enormous cost and risk. For model years 2018 to 2025, "California projected compliance costs in California alone … 'to be approximately $10.5 billion.' " R-224 at 14. That figure actually understates the problem because it accounts only for the costs specific to the vehicle industry in California, and ignores the substantial costs imposed on the petrochemical industry nationwide and the "significant investments needed to improve the electricity grid capacity" that would be required to achieve California's goals. R-140 at 10.

The costs and effects of California's standards will not be limited to California. Under Section 177, other States can adopt California's standards, meaning that California's standards may well dictate the future of the

automobile and energy industries. To date, 17 States and the District of Columbia, representing more than 40% of the vehicle market, have embraced California's current standards as their own. *See supra* p. 10. California has touted the dramatic import of its regulations: its governor lauded recent rules passed in the wake of the waiver reinstatement as "one of the most significant steps to the elimination of the tailpipe as we know it." Coral Davenport, et al., *California to Ban the Sale of New Gasoline Cars*, N.Y. Times (Aug. 24, 2022), http://www.nytimes.com/2022/08/24/climate/california-gascarsemissions.html.

West Virginia also observed that the major-questions doctrine applies where an agency asserts authority "to adopt a regulatory program that Congress ha[s] conspicuously and repeatedly declined to enact itself." 142 S. Ct. at 2610. Congress has repeatedly confronted questions involving greenhouse-gas emissions from motor vehicles and related electric-vehicle mandates. At every turn, it has declined to give free-ranging authority on these complex national issues even to *federal regulators*, let alone a single *State*. For example, Congress expressly prohibited NHTSA from mandating electric vehicles in setting fuel-economy standards. *See* 49 U.S.C. § 32902(h)(1). And Congress has repeatedly considered and rejected legislation authorizing EPA to establish an electric-vehicle mandate. *See, e.g.*,

Zero-Emission Vehicles Act of 2019, H.R. 2764, 116th Cong. § 2 (2019); *see also* *Texas* v. *EPA*, No. 22-1031 (D.C. Cir. Feb. 28, 2022). Congress has never—in 1967 or at any time since—silently authorized California to address global climate change by forcing manufacturers to produce electric vehicles instead of traditional vehicles.

Other federal statutes confirm that Congress has pervasively regulated in this area and would have spoken clearly before authorizing California to undermine federal policy. First, the Energy Policy and Conservation Act (EPCA) instructs NHTSA to set "average fuel economy standards" nationwide. 49 U.S.C. § 32902. Because "[o]ne of Congress' objectives in EPCA was to create a national fuel economy standard," 83 Fed. Reg. 42,986, 43,233 (Aug. 24, 2018), EPCA expressly preempts state or local regulations "*related to* fuel economy standards or average fuel economy standards for automobiles," 49 U.S.C. § 32919(a) (emphasis added). As the State petitioners have shown, California's greenhouse-gas standards and zero-emission-vehicle mandate are "related to fuel economy standards," and are therefore preempted by EPCA. *See* Ohio Br. at 33-41. And even if EPCA does not expressly preempt California's standards, Congress's demonstrated

preference for a national approach in this area underscores the need for a clear statement authorizing California's waiver here.

Second, Congress has enacted a Renewable Fuel Standard (RFS) mandating the production of "clean renewable fuels" in order to "move the United States toward greater energy independence and security." *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 697 (D.C. Cir. 2017) (*ACE*) (quoting Pub. L. No. 110-140, 121 Stat. 1492 (2007)). The RFS requires EPA to calculate "nationwide [renewable fuel] volume mandates" each year, starting with 4 billion gallons of renewable fuel in 2006 and increasing to 36 billion gallons in 2022. *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2175 (2021).

In the RFS, Congress specifically sought to decrease greenhouse-gas emissions from the transportation sector by introducing increasing amounts of renewable fuels into the national supply. *See ACE*, 864 F.3d at 696. It is implausible that Congress would have authorized California to take a competing approach to greenhouse-gas emissions by mandating electrification, when that approach puts severe pressure on regulated entities' ability to comply with the RFS by eliminating vehicles that use liquid renewable fuels.

* * *

EPA cannot demonstrate a "'clear congressional authorization' to regulate in th[e] manner" that it chose. *West Virginia*, 142 S. Ct. at 2614 (quoting *Utility Air*, 573 U.S. at 324). Because Congress did not unmistakably authorize EPA to radically reorder the division of power among the States by appointing California as a co-regulator of greenhouse-gas emissions from vehicles, EPA's reinstatement of the waiver was unlawful.

B. Global Climate Change Is Not A "Compelling And Extraordinary Condition" Under Section 209(b)(1)(B).

The Clean Air Act does not just fail to clearly authorize EPA's waiver here; it forecloses the grant of a waiver to California in these circumstances. EPA must find that California "need[s]" its own standards "to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). The Act's text, structure, and history demonstrate that the phrase "compelling and extraordinary conditions" refers to California's distinctive *local* pollution problems; it does not encompass the causes or effects of *global* climate change.

1. California's conditions are "extraordinary" only if California suffers a distinct, localized problem.

Under the ordinary meaning of the terms "compelling" and "extraordinary," California may deviate from uniform federal emission standards only if it faces a pollution problem that is both significant and

distinctive. Climate-change related risks may be "compelling" conditions, but they are not "extraordinary" ones, as the term is used in Section 209(b).

a. Section 209(b)'s plain text controls here. *See Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain" courts must "enforce it according to its terms."). To prevent the needless unraveling of Title II's national regulatory framework, Congress carefully constrained California's unique ability to impose its own emission standards. Among other limits, California must face "compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B).

The statute does not define either "compelling" or "extraordinary," so "we turn to the phrase's plain meaning at the time of enactment." *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020). A condition is "compelling" if it is "force[ful]" or "hold[s] one's attention." *Webster's New International Dictionary* 463 (3d ed. 1961). And a condition is "extraordinary" if it is "most unusual" or "far from common." *Id.* at 807; *see American Heritage Dictionary* 486 (1969) ("Beyond what is ordinary, usual, or commonplace."); *United States* v. *Winston*, 2021 WL 2592959, at *6 (D.D.C. June 24, 2021) (defining extraordinary in the context of a sentence reduction for "extraordinary and compelling reasons" as "very exceptional").

California must satisfy both requirements to be eligible for a waiver. *See Brown* v. *State of La.*, 383 U.S. 131, 138 (1966) (explaining that where a statute is phrased in the conjunctive both terms must be met). It must target "compelling" conditions, meaning that California's pollution problems must be serious; it cannot deviate from the uniform national framework to address minor pollution concerns. And California must target "extraordinary" conditions, meaning that its pollution problems must be exceptional; it cannot deviate from the uniform national framework to address conditions similarly prevailing in other States. *See* S. Rep. No. 90-403, at 33 (referring to conditions that are "sufficiently different from the Nation as a whole to justify" state-specific treatment).

The latter point is critical here. The term "extraordinary" in Section 209(b) means "most unusual" *as compared to other States*, not as compared to other pollution problems. First, Section 209(b) is an exception from uniform federal regulation. It may make sense to allow a State to act independently when it faces conditions unique to that State, but it would make little sense to waive preemption when a broadly shared condition is especially serious. Indeed, the opposite is true: the more serious a national or international problem is, the more appropriate it is for the federal government to be

responsible. Second, "extraordinary" must have content that "compelling" does not share. *See Bailey* v. *United States*, 516 U.S. 137, 146 (1995) ("Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."). If "extraordinary" meant "unusual" in terms of the problem's magnitude, it would be redundant of "compelling."

b. Statutory context reinforces that reading. As discussed below, California must "need" separate standards to "meet" the conditions it faces. *See* Part I.C, *infra*. Those surrounding terms make clear that Section 209(b) contemplates conditions that "have their basic cause, and therefore their solution, locally in California," 73 Fed. Reg. at 12,163—not global conditions that California-specific motor-vehicle standards could not meaningfully affect.

A related provision, Section 177, also strongly indicates that Section 209(b)(1)(B) refers to conditions caused by "pollutants that affect local or regional air quality and not those relating to global air pollution." 84 Fed. Reg. at 51,351. Section 177 authorizes other States to adopt California's standards if the State "has plan provisions approved under this part." 42 U.S.C. § 7507. "[T]his part" is Part D of the Act, which addresses "[p]lan requirements for nonattainment areas"; the referenced "plan provisions" are state plans to attain EPA's national ambient air-quality standards, which address the six

criteria pollutants that cause smog, and other local pollution problems. 84 Fed. Reg. at 51,350. Congress thus plainly contemplated that the standards California would adopt under Section 209(b)—and the standards that other States might embrace as their own—would help States attain and maintain local ambient air-quality standards within their respective borders.

California's mandates are different in kind. EPA has set no ambient air-quality standards for greenhouse gases, because those gases mix evenly throughout the global atmosphere rather than concentrating locally to affect ambient air quality. As EPA recently explained, "the Clean Air Act's [air-quality standard] regime would make no sense applied to [greenhouse gases]" because that regime "has no relevance to a global air pollutant … that is dispersed around the world." Andrew R. Wheeler, Administrator of the EPA, *Denial of Petitions to Establish National Ambient Air Quality Standards for Greenhouse Gases* 9 (Jan. 19, 2021).

Moreover, a narrow reading of Section 209(b) respects Congress's general preference throughout Title II for a uniform national approach to regulating emissions from new motor vehicles. Congress struck a balance between the need for national uniformity and giving California latitude to address certain extraordinary local problems. But EPA would blast a hole in

Title II's careful division of federal and state authority, allowing California to assume a role in setting national climate policy that Congress has never delegated to any State—and, indeed, that Congress denied even to EPA itself. *See supra* pp. 7, 24.

c. Section 209(b)'s history confirms that Congress did not enact the waiver program to allow California to regulate global climate change. As this Court has recognized, "clearly the intent" of the waiver provision was to "focus on *local* air quality problems … that may differ substantially from those in other parts of the nation." *Ford Motor Co.* v. *EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979) (emphasis added). Congress sought only to empower California to "set more stringent standards to meet peculiar local conditions." S. Rep. No. 90-403, at 33; *see* 84 Fed. Reg. at 51,342. And Congress identified those "peculiar" circumstances: California's "unique problems" resulting from local emissions and pollution concentrations interacting with the State's distinctive "climate and topography." H.R. Rep. No. 90-728, at 22. In particular, Congress sought to allow California to address "the acute susceptibility of the Los Angeles basin to concentrations of smog," and "frequent thermal inversions along the coast." R-224 at 8. Congress thus found that California's special exemption from an otherwise uniform national program was justified

by *local* conditions with *local* causes and effects. The unique "susceptibility of the Los Angeles basin to concentrations of smog" might make California's problems "extraordinary"; the State's concerns about climate change do not.

2. California's conditions related to global climate change are not "extraordinary."

California's greenhouse-gas emissions "bear no particular relation" to "California-specific circumstances" like the thermal inversions resulting from local geography and wind patterns that Congress specifically identified when enacting Section 209. 84 Fed. Reg. at 51,341, 51,343. In its waiver decision, EPA stated that "California is particularly impacted by climate change," pointing to its potential to experience "fires, heat waves, storm surges, sea-level rise, water supply shortages and extreme heat." 87 Fed. Reg. at 14,363. But as EPA previously acknowledged, "[m]any parts of the United States, especially western States, may have issues related to drinking water … and wildfires, and effects on agriculture; these occurrences are by no means limited to California." 84 Fed. Reg. at 51,348. As a result, "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." *Id.* at 51,348 n.278. So "while effects related to climate change in California could be substantial, they are not sufficiently different from the

conditions in the nation as a whole to justify separate State standards." *Id.* at 51,344; *see id.* at 51,342-43, 51,343 n.265; 83 Fed. Reg. at 43,248-50.

Even if California could establish that it suffered from materially distinct climate-change impacts, global climate change would still not be a condition covered under Section 209(b). Greenhouse gases remain outside the sorts of conditions that Congress created the waiver process to address—that is, "localized pollutants that can affect California's local climate, or that are problematic due to California's specific topography." 84 Fed. Reg. at 51,340.

3. EPA's counterarguments lack merit.

In defending its sweeping interpretation of "compelling and extraordinary conditions," EPA misconstrues the Act's text and history.

a. EPA barely attempts to parse the term "extraordinary" or to assign it a meaning distinct from "compelling." *See* 87 Fed. Reg. at 14,357 & n.222. Instead, EPA contends that "words like 'peculiar' and 'unique'" cannot be used to "define 'extraordinary and compelling,'" because they "appear nowhere in the text." *Id.* at 14,357; *see id.* at 14,359. But Congress did not need to use the words "peculiar" or "unique" because it used a synonym: "extraordinary." The question is whether, in context, Congress used the term "extraordinary" to mean peculiar or unique *to California*. And EPA

elsewhere acknowledges that very meaning of "extraordinary," emphasizing that the phrase "compelling and extraordinary conditions" encompasses California-specific conditions, including its "geographical and climatic conditions (like thermal inversions)." *Id.* at 14,365, 14,354 n.191.

EPA further contends that Section 209(b) permits waivers for anything preempted under Section 209(a), and notes that Section 209(a) preempts state greenhouse-gas standards. 87 Fed. Reg. at 14,359-60. But Sections 209(a) and (b) are not identical in scope. That is the point of the three conditions in Section 209(b): standards preempted under Section 209(a) are not eligible for a waiver when, among other things, they are not "need[ed] … to meet compelling and extraordinary conditions." EPA's interpretation simply reads out the limiting criteria in Section 209(b).

b. Pointing to legislative history, EPA asserts that Congress intended "to allow California to serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards and developing control technology." 87 Fed. Reg. at 14,341 & n.70. California's pioneering efforts may inform why there is a waiver process at all. They do not, however, justify a waiver in the absence of "compelling and extraordinary conditions." If Congress had wanted to give California free rein to experiment with motor-

vehicle emission standards, untethered to whether California's standards are needed to meet "compelling and extraordinary conditions" in the State, it would have granted California a blanket preemption exemption, as it did for California's fuel regulations. *See* 42 U.S.C. § 7545(c)(4)(B). It did not, and this Court should give meaning to Congress's choice to adopt a more limited exemption here.

c. Lacking support in the Act's text or history, EPA retreats to claiming that Congress has acquiesced in EPA's view, because "Congress has cited California's [greenhouse-gas] standards and [zero-emission-vehicle] sales mandate in subsequent legislation." 87 Fed. Reg. at 14,360. The provisions EPA relies on, however, do not refer to Section 209, let alone establish that Section 209 authorizes a waiver for California emission standards and forced electrification aimed at global climate change. One provision requires EPA to "take into account the most stringent standards for vehicle greenhouse gas emissions" in identifying vehicles to prioritize for federal procurement. 42 U.S.C. § 13212(f)(3)(B). The other permits States to provide credits for the purchase of "clean fuel" for "centrally fueled fleets" under standards established by EPA that "conform as closely as possible to

standards … established by … California" for low-emission vehicles. 42 U.S.C. § 7586(f)(4).

These two provisions are consistent with petitioners' reading of Section 209(b). California, like any State, is free to set greenhouse-gas emission standards for *state-owned* fleets. *See Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1050 (9th Cir. 2007) (holding that Section 209(a) does not preempt state emission standards for government-owned fleets); *see also* 49 U.S.C. § 32919(c) (similar exemption from EPCA preemption). Thus, these provisions concerning state and federal procurement of their own vehicles, 84 Fed. Reg. at 51,322, say nothing about the scope of Section 209(b), which affects vehicle sales to individual citizens. The procurement provisions certainly do not provide the "overwhelming evidence of [congressional] acquiescence" required to "replace the plain text and original understanding of a statute with an … agency interpretation." *SWANC*, 531 U.S. at 169 n.5.

C. California Does Not "Need" Its Own Emission Standards To "Meet" Climate-Change Conditions That The Standards Will Not Meaningfully Address.

Even if California's conditions related to global climate change were "extraordinary" within the statute's meaning, EPA still could not grant a waiver because California does not "need" its greenhouse-gas standards and zero-emission-vehicle mandate to "meet" those conditions. *See* 84 Fed. Reg. at 51,349. To the contrary, as EPA explained in withdrawing the waiver in 2019, California's standards "will not meaningfully address global air pollution problems of the sort associated with [greenhouse-gas] emissions." *Id.* Indeed, EPA previously found that the waiver "would result in an *indistinguishable* change in global temperatures" and "likely *no change* in temperatures or physical impacts resulting from anthropogenic climate change in California." *Id.* at 51,341 (emphases added). Critically, in reinstating the waiver, EPA did not disturb these findings about the futility of California's standards.

1. The requirement that California "need" separate standards to "meet" conditions requires that the standards have some meaningful effect.

A Section 209(b) waiver is not needed and therefore not permitted if a California-specific emission standard would not appreciably affect the

conditions that supposedly warrant it. That accords with the ordinary meaning of the statutory terms "need" and "meet."

a. The verb "need" means to "be *necessary*." *Webster's New International Dictionary* 1512 (3d ed. 1961) (emphasis added). And the term "necessary" ordinarily means "essential; indispensible." *American Heritage Dictionary* 878 (1969). In all events, terms of necessity "must be construed in a fashion that is consistent with the[ir] ordinary and fair meaning … so as to limit 'necessary' to that which is required to achieve a desired goal." *GTE Ser*v. *Corp.* v. *FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000).

The verb "meet" means "[t]o satisfy (a demand, need, obligation)" *American Heritage Dictionary* 816 (1969). Consistent with its ordinary meaning, Congress used forms of the verb "meet" at least 50 times in Title II to mean "to satisfy." *See, e.g.*, 42 U.S.C. §§ 7514(a), 7545(c)(4)(C)(ii)(III), 7545(g)(2), 7545(o)(4)(A). The same word has the same meaning here. *See Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Putting the terms together, and reading them in the context of Section 209(b) as a whole, two things are clear. First, California must "need"—*i.e.*,

require as essential or very important—standards that differ from federal standards. That, of course, was why Congress created the waiver authority: "California ha[d] demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, *need* [to] be more stringent than national standards." S. Rep. No. 90-403, at 33 (emphasis added). Second, California's standards must meaningfully address the conditions giving rise to California's need for separate standards. At a minimum, if the State's standards have *no impact* on those conditions, then they cannot be said to be even helpful, let alone necessary, essential, or indispensable, to "meet" the conditions the State faces.

As the Supreme Court has explained, agencies must "apply *some* limiting standard" where a statute requires that an agency action be "necessary." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999). That limiting standard is particularly important here. EPA determined that the "costs" of imposing California's standards are not "legally pertinent" to its waiver determination. 87 Fed. Reg. at 14,342. If California's standards are warranted *whatever the costs*—a dubious proposition on its own—then surely they should at least be necessary to achieving their stated goals. "One would not say that

it is even rational, never mind" *necessary*, "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015). Likewise, if California's standards do not appreciably affect the conditions it has identified, no one would say that California "need[s]" its standards to "meet" those conditions.

Section 209(b)(1)(B)'s text plainly insists on more progress than none at all to justify a waiver. If Congress had wanted to authorize a waiver based solely on "compelling and extraordinary conditions," without a further showing that California's standards are "need[ed]" to "meet" those conditions, it could easily have omitted the latter terms and directed EPA to deny a waiver only if "such State does not face compelling and extraordinary conditions." But Congress required a showing that California "need[s]" its standards to "meet" the conditions it identifies, and that additional requirement must be given effect. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is this Court's duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

b. In reinstating California's waiver, EPA effectively erased the "need" to "meet" requirement from the statute. EPA had previously found that California's standards would not decrease global greenhouse-gas

emissions or have a meaningful impact on climate change. 84 Fed. Reg. at 51,341, 51,358. In reinstating the waiver, EPA did not disturb those findings or confront arguments about the environmental impact of electric vehicles. Under its expansive view of its statutory authority, it did not need to.

Commenters had raised a host of arguments about electric vehicles' impact on overall emissions. For example, some commenters contended that electric vehicles "cause criteria pollutant and [greenhouse-gas] emissions and environmental impacts throughout their lifecycle, including from minerals mining, component production, assembly, electricity generation, and other processes." R-140 at 1 n.2. Other commenters observed that electric vehicles "have higher non-exhaust wear and tear particle matter emissions than gasoline cars because they are heavier," and those emissions may "offset" the benefits of non-exhaust-emitting engines. R-224 at 39. And EPA itself had predicted that the presence of lower-emitting vehicles in California and the Section 177 States would "likely be offset" by higher-emitting vehicles that manufacturers could produce elsewhere, as a consequence of national fleetwide-averaging rules. 84 Fed. Reg. at 51,358; *see id.* at 51,352-51,353; R-224 at 33-34.

Rather than tackling those questions about the possible inefficacy of California's standards, EPA asserted that there is "no basis" to require a waiver request to "independently solve a pollution problem." 87 Fed. Reg. at 14,366. It invoked the Supreme Court's prediction that regulators will likely "whittle away" at climate change "over time." *Id.* (quoting *Massachusetts* v. *EPA*, 549 U.S. 497, 524 (2007)). True enough, Section 209(b) does not require that California's standards solve the entire climate-change problem. It does, however, require a showing that the standards would do at least *something* to meaningfully ameliorate the conditions at which they are targeted. EPA may not simply assume that California's standards will make a marginal but somehow necessary difference over an indefinite period. The statute requires EPA to "*find*[]" that California "need[s]" its standards to "meet" climate-change conditions. 42 U.S.C. § 7543(b)(1) (emphasis added).

EPA could not make that finding even if it had tried. California has all but admitted that it does not "need" separate standards. Until 2018, California offered a "deemed-to-comply" option, under which it permitted automakers to comply with EPA's standards in lieu of California's. Thus, for many years, California's own conduct made clear that the State did not "need" its own standards to combat climate change. Even now, although California claims it

needs its own standards, it has never shown that those standards will meaningfully address global climate change. And EPA did not say otherwise in restoring the waiver. As noted, EPA did not disturb its earlier finding that the waiver "would result in an *indistinguishable* change in global temperatures" and "likely *no change* in temperatures or physical impacts resulting from anthropogenic climate change in California." 84 Fed. Reg. at 51,341 (emphases added).

2. EPA cannot rely on an "aggregate" approach to avoid applying the statutory waiver criteria.

Unable to show that California "need[s]" its greenhouse-gas standards and zero-emission-vehicle mandate to "meet" climate-change conditions, EPA contends that such a demonstration is irrelevant. According to EPA, the only question relevant to EPA's waiver decision is whether California needs *a separate motor-vehicle program* at all—not whether it needs the specific standards outlined in a particular waiver application. *See* 87 Fed. Reg. at 14,335. Put differently, under EPA's "whole program" approach, so long as the State needs *any* "separate motor vehicle emission program," for any pollutant, it does not matter if it needs *these* emission standards. That is wrong.

a. As an initial matter, this Court need not address EPA's whole-program approach. Even if that approach allowed EPA to avoid a "need[s] to meet" analysis for each new criteria-pollutant standard, it cannot justify a preemption waiver for standards outside Section 209(b)'s scope. Section 209(b) categorically forbids a waiver for standards aimed at global conditions because such conditions do not "fall within the scope of the 'compelling and extraordinary conditions' encompassed by the [statute's] terms." 84 Fed. Reg. at 51,349. And EPA cannot use its authority to waive preemption for standards aimed at California's local pollution problems "as a bootstrap to overcome [an] explicit limitatio[n] established by Congress." *AFGE, Local 2953* v. *FLRA*, 730 F.2d 1534, 1538-1539 (D.C. Cir. 1984).

b. In any event, EPA's whole-program argument fails on its own terms. As the agency previously acknowledged, Section 209(b)(1)(B) does not refer to California's need for "any" standards or for its own "program." 84 Fed. Reg. at 51,342. It refers to "such State standards"—that is, the previously described "standards … for the control of emissions from new motor vehicles" that California "has adopted" and for which it is presently seeking a waiver. 42 U.S.C. § 7543(b)(1). That language cannot be read to encompass California's general need for its own emission program. Rather, it

refers to the specific waiver request, and requires EPA to assess California's need for the particular standards for which it seeks a waiver.

Moreover, EPA's whole-program approach would render Section 209(b)'s "need[s] … to meet" requirement meaningless. Because California "long ago established a 'need' to have *some form* of its own vehicle emissions program," 84 Fed. Reg. at 51,339, EPA would conclude that Section 209(b)(1)(B) has been satisfied for any and all standards California seeks to put into place. Section 209(b)(1)(B) is not a blank check. Just because California needs a separate emission standard for say, smog, does not mean that the Clean Air Act now empowers it to enact any other emission standards it desires, targeted at any other pollutant—no matter how unrelated, disruptive, or ineffectual those standards may be. EPA may not construe an important statutory limitation like Section 209(b)(1)(B) into "superflu[ity], void[ness], or insignifican[ce]." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

EPA's reading also conflicts with the settled interpretation of the identical phrase "such State standards" in a neighboring subsection. Section 209(b)(1)(C) requires EPA to consider whether "such State standards" comply with Section 202(a), which in turn guarantees that manufacturers have

sufficient lead time to meet the standards, given "the requisite technology" and the "cost of compliance." 42 U.S.C. § 7521(a)(2); *see id.* § 7543(b)(1)(C). EPA's current, whole-program interpretation of the phrase "such State standards" in subsection (B) would be incoherent in subsection (C). Different aspects of emission programs require different technologies, have different costs, and are enforced on different timelines. EPA has accordingly read "such State standards" in subsection (C) to require review of the specific standards proposed in a waiver request. *See* 84 Fed. Reg. at 51,332. If that is the correct meaning of the phrase in subsection (C), then the same phrase should have the same meaning in subsection (B). *See Brown* v. *NHTSA*, 673 F.2d 544, 546 n.5 (D.C. Cir. 1982) ("[W]hen the same phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in [the other].") (quoting *United States* v. *Nunez*, 573 F.2d 769, 771 (2d Cir. 1978)).

c. EPA primarily seeks to justify its whole-program approach by pointing to Section 209(b)(1). Section 209(b)(1) requires that California "determin[e] that the State standards will be, *in the aggregate*, at least as protective" as federal standards. 42 U.S.C. § 7543(b)(1) (emphasis added). EPA then has a corresponding duty to determine that California's aggregate

protectiveness finding is not "arbitrary and capricious." *Id.* § 7543(b)(1)(A). But EPA's aggregate "protective[ness]" review under subsection (A) does not justify an aggregate "need" determination under subsection (B), or an aggregate "lead-time" determination under subsection (C). To the contrary, Congress's choice to include "in the aggregate" in one provision—and to omit it in subsections (B) and (C)—shows that Congress permitted an aggregate assessment in one place but not the others. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acts intentionally.") (internal quotation marks omitted).

The history of Section 209(b) confirms the distinction between subsections (A) and (B). The original 1967 waiver provision indisputably required EPA to evaluate the particular standards for which California sought a waiver. *See MEMA*, 627 F.2d at 1110 n.32. A decade later, Congress added the "in the aggregate" language to subsection (b)(1), and by incorporation to subsection (A), to fix a specific problem. California needed more stringent limits for nitrogen oxides than EPA had imposed, but technological constraints prevented California from increasing its nitrogen-oxide limits without loosening its (inversely related) carbon-monoxide limits. *See id.*

Congress solved this conundrum by permitting California's standards to be at least as *protective* "in the aggregate." *Id.* (discussing Pub. L. No. 95-95, § 207). That amendment allowed potential increases in one pollutant to be offset by more critical decreases of another pollutant. It did nothing to change the default that California must need the particular standards in the requested waiver to meet compelling and extraordinary conditions.

EPA also invokes its past practice, contending that, "[w]ith two noted exceptions"—*i.e.*, the 2008 denial of California's first greenhouse-gas waiver request and the 2019 withdrawal—it has "consider[ed] whether California needs a separate motor vehicle emission program as compared to the specific standards in the waiver request." 87 Fed. Reg. at 14,354. Of course, no amount of prior agency practice can supplant the statute's plain meaning. Regardless, as EPA's caveat makes clear, its practice has not been consistent. And when it has embraced a whole-program approach, that has never mattered: to avoid commenters' concerns about EPA's obvious statutory misreading, "EPA's practice has been to nevertheless … determine whether California needs th[e] *individual* standards to meet compelling and extraordinary conditions." *Id.* at 14,337 (emphasis added).

3. EPA cannot justify a waiver for standards addressing global climate change by pointing to incidental impacts on local criteria pollution.

In a last-ditch effort, EPA seeks to justify reinstating California's waiver for its greenhouse-gas and zero-emission-vehicle regulations based on their purported incidental effects on California's local pollution conditions. *See* 87 Fed. Reg. at 14,363-67. This argument also fails.

a. California's avowed purpose in seeking a waiver for its greenhouse-gas and zero-emission-vehicle regulations was to address global climate change. California proclaimed in its waiver application that its standards represented a "historic" effort to control "greenhouse gas … emissions and their consequent effect on global warming." R-5 at 1. Standards aimed at that preempted purpose fall outside Section 209(b)'s scope and do not become waiver-eligible just because they have some ancillary impact on local conditions. *See Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 104-108 (1992) ("[A] law directed at workplace safety is not saved from pre-emption simply because the State can demonstrate some additional effect outside of the workplace.").

Consistent with its stated objective, moreover, California's application did not claim that its greenhouse-gas standards would help with local pollution

problems. *See* 84 Fed. Reg. at 51,337. And California "expressly disclaimed criteria pollutant benefits from the [zero-emission-vehicle] program," presenting that program to EPA "solely as a [greenhouse-gas] compliance strategy." *Id.* at 51,337 & n.252. California stated bluntly: "There is *no criteria emissions benefit* from" its zero-emission-vehicle proposal "in terms of vehicle … emissions." R-7 at 15 (emphasis added). EPA cannot now rewrite California's application in a transparent effort to satisfy Section 209(b)(1)(B). *See* 84 Fed. Reg at 51,349 n.284; *cf. Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 254-255 (2004) (holding that emission standards cannot avoid preemption under Section 209(a) by purporting to regulate sales rather than manufacturing); *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 464 (2012) (stating that California "ma[d]e a mockery of [a] preemption provision" by "framing" plainly preempted production regulations as sales regulations).

b. In any event, EPA's determination that California "need[s]" its greenhouse-gas standards and zero-emission-vehicle mandate to address local pollution is unsupported. EPA relied principally on the "logical link" between ozone pollution and greenhouse gases—namely, that ozone levels are "exacerbate[d]" by higher temperatures caused by global warming. 87 Fed. Reg. at 14,363-64. But EPA's *logical* link is no basis for a waiver because the

factual link between California's standards and lower temperatures is missing. As explained earlier, EPA previously found that the State's rules would produce "likely no change" to climate-change conditions—including rising temperatures—in California. 84 Fed. Reg. at 51,341. Moreover, EPA failed to address commenters' concerns that California's standards would "make its ozone problems *worse*" by raising vehicle prices and causing consumers to "keep[] their older (dirtier) vehicles longer." R-224 at 45; *see* R-140 at 18 & n.112.

Instead, EPA pointed to evidence purporting to show that California's standards would address upstream stationary-source criteria pollution. *See* 87 Fed. Reg. at 14,364 & n.305. But California can regulate stationary sources directly and therefore does not "need" its own motor-vehicle regulations to address such emissions. *See West Virginia*, 142 S. Ct. at 2600-2602 (describing statutory framework for stationary sources). And even if those upstream impacts could be the basis for a waiver, the asserted reductions are "trivial" and "would have no discernible effect" on California's air quality, as commenters demonstrated and EPA did not dispute. *See* R-224 at 39-40.

D. Even If Section 209(b) Were Ambiguous, It Should Be Construed Narrowly To Avoid Serious Constitutional Problems.

If there were any doubt about the scope of Section 209(b), this Court should reject EPA's construction in order to avoid serious constitutional problems. As the State petitioners have shown, construing Section 209(b) to permit California, alone among the States, to enact standards targeting global climate change would violate the "fundamental principle of equality of the states under the Constitution." *Bolln* v. *Nebraska*, 176 U.S. 83, 89 (1900). Neither the causes nor the effects of climate change are "*local* evils" peculiar to California that support giving the State the unique ability to redress them. *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 203 (2009) (emphasis added) (quoting *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328-329 (1966)).

At a minimum, the equal-sovereignty question is a serious one. Because Section 209(b) is at best ambiguous for EPA, this Court should construe it to avoid that difficult constitutional question. *See United States* v. *Davis*, 139 S. Ct. 2319, 2332 n.6 (2019) (courts must "interpret ambiguous statutes to avoid rendering them unconstitutional" and "to avoid the need even to address serious questions about their constitutionality"); *see also SWANC*, 531 U.S. at

173 (rejecting deference for interpretation that "raise[d] serious constitutional problems"); *Utility Air*, 573 U.S. at 310-311, 327 (declining, in part because of concerns about "the Constitution's separation of powers," to read the Clean Air Act to authorize an "unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy").

EPA's contrary arguments miss the mark. First, EPA observes that Section 177 allows other States to follow California's lead. 87 Fed. Reg. at 14,360. That option, however, does not "undermin[e] the notion that the regulatory scheme treats California in an extraordinary manner." *Id.* If anything, it *strengthens* California's unique regulatory power vis-à-vis other States by allowing California alone to shape national industries, in ways that may burden those States that decline *not* to opt-in to California's standards. *See* R-125 at 9 ("[T]he vehicles available to Ohioans [will] not [be] governed by Ohio's standards or the Federal government's standards, but rather by California's standards.").

Second, EPA notes that Section 209(b) does not "impose any burden on any state." 87 Fed. Reg. at 14,360. That is both untrue and irrelevant. It is untrue because Section 209 *does* significantly burden the 49 States that are subject to severe economic harms and disruption from California's regulatory

schemes. And it is irrelevant because the equal-sovereignty doctrine also prohibits unequal benefits—for instance, the "extension of the sovereignty of a State into a domain … from which the other States have been excluded." *United States* v. *Texas*, 339 U.S. 707, 719-720 (1950).

Finally, EPA points to federalism. But federalism does not mean that just one State gets "to be a laboratory for innovation," 87 Fed. Reg. at 14,360, while other States have no room to experiment—at least where the unequal treatment relates to a shared national concern.

II. The Waiver Reinstatement Cannot Be Affirmed Based On EPA's Narrow View Of Its Reconsideration Authority.

EPA cannot shield its decision from this Court's scrutiny by relying on the agency's 14 years of vacillating on the permissibility of waivers aimed at climate change. Without questioning the propriety of its 2009 reconsideration of an earlier waiver *denial*, EPA now contends that its 2019 reconsideration of an earlier waiver *grant* was improper. In particular, EPA contends for the first time that, "in the context of reconsidering a waiver grant," the agency's reconsideration authority can be exercised only to "address a clerical or factual error or mistake, or where information shows that factual circumstances or conditions related to the waiver criteria … have changed so significantly that the propriety of the waiver grant is called into doubt." 87 Fed. Reg. at 14,344.

This Court should reject EPA's procedural contention for two reasons. First, EPA's cramped view of its own reconsideration authority was not an independent ground for reinstating the waiver. Second, even if it were, EPA's current view is wrong. The Clean Air Act's text, agency practice, and common sense establish that EPA possesses inherent authority to reconsider a prior waiver determination when it believes the waiver rests on an incorrect understanding of the law.

A. EPA's Analysis Of Its Reconsideration Authority Is Intertwined With The Merits Of Its Statutory Arguments.

EPA's analysis of its reconsideration authority does not independently support its decision because that analysis is intertwined with EPA's erroneous interpretation of Section 209(b). "When a decision of a government agency is put on several grounds, and one or more is invalid, a reviewing court must appraise whether the invalid ground may not have infected the entire decision." *Dietrich* v. *Tarleton*, 473 F.2d 177, 179 (D.C. Cir. 1972); *cf. Allina Health Servs.* v. *Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (procedural deficiency created "enough uncertainty as to its possible [e]ffect [*sic*] on the agency's disposition" that vacatur was appropriate) (internal quotations omitted).

Here, EPA's erroneous statutory analysis "infected" its procedural objections. EPA's lengthy statutory-interpretation analysis indicates that the agency's view on the merits, not its procedural objection to reconsideration, drove its decision. As EPA explained, it believed the 2019 reconsideration reflected both a "flawed statutory interpretation" and a "misapplication of the facts under that interpretation." 87 Fed. Reg. at 14,352. EPA likewise indicated that reconsideration would be appropriate if "conditions related to the waiver criteria" had changed such that "the propriety of the waiver grant is called into doubt." *Id.* at 14,350. And EPA stated that it "should not be exercising authority to reconsider prior *valid* waivers that present no factual errors based on different statutory interpretations." *Id.* at 14,351 (emphasis added). EPA's reconsideration analysis thus cannot reasonably be isolated from its simultaneous conclusion that the statutory interpretation underlying the 2013 waiver *had* been valid.

As a result, if this Court agrees that the waiver exceeds EPA's statutory authority, EPA's reinstatement of that waiver must be set aside, notwithstanding the agency's procedural objections to reconsideration. *Cf.* *Carlson* v. *Postal Regul. Comm'n*, 938 F.3d 337, 351 (2019) (even a lawful aspect of an agency action must be vacated unless the agency "would have

adopted the same disposition" if the unlawful "portion were subtracted"). At the very least, the Court should vacate and remand for EPA to reevaluate its reconsideration analysis in light of the correct interpretation of Section 209(b). *See PPG Indus., Inc.* v. *United States*, 52 F.3d 363, 365-366 (D.C. Cir. 1995) (remanding decision that "rested on an incorrect legal standard").

B. EPA Properly Exercised Its Inherent Authority To Reconsider Its Earlier Waiver.

In all events, EPA's unduly narrow view of its reconsideration authority is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

1. In the absence of statutory language to the contrary, agencies are assumed to possess implied or inherent authority to revisit their prior decisions. *See Ivy Sports Med., LLC* v. *Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). There are occasional exceptions, when Congress speaks clearly and "limit[s] an agency's discretion to reverse itself." *New Jersey* v. *EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008); *see Am. Methyl Corp.* v. *EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984). But if Congress does not provide "an exclusive statutory mechanism" for reconsideration, the agency has "the inherent authority to revisit its own decisions"—including its own legal determinations—because "the power to reconsider is inherent in the power to decide." *Ranbaxy Lab'ys,*

Ltd. v. *Burwell*, 82 F. Supp. 3d 159, 194 (D.D.C. 2015) (quoting *Ivy Sports*, 767 F.3d at 86).

EPA's inherent reconsideration authority includes the ability to rescind a waiver that was premised on an erroneous statutory interpretation. As the Supreme Court has explained, "[a]n initial agency interpretation" of the statute it administers "is not instantly carved in stone." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984). Rather, administrative agencies "*must* consider varying interpretations … on a continuing basis." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) (quoting *Chevron, U.S.A., Inc.*, 467 U.S. at 863-864) (emphasis added). Courts have thus frequently held that an agency's changed legal position—in particular its view that a prior decision was based on an erroneous reading of the law—is a proper ground for reconsideration. *See, e.g.*, *Gun South, Inc.* v. *Brady*, 877 F.2d 858, 859-862 (11th Cir. 1989); *Belville Min. Co.* v. *United States*, 999 F.2d 989, 998 (6th Cir. 1993); Daniel Bress, *Administrative Reconsideration*, 91 Va. L. Rev. 1737, 1753 (2005) ("[R]econsideration is said to be available because the agency relied on a legal position that it no longer considers proper.").

EPA nevertheless concluded that its waiver-reconsideration authority is limited to "clerical or factual error" or changed "factual circumstances." 87 Fed. Reg. at 14,349-50. But it gave no explanation for distinguishing between these grounds and legal error. And its limitation would turn the traditional understanding of an agency's inherent authority on its head. A "ministerial" or "clerical error" rule applies even when Congress has spelled out, with specificity, the extent of an agency's reconsideration authority. The agency still retains the power to revisit that decision to correct erroneous facts or clerical errors. *Int'l Paper Co.* v. *FERC*, 737 F.2d 1159, 1164, 1166 (D.C. Cir. 1984) (Bork, J.); *see Am. Trucking Assoc.* v. *Frisco Trans. Co.*, 358 U.S. 133, 145 (1958). But if Congress has *not* expressly limited an agency's reconsideration authority, the agency's inherent authority extends beyond ministerial or clerical errors.

Absent a statutory command otherwise, the only limit on an agency's inherent reconsideration authority is that the agency must reconsider "within a reasonable period of time." *Mazaleski* v. *Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977). That limit, however, applies most naturally where the agency adjudicates private parties' rights or where the reconsideration decision "will have retroactive effect." *Id.* Here, Congress's design allows reconsideration

whenever circumstances make it appropriate. EPA does not dispute that an extended reconsideration period is appropriate when reconsidering a waiver decision for future model years. Indeed, EPA's 2022 reconsideration of its 2019 decision occurred over two-and-a-half years later. That makes sense because the Section 209(b) waiver process is effectively an ongoing proceeding that requires a lengthy notice-and-comment period each time. So timing is no barrier to reconsideration in this statutory context.

2. EPA's "past administrative practice" supports the traditional understanding of its inherent reconsideration authority. *Am. Methyl Corp.*, 749 F.2d at 838-839. EPA has previously reconsidered its waiver decisions. *See* 43 Fed. Reg. 998 (Jan. 5, 1978) (grant of reconsideration); 47 Fed. Reg. 7,306 (Feb. 18, 1982) (reconsidering and affirming grant of waiver). And those reconsiderations have sometimes been premised on a changed statutory interpretation. 74 Fed. Reg. at 32,747 (reconsidering waiver denial based on prior "misinterpretation" of the waiver factors). The agency's well-established historical practice undermines its sudden discovery of a severely cabined reconsideration authority.

EPA also failed to reconcile its position here with its 2009 reconsideration of its original waiver denial. Section 209(b) should not be read

as a one-way ratchet under which EPA has broad power to reconsider only the *denial* of a waiver but not the *grant* of one. That approach has no basis in the statute and would carve out an ever-growing set of a single State's regulations from a federal preemption provision. It would also lead to absurd results. For example, even if this Court or the Supreme Court were to reject EPA's interpretation of the waiver criteria, EPA could not revisit a waiver decision resting on that erroneous interpretation. *But see ConocoPhillips Co.* v. *EPA*, 612 F.3d 822, 832 (5th Cir. 2010) (remanding for reconsideration in light of Supreme Court decision interpreting relevant statute based on agency's "inherent authority to reconsider"). The agency's flawed reading would be forever embedded in national climate policy—so long as the error favored less preemption rather than more. That cannot be right.

3. EPA's other attempts to defend its cramped view of its reconsideration authority also lack merit. First, EPA suggests that its reconsideration authority "is constrained by the three waiver criteria." 87 Fed. Reg. at 14,334. Although EPA can certainly reconsider a waiver if California no longer meets the waiver requirements, that may be true either because the facts on the ground have changed or because the agency has changed its position on the *meaning* of the waiver criteria.

EPA asserts that legislative history supports its position. *Id.* at 14,348. But the Senate Report it cites declared that "[i]mplicit in this provision is the right of the [Administrator] to withdraw the waiver *at any time* [if] … California no longer complies with the conditions of the waiver." *Id.* (quoting S. Rep. No. 90-403, at 34 (emphasis added)). The Senate Report drew no line between failure to comply with the conditions of a waiver because of a factual change versus a legal one.

Finally, EPA implies that reliance interests foreclosed withdrawing the waiver. *See id.* at 14,344. Reliance interests are of lesser concern where, as here, an agency reconsideration reduces regulatory obligations and thereby provides affected parties with *more* flexibility rather than less. Regardless, reliance is not a flat bar to reconsideration, but rather a factor the agency must address. *See Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221-222 (2016); *FCC* v. *Fox Television Stations*, 556 U.S. 502, 515 (2009). And EPA's 2019 decision included a detailed analysis of the reliance interests that might have attached to the waiver and reasonably explained why they did not preclude reconsideration. *See* 84 Fed. Reg. at 51,334-37.

CONCLUSION

For the foregoing reasons, the Court should set aside EPA's action rescinding the withdrawal of California's preemption waiver.

OCTOBER 24, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with Federal Rule of Appellate Procedure 32(f) and (g), along with the Court's September 20, 2020 Order because it contains 12,538 words.

This Brief also complies with the requirements of Federal Rule of Appellate Procedure 27(d)(1)(E), 32(a)(5) and (6) because it was prepared in 14-point font using a proportionally spaced typeface.

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OCTOBER 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of October, 2022, I electronically filed the foregoing Final Brief for Petitioners with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

s/ Jeffrey B. Wall
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OCTOBER 24, 2022

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

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF OHIO, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

ADVANCED ENERGY ECONOMY, ET AL.,
Intervenors.

On Petition for Review from the United States Environmental Protection Agency
(No. EPA-HQ-OAR-2021-0257)

PRIVATE PETITIONERS' ADDENDUM OF STATUTES AND STANDING DECLARATIONS

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PRIMARY STATUTES AND REGULATIONS

A. Section 209 of the Clean Air Act, *see* 42 U.S.C. § 7543, provides:

> (a)Prohibition
>
> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.
>
> (b)Waiver
>
> (1)The Administrator shall, after notice and opportunity for public hearing, waive application of this section to 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, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.
>
> (2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

(c)Certification of vehicle parts or engine parts

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b).

(d)Control, regulation, or restrictions on registered or licensed motor vehicles

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

(e)Nonroad engines or vehicles

(1)Prohibition on certain State standardsNo State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter—

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(B) New locomotives or new engines used in locomotives.

Subsection (b) shall not apply for purposes of this paragraph.

(2)Other nonroad engines or vehicles

(A)In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that—

(i) the determination of California is arbitrary and capricious,
(ii) California does not need such California standards to meet compelling and extraordinary conditions, or
(iii) California standards and accompanying enforcement procedures are not consistent with this section.

(B)Any State other than California which has plan provisions approved under part D of subchapter I may adopt and enforce, after notice to the Administrator, for any period, standards relating to control of emissions from nonroad vehicles or engines (other than those referred to in subparagraph (A) or (B) of paragraph (1)) and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if—

(i) such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A), and
(ii) California and such State adopt such standards at least 2 years before commencement of the period for which the standards take effect.

The Administrator shall issue regulations to implement this subsection.

B. 42 U.S.C. §7545(c)(4)(B):

> (B) Any State for which application of section 209(a) has at any time been waived under section 209(b) may at any time prescribe and en-force, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

C. 49 U.S.C. §32919(a) (part of the Energy Policy and Conservation Act of 1975):

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, ADVANCED ENERGY ECONOMY, ET AL., Intervenors.	Case No. 22-1081 and consolidated cases

DECLARATION OF CHRIS BAMBURY

I, Chris Bambury, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Vice President of Bambury, Inc. ("Bambury"), a family-owned and operated business in California. Bambury is a fourth-generation operated company that just celebrated 100 years since it was established. For 50 years it operated towing and auto repair services, but recently ceased those operations due to profitability challenges. We've

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operated a foodservice (deli) business for over 30 years, but it has struggled through COVID.

2. Bambury is a member of the National Association of Convenience Stores ("NACS"), and I currently serve on the Board of Directors of NACS. I am also the Senior Vice President of the California Fuels and Convenience Alliance ("CFCA"), which is the state association that represents independently owned convenience store operators and fuel marketers. While CFCA is not formally affiliated with NACS, the two organizations collaborate and share resources to stay on top of federal, state, and local issues, such as EPA's decision to grant California a waiver for its greenhouse-gas standards and its zero-emission-vehicle mandate.

3. Bambury owns and operates three retail convenience stores in Sonoma, California, two of which have fueling stations. These stores and our fuel are branded under the name BONNEAU, after our founders August and Catherine Bonneau, my great grandparents. We currently employ 32 employees between three locations. Bambury does not own or operate any stores or fueling stations outside of California.

4. Approximately 85% of Bambury's revenue comes from fuel sales. The other 15% comes from the sale of beverages, snacks, tobacco, lotto, and other convenience-store items.

5. I am generally familiar with California's regulations limiting vehicular greenhouse-gas emissions and mandating zero-emission vehicles. I am also aware that earlier this year the federal government reinstated a waiver that permits the State to implement these standards.

6. I understand that California's greenhouse-gas standards and zero-emission-vehicle mandate reduce the demand for fuel in California by requiring automakers to deliver vehicles for sale in California that are more fuel efficient, as well as a minimum percentage of zero-emission vehicles, such as electric vehicles, that do not run on conventional fuels.

7. Reducing the demand for fuel harms Bambury financially. Drivers of low- and zero-emission vehicles have less of a need, or no need at all, to stop at our gas stations to refuel. As a result, our locations that offer fueling sell less fuel, directly harming Bambury's bottom line.

8. In addition, because customers at those locations come through our stores and make retail purchases when they stop to refuel, our retail sales suffer when drivers refuel less often.

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9. Although Bambury recently installed four electric-vehicle chargers at its stores, revenue from these charging stations will not replace our lost revenue from fuel and retail sales. Because most electric-vehicle drivers are able to recharge at home or at work, each charging station averages one to two charges every other day, and zero charges on other days. By comparison, each of our fueling positions averages over 100 patrons per day. The charging stations are not a significant source of revenue, and I do not anticipate that they will become a significant source in the future.

10. For these reasons, the waiver allowing California to implement its greenhouse-gas emission standards and zero-emission-vehicle mandate harms Bambury financially.

Dated: 10/19/2022

DocuSigned by:
Chris Bambury
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Chris Bambury

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioner,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondent.*	No. 22-1081 (and consolidated cases)

DECLARATION OF DAVE LOOS OF ILLINOIS CORN GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS' OPENING BRIEF

I, Dave Loos, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Director of Biofuels and Research of the Illinois Corn Growers Association, a nonprofit trade association based in Illinois with a membership of 5,000 corn farmers, as well as their supporters and members of corn farming-related industries. We operate to promote the general commercial, legislative, and other common interests of our members.

2. I am familiar with all aspects of the Association's work and with the market for corn and products, such as ethanol, that are made using the corn grown by our members.

3. Illinois is one of the nation's leading corn producing states, with a net production of more than 2 billion bushels of corn. The majority of this corn is used as a feedstock for ethanol production.

4. The ethanol industry supports over 400,000 jobs in more than 25 states. Ethanol contributes more than $52 billion to the national GDP and profitably processed more than 5.1 billion bushels of corn in 2021.

5. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist "knocking" in an engine—reducing vehicles' fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline in part to raise its octane rating to a level suitable for use in most vehicles. In 2021 alone the use of ethanol reduced greenhouse gas emissions by more than 50 million metric tons, equivalent to the savings of turning off 126 natural gas-fired power plants. *See* EPA, *Greenhouse Gas Equivalencies Calculator* (Oct. 11, 2022), https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator. In California, over the last decade the use of ethanol has resulted in 26.9 metric tons of GHG emission savings.

6. The United States Environmental Protection Agency promulgated a final agency action entitled *California State Motor Vehicle Pollution Control*

Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14,332 (Mar. 14, 2022) ("Waiver Restoration"). This decision purports to reinstate a waiver of Clean Air Act preemption to California (and, by extension, to some seventeen other states that have opted to copy California's regulations) to impose its own greenhouse gas emissions standards for new automobiles as well to impose a zero-emissions vehicle sales quota.

7. As California explained in its original waiver request, California's regulations will reduce emissions through "'reductions in fuel production.'" 87 Fed. Reg. 14,364 (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16). Economic harm from these rules is not speculative. Indeed, California estimated "substantial reductions in demand for gasoline—exceeding $1 billion beginning in 2020 and increasing to over $10 billion in 2030." Cal. Air Resources Bd., *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant Exhaust Emission Standards* 201 (Dec. 7, 2011). By reducing total gasoline consumption, if gasoline remains at the current 10% ethanol blend level, ethanol demand destruction will also result.

8. While these standards are in effect, they will drive down demand for ethanol, not only in California but also in states that have adopted California's

standards: Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

9. This demand destruction harms the Illinois Corn Growers Association and its members by decreasing demand for the corn they grow, particularly in California and in states that have adopted California's standards. According to the U.S. Energy Information Administration, California consumes 10% of the nation's fuel ethanol supply, which is about seven times more than ethanol plants operating within the State can produce. *See* U.S. Energy Information Administration, *California State Energy Profile* (Oct. 20, 2022), https://www.eia.gov/state/print.php?sid=CA.

10. These financial harms affect our members and also redound to the Association itself, which will lose funding it uses to pursue its mission of advocating for the interests of its members.

11. All these injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 22, 2022

Dave Loos

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioners,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents.*	No. 22-1081 (and consolidated cases)

DECLARATION OF DEEPAK GARG

I, Deepak Garg, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a Vice President leading the Fuels Regulatory and Planning and HSE Assurance division servicing Valero Renewable Fuels Company, LLC ("Valero Renewables") and Diamond Alternative Energy, LLC ("Diamond Alternative"). I am responsible for a wide range of compliance and business matters relating to Valero Renewables and Diamond Alternative's production and sale of renewable fuels such as ethanol and renewable diesel. My responsibilities include analyzing market and economic impacts of regulatory and statutory changes on the

liquid fuels production industry, including the impacts on renewable fuels.

2. I have extensive experience in ensuring the Valero family of companies' cost-effective compliance with the requirements of the federal Renewable Fuel Standard, which requires so-called "obligated parties" to blend certain percentages of renewable fuels into transportation fuels or to purchase an equivalent number of "Renewable Identification Numbers" credits, or RINs, to meet an EPA-specified Renewable Volume Obligation ("RVO").

3. In addition, I have extensive experience with California's Low Carbon Fuel Standard ("LCFS") program. The LCFS is designed to reduce greenhouse gas emissions by setting a carbon intensity ("CI") benchmark for transportation fuels consumed in the State, which decreases over time. Under this program, each fuel is assigned a CI value based on a model produced by the California Air Resources Board ("CARB"). The CI value is intended to represent the GHG emissions associated with the feedstocks from which the fuel was produced, the fuel production and distribution activities, and the use of the finished fuel. Fuels below the benchmark generate LCFS credits, while fuels above the benchmark generate deficits. The lower the fuel's CI score compared to the benchmark, the greater number of credits generated. Each producer or importer of fuel must demonstrate that the overall mix of fuels it supplies for use in California meets the CI benchmarks for each

compliance period. A producer or importer with a fuel mix that is above the CI benchmark must purchase LCFS credits sufficient to meet the CI benchmark.

4. I am generally aware of EPA's decision to waive federal preemption for regulations issued by the State of California under its Advanced Clean Cars I ("ACC I") program. It is my understanding that the State of California has found that both the Lower Emission Vehicle regulations and the Zero-Emission Vehicle regulations in the ACC I program reduce demand for liquid transportation fuels within the State. As I understand it, the Zero-Emission Vehicle regulations require automakers in the State to sell a minimum percentage of so-called "zero-emission vehicles," such as electric vehicles, each year (up to 22% for large manufacturers in model year 2025). 78 Fed. Reg. 2111, 2114, 2119 (Jan. 9, 2013). These electric vehicles displace new internal combustion engine vehicles in the State that are powered by gasoline, diesel, and renewable fuels.

5. As a result, the ACC I program causes financial injury to Valero Renewables and Diamond Alternative, which produce ethanol and renewable diesel, respectively, for sale in the State of California, along with valuable LCFS credits and RINs.

6. Valero Renewables is an independent ethanol producer owning and operating 12 ethanol plants with a combined production capacity of around 1.6 billion

gallons per year.

7. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist "knocking" in an engine—reducing vehicles' fuel usage and net greenhouse gas ("GHG") emissions. Across California, as in most of the United States, refiners add ethanol to gasoline to raise its octane rating to a level suitable for use in most vehicles, with the result that approximately 10% of the final product consists of ethanol, and to meet federal renewable mandates. Over the past decade, the use of ethanol in California has 26.9 million metric tons of GHG emission savings. Erin Voegele, *California ethanol producers ask Feinstein to withdraw bill*, Ethanol Producer (Aug. 3, 2021), shorturl.at/cnwM9.

8. California is a substantial part of Valero Renewables' ethanol market. According to the U.S. Energy Information Administration ("EIA"), California is the second largest consumer of motor gasoline among the 50 states. The State also accounts for 10% of the nation's fuel ethanol demand, which is about seven times more than ethanol plants operating within the State can currently produce. EIA, California State Energy Profile, https://www.eia.gov/state/print.php?sid=CA (last visited Oct. 20, 2022). In other words, much of the ethanol consumed in the State of California is imported from producers like Valero Renewables. In fact, in 2021,

Valero Renewables imported more than 10.5 million gallons of ethanol into the State of California. It is anticipated that ethanol imports from Valero Renewables will be substantially greater in 2022, as Valero's ethanol production has been altered to manufacture a lower carbon intensity product specifically designed to go to California. Gasoline demand destruction in California would undermine the substantial economic investment in this project by Valero Renewables.

9. Diamond Alternative is a part owner of the Diamond Green Diesel renewable diesel production facility in St. Charles Parish, Louisiana. Diamond Green Diesel currently produces over 700 million gallons of renewable diesel per year at its St. Charles production facility, making it America's largest renewable diesel plant, and is expected to produce over 1.2 billion gallons of renewable diesel per year once its newly-constructed production facility in Port Arthur, Texas begins production later this year or early next year.

10. Renewable diesel is made from sustainable low-carbon feedstocks, such as used cooking oil, inedible animal fats derived from processing meat fats, soy bean oil, and inedible corn oil. Its chemical composition is nearly identical to that of petroleum-based diesel, making it a "drop-in" fuel that can be stored, distributed, and used interchangeably with petroleum-derived diesel, but its production results in up to 80% fewer greenhouse gas emissions for the finished fuel.

11. Even more so than ethanol, California plays an enormous role in driving demand for renewable diesel. According to the EIA, California accounts for almost all of the renewable diesel consumed in the United States. EIA, California State Energy Profile, https://www.eia.gov/state/print.php?sid=CA (last visited Oct. 20, 2022). Currently, approximately 65% of the renewable diesel produced by the DGD St. Charles facility is sold into California.

12. The ACC I program also impacts revenues Valero Renewables and Diamond Alternative obtain through their participation in the LCFS and RFS programs.

13. Ethanol produced by Valero Renewables and renewable diesel produced by Diamond Alternative have CI scores that are lower than traditional petroleum-based transportation fuels. Therefore, these fuels generate LCFS credits that have significant monetary value and are an important part of the business planning and economics for the renewable fuels facilities, as they generate hundreds of millions of dollars in revenue annually. Both Valero Renewables and Diamond Alternative rely on credit revenue to provide a return on investment, and decreased demand for renewable fuels in the State would undermine these expectations. By way of example, the economics underlying the significant investment in the Port Arthur renewable diesel facility were driven, in large part, by the expectation of LCFS credit values.

14. Likewise, Valero Renewables and Diamond Alternative rely on revenue from RIN sales. As demand for liquid transportation fuels decreases in the State, so do the RIN revenues these businesses generate.

* * *

15. These economic impacts are not speculative. Indeed, as California asserted in its original waiver request, the ACC I program aims to reduce emissions through "reductions in fuel production." 87 Fed. Reg. 14,332, 14,364 (Mar. 14, 2022) (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16). This would, in turn, result in depressed demand for liquid fuels, including the demand for the ethanol that Valero Renewables produces and imports into the State and the renewable diesel that Diamond Green Diesel manufactures and imports into the State. R-7041 (CARB, LEV Initial Statement of Reasons at 201, 199 (2012)); R-8158 at 68, 70 (CARB, ZEV Initial Statement of Reasons (2012)) (recognizing that "oil and gas industry, fuel providers, and service stations are likely to be" the industries "most adversely affected" by California's regulations and the resulting "substantial reductions in demand for gasoline" in California.").

16. All these injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 24, 2022

Deepak Garg

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, ADVANCED ENERGY ECONOMY, ET AL., Intervenors.	Case No. 22-1081 and consolidated cases

DECLARATION OF ERIN GRAZIOSI

I, Erin Graziosi, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the President of Robinson Oil Corporation ("Robinson Oil"), a fourth-generation family business headquartered in Santa Clara County, California. We own and operate fueling stations and convenience stores; operate five fuel trucks that deliver to our stations only; and also run our own wholesale fuel and maintenance departments for the benefit

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of our retail stores, as well as a commercial fueling department that markets fleet cards.

2. Robinson Oil is a member of the National Association of Convenience Stores ("NACS"). In addition, I currently serve as the President of the California Fuels and Convenience Alliance ("CFCA"), which is our California state association that represents the needs of independent wholesalers, retail marketers, and transporters of fuel, as well as retail convenience stores. Most of our members are small-business owners, many of which are family-owned and multi-generational. CFCA partners with NACS regularly on issues that affect our membership.

3. Robinson Oil owns and operates 36 unbranded fueling stations with convenience stores of various sizes in Northern California, with three more in the building or permit stages. The convenience stores operate under the brand name Rotten Robbie, each of which has 4 to 20 employees. Overall we have about 300 employees. Robinson Oil does not own or operate any fueling stations or stores outside of California.

4. The bulk of Robinson Oil's revenue—over 70%—comes from fuel sales. As described below, with diminishing fuel sales, I believe we

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would also have fewer customers coming into our stores, which would reduce the store purchases that make up another portion of our revenue.

5. I am generally familiar with California's standards regulating vehicular greenhouse-gas emissions and mandating zero-emission vehicles. I am also aware that earlier this year the federal government reinstated a waiver that permits the State to implement these standards.

6. I understand that California's greenhouse-gas standards and zero-emission-vehicle mandate reduce the demand for fuel in California by requiring automakers to deliver vehicles for sale in California that are more fuel efficient, as well as a minimum percentage of zero-emission vehicles, such as electric vehicles, that do not run on conventional fuels.

7. Reducing the demand for fuel harms Robinson Oil financially. Drivers of low- and zero-emission vehicles have less of a need, or no need at all, to stop at our gas stations to refuel. As a result, our fueling stations sell less fuel, directly harming the company's bottom line.

8. In addition, because customers come through our stores and make retail purchases primarily when they stop to refuel, our retail sales suffer when drivers refuel less often.

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9. I anticipate broader impacts on my business as revenue declines. For example, declining revenue from fuel reduces the resale value of fueling-station properties, as well as fuel sellers' ability to access capital to operate and grow a business.

10. Although one Rotten Robbie location now has electric-vehicle charging stations, revenue from these charging stations and any we might install in the future cannot replace our lost revenue from fuel and retail sales. Because most electric-vehicle drivers are able to recharge at home or at work, each of our charging stations averages only 1.5 patrons per day, compared to an average of 400 fueling transactions a day.

11. Further, because there is only a single provider of electricity in my area, I am not able to purchase the electricity for these charging stations at a competitive price and therefore cannot offer competitively priced electricity to my customers. By contrast, I can purchase fuel from multiple sources to competitively price my fuel offerings to customers.

12. The charging stations are therefore not a significant source of revenue. In fact, I anticipate that it will take over 10 years to pay back the investment made in installing the charging stations.

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13. For these reasons, the waiver allowing California to implement its greenhouse-gas emission standards and zero-emission-vehicle mandate harms Robinson Oil financially.

Dated: 10/17/2022

DocuSigned by:
Erin Graziosi
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Erin Graziosi

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioners,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents.*	No. 22-1081 (and consolidated cases)

DECLARATION OF JENNIFER M. SWENTON

I, Jennifer M. Swenton, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Director of Optimization & Planning in the Optimization Planning and Economics division for Valero. In this role, I am responsible for a wide range of planning and economic business matters regarding Valero's operating strategies for its West Coast, Mid-Continent, and North Atlantic refinery assets. My responsibilities include management oversight of the planning and economics teams for these Valero assets, and through my background, I also have significant technical and operational experience from several of Valero's refineries.

2. I am generally aware of EPA's decision to waive federal preemption for regulations issued by the State of California under its Advanced Clean Cars I ("ACC I") program. It is my understanding that the State of California has found that both the Lower Emission Vehicle regulations and the Zero-Emission Vehicle regulations in the ACC I program reduce demand for liquid transportation fuels within the State. As I understand it, the Zero-Emission Vehicle regulations require automakers in the State to sell a minimum percentage of so-called "zero-

emission vehicles," such as electric vehicles, each year (up to 22% for large manufacturers in model year 2025). 78 Fed. Reg. 2111, 2114, 2119 (Jan. 9, 2013). These "zero-emission vehicles" displace new internal combustion engine vehicles in the State that are powered by gasoline, diesel, and renewable fuels.

3. As a result of this projected displacement, the ACC I program will cause financial injury to Valero's refining business segment and, in particular, its West Coast operations, which would otherwise not occur in the absence of ACC I.

A. Valero's Overall Business Strategy

4. Unlike some other refining companies, Valero does not explore for or produce crude, i.e., it does not drill for oil. Instead, it purchases crude from third parties.

5. Valero also does not operate any retail motor fuel stations. It sells motor fuel (i.e., gasoline and diesel) at the wholesale and bulk sale levels. Valero sells motor fuels at the wholesale level under several different channels of trade, including unbranded contract, unbranded "spot," and branded motor fuel sales. Bulk sales are made to clear the remaining refined product length from Valero's refineries to manage inventories.

B. West Coast Refineries and Refining Practices

6. There are two Valero refineries on the West Coast, and both are in California. The Valero Benicia refinery is located in Benicia (in the San Francisco Bay Area), and its Wilmington refinery is located in Wilmington (in the greater Los Angeles area). Both refineries make gasoline, diesel, jet fuel, and other petroleum products. Benicia's refined products are mostly sold in Northern California and some limited amounts in Nevada. Wilmington's refined products are typically sold in Southern California, but it also supplies some limited amounts into the Nevada and Arizona markets.

7. Most of the gasoline that the Wilmington and Benicia refineries produce is California Reformulated Gasoline Blendstock for Oxygenate Blending ("CARBOB"), which is a special RBOB formula mandated for use in the State of California. Most other states in the United States use Reformulated Blendstock for Oxygenate Blending ("RBOB") or Conventional Blendstock for Oxygenate Blending ("CBOB"), which are the two base gasoline stocks that get mixed with ethanol at the terminal racks in other states. CARBOB is considered to be a "boutique fuel," meaning it is a specialized fuel formulation that is unique to a particular market by virtue of local laws. Compared to CBOB and RBOB, CARBOB is more expensive and complicated to produce because it requires more processing steps. For this reason, most refineries outside of California do not produce it.

8. Valero's California refineries must maintain a relatively high operating rate to remain stable, so they cannot run at low turndown rates.

9. Another major consideration for Valero's West Coast refinery operations is the logistical limitations of the availability of pipeline capacity.

10. Valero's movement of a small portion of finished product from California to another locale (such as with its production of AZRBOB for the Phoenix market) is a planned event driven primarily by existing contractual obligations for supplying gasoline to a market that is connected to California via pipeline. The Benicia and Wilmington refineries generally operate independently of the other Valero refineries. In addition, both of Valero's West Coast refineries supply CBOB to the Nevada area via third party pipelines. However, this volume is typically only a small percent of the gasoline produced in both refineries. This volume sold on pipeline is based on product demand and margins, but is limited based on line space up to the pipeline capacities.

11. Like most refineries, Valero's Wilmington and Benicia refineries have finite storage capacities. Because of this, Valero does not have the ability to store significant volumes of gasoline blendstocks and/or significantly increase volumes of different grades of finished gasoline (CARBOB, AZRBOB, CBOB, RBOB).

12. Valero sells the majority of its CARBOB production at the rack. A rack is a distribution terminal that refiners send their gasoline to via pipeline; customers (e.g., distributors and jobbers) purchase their product at the rack by the tanker truck load. Whatever product Valero does not sell at the racks, it must sell on the bulk market to ensure that it has available space for products coming out of the refinery. Due to its limited ability to store excess inventory of CARBOB production, Valero maintains a buffer with its tankage to avoid reaching maximum inventory capacity, which it refers to as "containment." Reaching maximum capacity would require shutting down a refinery or reducing its output because there would be no place for finished product to go.

13. The West Coast has a comparatively limited spot market in part because there is not enough equipment (e.g., pipes, terminal hookups, storage tanks etc.) to move and store products efficiently and timely, and there are major logistical constraints at West Coast dock facilities. This lack of available equipment and docking facilities constrain Valero's ability to move gasoline and other petroleum products into, out of, and/or throughout California. For instance, there are a limited number of barge windows for moving product and blending components, so the barges have to compete for berth space.

14. Moreover, the Jones Act, which requires that goods shipped between U.S. ports be transported on ships that are built, owned, and operated by United States citizens or permanent residents, limits Valero's ability to transport supplies domestically by water.

Because there are a small number of Jones Act compliant barges, they are always in high demand and significantly more expensive to use than non-Jones Act vessels.

15. Valero's Wilmington refinery operates one barge dock where gasoline blendstocks can be brought into the refinery. However, finished gasoline and/or blendstocks cannot be shipped out of the refinery due to logistical and permitting constraints. This barge dock is typically used for moving distillates and other intermediates. Valero's Wilmington refinery utilizes third-party docks (berths) for feedstock deliveries. Similarly, Valero's Benicia refinery is not well-equipped for exporting product to other markets because of logistical limitations. This is partly because the refinery is located relatively far inland, presenting intervening shoals that ships and barges must navigate (therefore limiting vessel size). The Benicia refinery also has limited dock space that it balances between crude, intermediates, and products. Thus, it is rare for Valero to export gasoline outside California from either of its West Coast refineries.

C. Reduction in California Fuel Demand

16. A significant reduction in California's gasoline demand, as contemplated by the ACC I program, will detrimentally impact Valero's business and, in particular, its West Coast operations. More specifically, the reduction in demand for CARBOB and diesel attributable to the projected market share increase of electric and hydrogen fuel cell vehicles will result in the need for California refineries to operate at lower capacities and/or to move additional gasoline and/or gasoline components to other markets. The former option naturally has a direct impact on the profitability and long-term viability of such refineries, while the latter is limited to logistical constraints and economic margins. These economic impacts are not speculative. Indeed, as California asserted in its original waiver request, the ACC I program aims to reduce emissions

through "reductions in fuel production." 87 Fed. Reg. 14,332, 14,364 (Mar. 14, 2022) (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16).

17. As stated above, Valero's California refineries must operate at or above a minimum operating threshold. A significant reduction in domestic market demand in California thus risks potential refinery shutdowns and even permanent closures. In this regard, one need only consider the impact of the COVID-19 pandemic on the West Coast refining sector, which experienced negative financial margins and multiple third-party refinery closures due to the reduction in gasoline demand. However, even if operating capacity is maintained at or above the minimum operating threshold, any reduction in the California market's demand would negatively impact the profitability of Valero's California refineries, which are currently operating at close to maximum capacity (outside of required maintenance events) post-COVID as a result of normal or near-normal market demand and a reduced market supply of CARBOB stemming from third-party California refinery closures.

18. In theory, the impacts of such reduction in demand can be mitigated to some extent through exports out of California, but such mitigation efforts come with increased costs and capacity limitations. In this regard, gasoline sales from Valero's California refineries to neighboring states may be possible through the existing third-party pipelines to Arizona and Nevada markets. However, as explained above, there are additional costs associated with such pipeline use, as well as scheduling and forecasting complications, including competition with other California refiners for limited throughput capacity. An increased emphasis on exports also introduces the added logistical and planning complexities and expenses associated with balancing a gradual decrease in CARBOB production with an increasing production of other blendstocks, particularly as domestic demand decreases yet nevertheless experiences occasional

changes in the market—e.g., seasonal demands and refinery turnarounds or closures. Moreover, Nevada is one of the Section 177 States, and is, therefore, expected to face similar domestic market demand reductions as California if the subject preemption waiver is not invalidated.

19. Exporting gasoline to Latin America or other markets via the shipping industry likewise requires the incurrence of additional transportation costs and is limited by dock, vessel, and permitting constraints as described above. To the extent capital investment might improve such constraints and allow for increased gasoline movements, that would nevertheless require significant expenditures by both Valero and third parties over whom Valero has no control, and would depend on business analyses and forecasts to justify said investment. Such exports would also require California refineries to compete with barrels from the Gulf Coast, the Far East, and Europe, which have lower operating and feedstock costs, and are therefore better equipped to compete in such markets. Additionally, California is one of the most expensive operating environments for refineries, and it is not at all clear these refineries would be competitive in the markets for conventional gasoline blends.

20. In short, the subject preemption waiver for California's ACC I program is projected by California and EPA to force a rapid expansion of the new vehicle market share for electric vehicles and a corresponding reduction in California liquid fuel demand. Such a reduction in demand will negatively impact Valero's business operations and profitability as described herein.

21. All these injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 24, 2022

Jennifer M. Swenton

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioner,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondent.*	No. 22-1081 (and consolidated cases)

DECLARATION OF JAMES E ZOOK OF MICHIGAN CORN GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS' OPENING BRIEF

I, James E. Zook, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Executive Director of the Michigan Corn Growers Association, a nonprofit trade association based in Michigan with a membership of approximately 1,400 corn farmers, as well as their supporters and members of corn farming-related industries. We operate to promote the general commercial, legislative, and other common interests of our members.

2. I am familiar with all aspects of the Association's work and with the market for corn and products, such as ethanol, that are made using the corn grown by our members.

3. Michigan is one of the nation's leading corn producing states, with a net production of around 350 million bushels of corn. The majority of this corn is used as a feedstock for ethanol production.

4. The ethanol industry supports over 400,000 jobs in more than 25 states. Ethanol contributes more than $52 billion to the national GDP and profitably processed more than 5.1 billion bushels of corn in 2021.

5. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist "knocking" in an engine—reducing vehicles' fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline in part to raise its octane rating to a level suitable for use in most vehicles. In 2021 alone the use of ethanol reduced greenhouse gas emissions by more than 50 million metric tons, equivalent to the savings of turning off 126 natural gas-fired power plants. *See* EPA, *Greenhouse Gas Equivalencies Calculator* (Oct. 11, 2022), https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator. In California, over the last decade the use of ethanol has resulted in 26.9 metric tons of GHG emission savings.

6. The United States Environmental Protection Agency promulgated a final agency action entitled *California State Motor Vehicle Pollution Control Standards;*

Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14,332 (Mar. 14, 2022) ("Waiver Restoration"). This decision purports to reinstate a waiver of Clean Air Act preemption to California (and, by extension, to some seventeen other states that have opted to copy California's regulations) to impose its own greenhouse gas emissions standards for new automobiles as well to impose a zero-emissions vehicle sales quota.

7. As California explained in its original waiver request, California's regulations will reduce emissions through "'reductions in fuel production.'" 87 Fed. Reg. 14,364 (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16). Economic harm from these rules is not speculative. Indeed, California estimated "substantial reductions in demand for gasoline—exceeding $1 billion beginning in 2020 and increasing to over $10 billion in 2030." Cal. Air Resources Bd., *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant Exhaust Emission Standards* 201 (Dec. 7, 2011). By reducing total gasoline consumption, if gasoline remains at the current 10% ethanol blend level, ethanol demand destruction will also result.

8. While these standards are in effect, they will drive down demand for ethanol, not only in California but also in states that have adopted California's

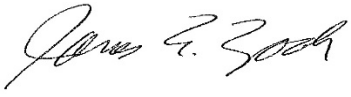
standards: Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

9. This demand destruction harms the Michigan Corn Growers Association and its members by decreasing demand for the corn they grow, particularly in California and in states that have adopted California's standards. According to the U.S. Energy Information Administration, California consumes 10% of the nation's fuel ethanol supply, which is about seven times more than ethanol plants operating within the State can produce. *See* U.S. Energy Information Administration, *California State Energy Profile* (Oct. 20, 2022), https://www.eia.gov/state/print.php?sid=CA.

10. These financial harms affect our members and also redound to the Association itself, which will lose funding it uses to pursue its mission of advocating for the interests of its members.

11. These injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 22, 2022



James E. Zook

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioner,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondent.*	No. 22-1081 (and consolidated cases)

DECLARATION OF JOSH ROE OF KANSAS CORN GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS' OPENING BRIEF

I, Josh Roe, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Vice President of Market Development and Policy of the Kansas Corn Growers Association, a nonprofit trade association based in Kansas with a membership of corn farmers, as well as their supporters and members of corn farming-related industries. We operate to promote the general commercial, legislative, and other common interests of our members.

2. I am familiar with all aspects of the Association's work and with the market for corn and products, such as ethanol, that are made using the corn grown by our members.

3. Kansas is one of the nation's leading corn producing states, with a net production of around 800 million bushels of corn. The majority of this corn is used as a feedstock for ethanol production.

4. The ethanol industry supports over 400,000 jobs in more than 25 states. Ethanol contributes more than $52 billion to the national GDP and profitably processed more than 5.1 billion bushels of corn in 2021.

5. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist "knocking" in an engine—reducing vehicles' fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline in part to raise its octane rating to a level suitable for use in most vehicles. In 2021 alone the use of ethanol reduced greenhouse gas emissions by more than 50 million metric tons, equivalent to the savings of turning off 126 natural gas-fired power plants. *See* EPA, *Greenhouse Gas Equivalencies Calculator* (Oct. 11, 2022), https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator. In California, over the last decade the use of ethanol has resulted in 26.9 metric tons of GHG emission savings.

6. The United States Environmental Protection Agency promulgated a final agency action entitled *California State Motor Vehicle Pollution Control*

Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14,332 (Mar. 14, 2022) ("Waiver Restoration"). This decision purports to reinstate a waiver of Clean Air Act preemption to California (and, by extension, to some seventeen other states that have opted to copy California's regulations) to impose its own greenhouse gas emissions standards for new automobiles as well to impose a zero-emissions vehicle sales quota.

7. As California explained in its original waiver request, California's regulations will reduce emissions through "'reductions in fuel production.'" 87 Fed. Reg. 14,364 (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16). Economic harm from these rules is not speculative. Indeed, California estimated "substantial reductions in demand for gasoline––exceeding $1 billion beginning in 2020 and increasing to over $10 billion in 2030." Cal. Air Resources Bd., *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant Exhaust Emission Standards* 201 (Dec. 7, 2011). By reducing total gasoline consumption, if gasoline remains at the current 10% ethanol blend level, ethanol demand destruction will also result.

8. While these standards are in effect, they will drive down demand for ethanol, not only in California but also in states that have adopted California's

standards: Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

9. This demand destruction harms the Kansas Corn Growers Association and its members by decreasing demand for the corn they grow, particularly in California and in states that have adopted California's standards. According to the U.S. Energy Information Administration, California consumes 10% of the nation's fuel ethanol supply, which is about seven times more than ethanol plants operating within the State can produce. *See* U.S. Energy Information Administration, *California State Energy Profile* (Oct. 20, 2022), https://www.eia.gov/state/print.php?sid=CA.

10. These financial harms affect our members and also redound to the Association itself, which will lose funding it uses to pursue its mission of advocating for the interests of its members.

11. These injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 22, 2022

Josh Roe

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 22-1081 and consolidated cases

DECLARATION OF KIRK LEEDS

1. My name is Kirk Leeds. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge. I am submitting this Declaration on behalf of the Petitioners' opening brief in the above-captioned matter.
2. I have been a member of the Iowa Soybean Association ("Association") for 33 years. I am currently the Association's Chief Executive Officer. The Association is a non-profit, nonpartisan advocacy organization that represents the interests of the state's soybean industry.
3. Bio-based diesel is produced in the United States and can either be blended with traditional petroleum diesel or used as a direct substitution. Engines

burning bio-based diesel can emit fewer pollutants than engines burning petroleum diesel, and compared to petroleum diesel, bio-based diesel reduces carbon dioxide emissions on average by 74% when considering the entire lifecycle.

4. Most of the bio-based diesel in the United States is made from soybean oil, and around 30% of the soybean oil produced in the United States is used to produce bio-based diesel.

5. In March of 2022, EPA issued a Notice of Decision on its reconsideration of its previous withdrawal of a waiver for California's Advanced Clean Car Program, reinstating the waiver and allowing California to implement its light-duty vehicle greenhouse gas emission standards and zero emission vehicles requirements. Such programs are aimed at reducing the proportion of liquid fuels in California's transportation fuel mix.

6. The amount of bio-based diesel consumed in California has been steadily increasing since 2012, to up to over 400,000,000 gallons per quarter in recent years. In Quarter 1 of 2022, soy-based bio-based diesel comprised roughly 19% of all bio-based diesel consumed in California. *See* Figure 1.

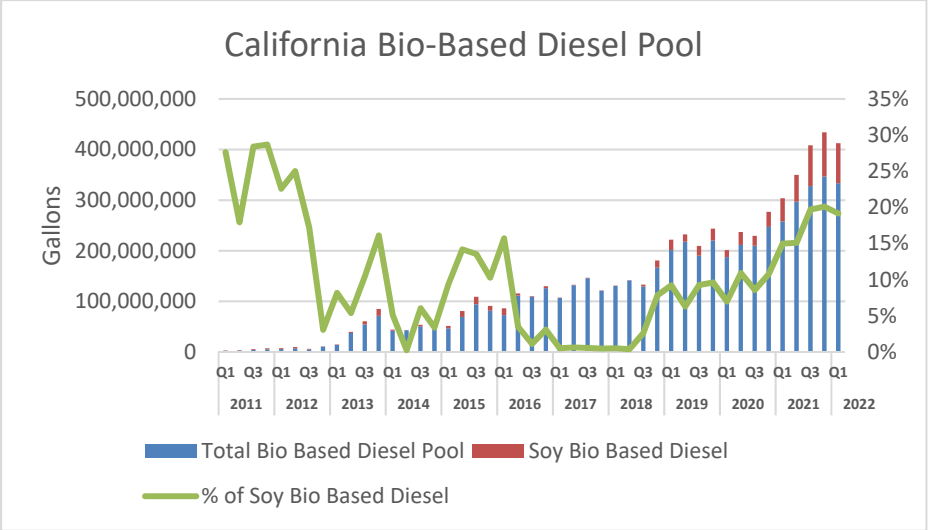


Figure 1. California Air Resources Board, LCFS Data Dashboard, *available at* https://ww2.arb.ca.gov/resources/documents/lcfs-data-dashboard/.

7. Many of the states that will be adopting California's emissions standards under Section 177 of the Clean Air Act are also currently consuming large amounts of renewable fuels. Oregon, for example, has consumed almost 35,000,000 gallons of bio-based diesel and renewable diesel in Quarter 1 of 2022. *See* Figure 2.

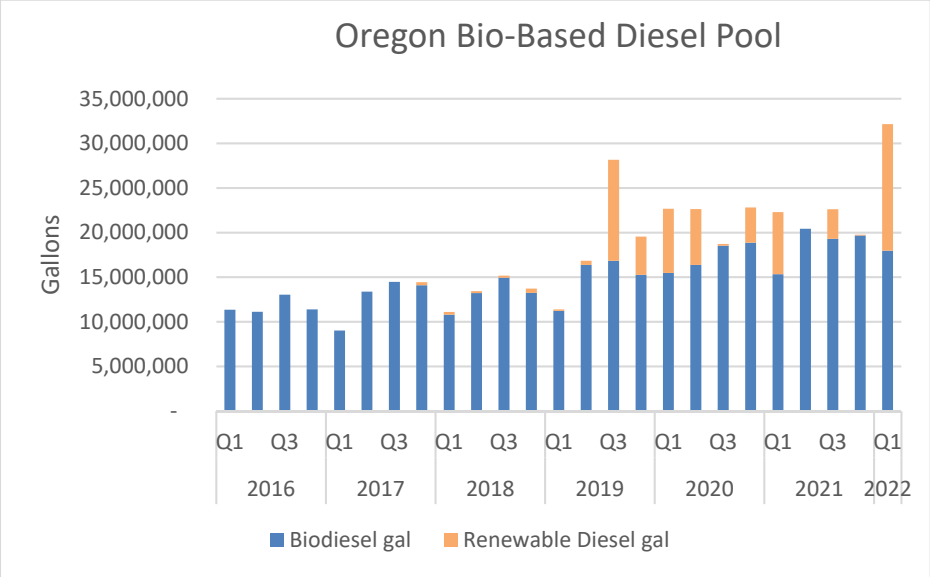


Figure 2. Oregon Clean Fuels Program, Quarterly Data Summaries, *available at* https://www.oregon.gov/deq/ghgp/cfp/Pages/Quarterly-Data-Summaries.aspx.

8. California's greenhouse gas emissions standards and zero emission vehicle mandate will reduce the demand for all liquid fuels, including bio-based diesel, which will in turn reduce the demand for the feedstocks used to produce renewable fuels, such as soybeans.
9. A reduced demand for bio-based diesel would result in great economic harm to the Association's members, as it would undermine their ability to sell soybeans at a profit.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based on my personal knowledge.

Date: October 24, 2022

Respectfully submitted,

Kirk Leeds

Chief Executive Officer for the Iowa Soybean Association

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioner,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondent.*	No. 22-1081 (and consolidated cases)

DECLARATION OF LANE HOWARD OF MISSOURI CORN GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS' OPENING BRIEF

I, Lane Howard, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Associate Director of Market Development of the Missouri Corn Growers Association, a nonprofit trade association based in Missouri with a membership of corn farmers, as well as their supporters and members of corn farming-related industries. We operate to promote the general commercial, legislative, and other common interests of our members.

2. I am familiar with all aspects of the Association's work and with the market for corn and products, such as ethanol, that are made using the corn grown by our members.

3. Missouri is one of the nation's leading corn producing states, with a net production of around 550 million bushels of corn. The majority of this corn is used as a feedstock for ethanol production.

4. The ethanol industry supports over 400,000 jobs in more than 25 states. Ethanol contributes more than $52 billion to the national GDP and profitably processed more than 5.1 billion bushels of corn in 2021.

5. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist "knocking" in an engine—reducing vehicles' fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline in part to raise its octane rating to a level suitable for use in most vehicles. In 2021 alone the use of ethanol reduced greenhouse gas emissions by more than 50 million metric tons, equivalent to the savings of turning off 126 natural gas-fired power plants. *See* EPA, *Greenhouse Gas Equivalencies Calculator* (Oct. 11, 2022), https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator. In California, over the last decade the use of ethanol has resulted in 26.9 metric tons of GHG emission savings.

6. The United States Environmental Protection Agency promulgated a final agency action entitled *California State Motor Vehicle Pollution Control*

Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14,332 (Mar. 14, 2022) ("Waiver Restoration"). This decision purports to reinstate a waiver of Clean Air Act preemption to California (and, by extension, to some seventeen other states that have opted to copy California's regulations) to impose its own greenhouse gas emissions standards for new automobiles as well to impose a zero-emissions vehicle sales quota.

7. As California explained in its original waiver request, California's regulations will reduce emissions through "'reductions in fuel production.'" 87 Fed. Reg. 14,364 (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16). Economic harm from these rules is not speculative. Indeed, California estimated "substantial reductions in demand for gasoline—exceeding $1 billion beginning in 2020 and increasing to over $10 billion in 2030." Cal. Air Resources Bd., *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant Exhaust Emission Standards* 201 (Dec. 7, 2011). By reducing total gasoline consumption, if gasoline remains at the current 10% ethanol blend level, ethanol demand destruction will also result.

8. While these standards are in effect, they will drive down demand for ethanol, not only in California but also in states that have adopted California's

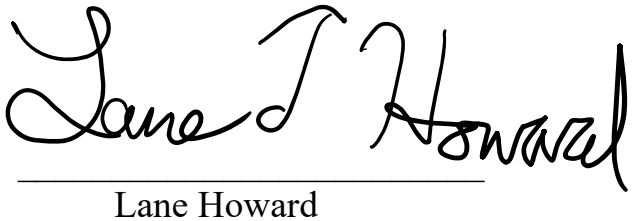
standards: Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

9. This demand destruction harms the Missouri Corn Growers Association and its members by decreasing demand for the corn they grow, particularly in California and in states that have adopted California's standards. According to the U.S. Energy Information Administration, California consumes 10% of the nation's fuel ethanol supply, which is about seven times more than ethanol plants operating within the State can produce. *See* U.S. Energy Information Administration, *California State Energy Profile* (Oct. 20, 2022), https://www.eia.gov/state/print.php?sid=CA.

10. These financial harms affect our members and also redound to the Association itself, which will lose funding it uses to pursue its mission of advocating for the interests of its members.

11. These injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 22, 2022



Lane Howard

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, ADVANCED ENERGY ECONOMY, ET AL., Intervenors.	Case No. 22-1081 and consolidated cases

DECLARATION OF ROCK ZIERMAN

I, Rock Zierman, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Chief Executive Officer of the California Independent Petroleum Association ("CIPA"). CIPA is a member of the Domestic Energy Producers Alliance.

2. CIPA is a non-profit, non-partisan trade association representing approximately 300 independent crude oil and natural gas

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producers, royalty owners, and service and supply companies operating in California. Our members represent approximately 70% of California's total crude oil production.

3. Because there are no pipelines that carry the crude oil that is produced in California to locations outside of the State nor is there export capacity by waterborne vessels, 100% of the crude oil produced by our members is sold within California.

4. I am generally familiar with California's standards regulating vehicular greenhouse-gas emissions and mandating zero-emission vehicles. I am also aware that earlier this year the federal government reinstated a waiver that permits the State to implement these standards.

5. I understand that California's greenhouse-gas standards and zero-emission-vehicle mandate reduce the demand for fuel in California by requiring automakers to deliver vehicles for sale in California that are more fuel efficient, as well as a minimum percentage of zero-emission vehicles, such as electric vehicles, that do not run on conventional fuels.

6. Reducing the demand for fuel harms CIPA financially. Drivers of low- and zero-emission vehicles have less of a need, or no need at all, to use liquid fuels. With more of those vehicles on the road, drivers

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will soon demand less fuel, wholesalers and retail locations will need less fuel from refineries, and, in turn, refineries will purchase less crude oil from CIPA's members. In short, when the demand for fuel decreases in California, so does the demand for the crude oil our members produce.

7. Because the only consumers of our members' crude oil products are in California, a significant reduction in fuel sales in the State would significantly harm those members' bottom lines. Our members could not avoid financial harm by selling crude oil outside of California.

8. Nor could our members avoid financial harm by shifting their sales to producers of other products made from crude oil, such as plastics. As demand for liquid fuel decreases, the price of crude oil decreases and our members lose revenue because they must sell their crude oil at lower prices.

9. Financial harm to CIPA's members harms CIPA financially. Two-thirds of our budget comes from member dues and the other one-third comes from sponsorships from those same members. When our member businesses are hurting financially, CIPA collects less from those members in the form of dues and sponsorships.

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10. For these reasons, the waiver allowing California to implement its greenhouse-gas emission standards and zero-emission-vehicle mandate harms CIPA financially.

Dated: October 21, 2022

DocuSigned by:
Rock Zierman
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Rock Zierman

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, ADVANCED ENERGY ECONOMY, ET AL., Intervenors.	Case No. 22-1081 and consolidated cases

DECLARATION OF SUSAN W. GRISSOM

I, Susan W. Grissom, declare under penalty of perjury that the following is true and correct, to the best of my knowledge:

1. I am the Chief Industry Analyst for American Fuel & Petrochemical Manufacturers ("AFPM"), responsible for analyzing market and economic impacts of regulatory and statutory changes on the refining and petrochemical manufacturing industries. I have extensive experience analyzing and directing the analysis of energy markets.

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2. AFPM is a national trade association representing nearly all American refining and petrochemical companies. Our 25 refining company members own and operate 86% of U.S. domestic petroleum refining capacity. These companies provide jobs, contribute to economic and national security, and enable the production of products used by families and businesses throughout the United States.

3. The refining industry supports nearly 1.8 million jobs in 42 States, plus the District of Columbia. In California, for example, the refining industry supports more than 81,000 jobs; contributes more than $28 billion to the State's economy, accounting for 1.0% of the State's GDP; generates $5.1 billion in state and local tax revenue; and generates another $222 million in federal tax revenue. All told, the refining industry contributes more than $305 billion to the United States economy.

4. Earlier this year, EPA reinstated a Clean Air Act waiver for California's regulations limiting tailpipe CO_2 emissions and mandating zero-emission-vehicle sales. The CO_2 emission limits require the sale of vehicles that use less gasoline and diesel fuel. *See* 84 Fed. Reg. 51,310 51,315 (Sept. 27, 2019) ("[A]lmost all technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable through improving the

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fuel economy levels of the vehicles in question."); 83 Fed. Reg. 42,986, 43,236 (Aug. 24, 2018) ("Improving fuel economy is the only feasible method of achieving full compliance."). And the zero-emission-vehicle mandate requires the sale of vehicles that use no liquid fuel at all.

5. These regulations depress the demand for petroleum fuels in California and thereby harm AFPM's member companies—such as Marathon Oil, PBF Energy, Phillips 66, and Valero Energy—that operate refineries in California and produce petroleum fuels for sale in California. A refining company's bottom line depends on the market's demand for petroleum transportation fuel. AFPM's members suffer economic injury, therefore, when California imposes tailpipe CO_2 emission restrictions that result in vehicles using less fuel per mile or forces consumers to buy vehicles that do not operate on gasoline or diesel fuel.

6. These economic harms are not speculative. California itself estimated that its regulations would cause "substantial reductions in demand for gasoline—exceeding $1 billion beginning in 2020 and increasing to over $10 billion in 2030." Cal. Air Resources Bd., *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to*

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Consider the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant Exhaust Emission Standards 201 (Dec. 7, 2011).

7. Nor are the harms limited to California. Pursuant to Section 177 of the Clean Air Act, 17 other States—Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington—and the District of Columbia have adopted California's CO_2 emission restrictions and/or its zero-emission-vehicle mandate. As a result, the demand for gasoline and diesel fuel will be depressed not just in California, but in each of these States as well.

8. For example, in recently promulgating regulations adopting California's CO_2 emission restrictions and zero-emission-vehicle mandate, the Minnesota Pollution Control Agency estimated that the regulations would cause "a reduction of approximately 700 million gallons of gasoline purchased by Minnesotans" over the first 10 years of implementation. Minn. Pollution Control Agency, *Statement of Need and Reasonableness*, *Proposed Revisions to Minnesota Rules, chapter 7023, Adopting Vehicle Greenhouse Gas Emissions Standards* 65 (Dec. 2020). Similar demand depression undoubtedly occurs in the other Section 177 States.

9. The reduced demand for gasoline and diesel fuels caused by California's waiver results in lost sales for AFPM member companies and requires them to expend resources changing feedstock and product slates, diverting fuel to other markets, and remedying supply-chain distortions.

10. For these reasons, EPA's reinstatement of California's waiver financially injures AFPM's member companies that produce gasoline and diesel fuels for sale in California and the Section 177 States.

Dated: 10/21/2022

DocuSigned by:
Susan W. Grissom

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, ADVANCED ENERGY ECONOMY, ET AL., Intervenors.	Case No. 22-1081 and consolidated cases

DECLARATION OF TRECIA CANTY

I, Trecia Canty, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Senior Vice President, General Counsel and Secretary for PBF Energy ("PBF"). PBF is a member of the American Fuel and Petrochemical Manufacturers.

2. PBF currently owns and operates six oil refineries and related assets in the United States with a combined processing capacity of

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approximately 1,000,000 barrels per day, two of which are located in California. PBF acquired its first California refinery located in Torrance, California in 2016 and it has a nameplate crude capacity of 166,000 barrels per day ("Torrance Refinery"). Our newest refinery, located in Martinez, California ("Martinez Refinery"), was acquired by PBF in 2020 and has a nameplate crude capacity of 157,000 barrels per day.

3. The Torrance Refinery and the Martinez Refinery each produce liquid transportation fuels, such as diesel and gasoline, that are primarily sold within the State of California.

4. I am generally familiar with the State of California's standards regulating vehicular greenhouse-gas emissions and mandating zero-emission vehicles. I am also aware that earlier this year the federal government reinstated a waiver that permits the State to implement these standards.

5. I understand that California's greenhouse-gas standards and zero-emission-vehicle mandate will reduce the demand for fuel in California by, among other things, requiring a minimum percentage of zero-emission vehicles, such as electric vehicles, that do not run on conventional fuels.

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6. Drivers of low- and zero-emission vehicles have less of a need, or no need at all, to use the fuels we produce at the Torrance Refinery and the Martinez Refinery. The mandate requiring more low-and zero-emission vehicles on the road will result in drivers in California purchasing less fuel and, in turn, the wholesalers and retail locations that we supply in California will purchase less fuel from PBF, resulting in financial harm to our company.

7. Because the primary consumers of the products produced by the Torrance Refinery and the Martinez Refinery are in California, a reduction in fuel sales within California would directly harm the economic viability of those operations which would, in turn, adversely impact the company's financial position.

8. PBF could not avoid financial harm by selling more of its gasoline, diesel and other products outside of California. To the extent that the company would be able to sell those products outside of California, it would not be able to do so without incurring significant additional costs that it does not incur today, including operational, transportation and storage costs.

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9. For these reasons, the waiver allowing California to implement its greenhouse-gas emission standards and zero-emission-vehicle mandate harms PBF financially.

Dated: 10/21/2022

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Trecia Canty
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Trecia Canty

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF OHIO, et al., *Petitioner,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondent.*	No. 22-1081 (and consolidated cases)

DECLARATION OF TREVOR HINZ OF ICM, INC. IN SUPPORT OF PETITIONERS' OPENING BRIEF

I, Trevor Hinz, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Director of Government and Industry Relations of ICM, Inc. ("ICM"), a Kansas corporation that is a global leader in developing biorefining capabilities, especially for the production of ethanol. Plants using ICM technology collectively produce 8.8 billion gallons annually. No other company serves more ethanol producers in the world. For over 25 years, we have been advancing the biofuel industry, protecting the environment, while helping American farmers and businesses enrich their communities and drive value back into U.S. agriculture. Today we offer a range of products and services designed to maximize productivi-

ty, diversify revenue, and yield valuable feed co-products.

2. I am familiar with all aspects of ICM's work and with the market for ethanol that is produced by our customers and service clients.

3. The ethanol industry supports over 400,000 jobs in more than 25 states. Ethanol contributes more than $52 billion to the national GDP and profitably processed more than 5.1 billion bushels of corn in 2021.

4. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist "knocking" in an engine—reducing vehicles' fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline to raise its octane rating to a level suitable for use in most vehicles. In 2021 alone the use of ethanol reduced greenhouse gas emissions by more than 50 million metric tons, equivalent to the savings of turning off 126 natural gas-fired power plants. *See* EPA, *Greenhouse Gas Equivalencies Calculator* (Oct. 11, 2022), https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator. In California, over the last decade the use of ethanol has resulted in 26.9 metric tons of GHG emission savings.

5. The United States Environmental Protection Agency took a final agency action entitled *California State Motor Vehicle Pollution Control Standards;*

Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14,332 (Mar. 14, 2022) ("Waiver Restoration"). This decision purports to reinstate a waiver of Clean Air Act preemption to California (and, by extension, to some seventeen other states that have opted to copy California's regulations) to impose its own greenhouse gas emissions standards for new automobiles as well to impose a zero-emissions vehicle sales quota.

6. As California explained in its original waiver request, California's regulations will reduce emissions through "'reductions in fuel production.'" 87 Fed. Reg. 14,364 (quoting 2012 Waiver Request, EPA–HQ–OAR–2012–0562–0004 at 16). Economic harm from these rules is not speculative. Indeed, California estimated "substantial reductions in demand for gasoline—exceeding $1 billion beginning in 2020 and increasing to over $10 billion in 2030." Cal. Air Resources Bd., *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant Exhaust Emission Standards* 201 (Dec. 7, 2011). By reducing total gasoline consumption, if gasoline remains at the current 10% ethanol blend level, ethanol demand destruction will also result.

7. While these standards are in effect, they will drive down demand for ethanol, not only in California but also in states that have adopted California's

standards: Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

8. Because ICM provides the technology and services necessary for the production of ethanol, a decrease in ethanol demand necessarily means a destruction in demand of our technologies and services. Thus, California's standards act to the financial detriment of ICM as well as other ethanol producers and stakeholders.

9. These injuries would be substantially ameliorated if EPA's decision were set aside.

Dated: October 24, 2022

Trevor Hinz

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, ADVANCED ENERGY ECONOMY, ET AL., Intervenors.	Case No. 22-1081 and consolidated cases

DECLARATION OF VARISH GOYAL

I, Varish Goyal, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the CEO of Au Energy, a family-owned and operated business located in California. Au Energy is a member of the National Association of Convenience Stores.

2. Au Energy owns and operates 135 retail convenience stores under various brand names. All of our stores sell gasoline. These stores

are all located in California, primarily in the Bay Area but also throughout Southern California. Au Energy does not do business outside of California.

3. In 2021, 89% of Au Energy's total revenue came from fuel sales. The remaining 11% came from convenience store sales and our car washes. Across our stores, we sell between 250 and 300 million gallons of fuel per year.

4. I am generally familiar with California's standards regulating vehicular greenhouse-gas emissions and mandating zero-emission vehicles. I am also aware that earlier this year the federal government reinstated a waiver that permits the State to implement these standards.

5. I understand that California's greenhouse-gas standards and zero-emission-vehicle mandate reduce the demand for fuel in California by requiring automakers to deliver vehicles for sale in California that are more fuel efficient, as well as a minimum percentage of zero-emission vehicles, such as electric vehicles, that do not run on conventional fuels.

6. Reducing the demand for fuel harms Au Energy financially. Drivers of low- and zero-emission vehicles have less of a need, or no need

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at all, to stop at our gas stations to refuel. As a result, our locations that offer fueling sell less fuel, directly harming Au Energy's bottom line.

7. In addition, because customers come through our stores and make retail purchases primarily when they stop to refuel, our retail sales at our convenience stores suffer when drivers refuel less often. For the same reason, our car-wash revenue will decrease as fewer customers stop to refuel.

8. Because so much of Au Energy's revenue derives from fuel sales, a significant reduction in fuel sales would force Au Energy to downsize significantly, including by reducing its workforce of 1,500 employees.

9. Although Au Energy is in the process of installing an electric-vehicle charging site at one of its locations, revenue from this site or others we may install in the future cannot replace our lost revenue from fuel and retail sales. Because most electric-vehicle drivers are able to recharge at home or at work, I expect these charging sites to service very few cars per day. Au Energy also leases land to another company to operate hydrogen fueling stations at seven of our locations. Because demand for hydrogen fuel is very low, these stations service only about 40

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cars per day, and revenue from hydrogen fueling also cannot replace the revenue Au Energy will lose from reduced fuel and retail sales.

10. For these reasons, the waiver allowing California to implement its greenhouse-gas emission standards and zero-emission-vehicle mandate harms Au Energy financially.

Dated: 10/18/2022

DocuSigned by:
Varish Goyal
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Varish Goyal