

ORAL ARGUMENT NOT SET

Consolidated Nos. 08-1178, 08-1179, 08-1180

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

**STATE OF CALIFORNIA BY AND THROUGH  
ARNOLD SCHWARZENEGGER, GOVERNOR  
OF THE STATE OF CALIFORNIA, THE  
CALIFORNIA AIR RESOURCES BOARD, AND  
EDMUND G. BROWN JR., ATTORNEY  
GENERAL OF THE STATE OF CALIFORNIA,**

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,**

Respondent.

Petition for Review Of Decision of the United States  
Environmental Protection Agency

**PETITIONERS' AND PETITIONER-INTERVENOR'S  
JOINT OPENING BRIEF**

EDMUND G. BROWN JR.  
Attorney General of California  
MATT RODRIQUEZ  
Chief Assistant Attorney General  
MARY E. HACKENBRACHT  
Senior Assistant Attorney General  
MARC N. MELNICK  
KATHLEEN A. KENEALY (SBN 212289)  
Deputy Attorneys General  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
Telephone: (213) 897-2605  
Fax: (213) 897-2802  
Email: Kathleen.Kenealy@doj.ca.gov  
Attorneys for Petitioner State of California

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE )  
COUNCIL, et al., )  
 )  
Petitioners, )  
 )  
v. )  
 )  
U.S. ENVIRONMENTAL )  
PROTECTION AGENCY and )  
STEPHEN L. JOHNSON, Administrator, )  
U.S. Environmental Protection Agency )  
 )

Case No. \_\_\_\_\_

**RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Petitioners the Natural Resources Defense Council, Sierra Club, Conservation Law Foundation, International Center for Technology Assessment, the Chesapeake Bay Foundation, Environmental Defense Fund, Environment America, Environment California, Environment Colorado, Environment Connecticut, Environment Florida, Environment Georgia, Environment Illinois, Environment Iowa, Environment Maine, Environment Maryland, Environment Michigan, Environment Massachusetts, Environment New Hampshire, Environment New Jersey, Environment New Mexico, Environment North Carolina, Environment Ohio, Environment Rhode Island, Environment Texas, PennEnvironment, Wisconsin Environment, Environment Washington, Environment Oregon, Arizona PIRG, Washington Environmental Council, Climate

Solutions, Oregon Wild, 3EStrategies, Angus Duncan, Center for Biological Diversity, Friends of the Earth, and Oregon Environmental Council provide the following corporate disclosure statement:

None of the above-named Petitioners has any outstanding shares or debt securities in the hands of the public, and does not have any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Respectfully submitted,

David Doniger <sup>42</sup>  
David Doniger  
Aaron Colangelo  
Natural Resources Defense Council  
1200 New York Ave, NW, Suite 400  
Washington, DC 20005  
(202) 289-6868  
(202) 289-1060 (fax)

Joseph Mendelson III <sup>42</sup>  
Joseph Mendelson III  
International Center for Technology  
Assessment  
660 Pennsylvania Ave., SE Suite 302  
Washington, DC 20003  
(202) 547-9359  
fax (202) 547-9429  
[joemend@icta.org](mailto:joemend@icta.org)

Attorney for International Center for  
Technology Assessment

Jon A. Mueller <sup>42</sup>  
Jon A. Mueller, Esq. Bar No. 50295

Amy E. McDonnell, Esq.  
The Chesapeake Bay Foundation, Inc.  
6 Herndon Avenue  
Annapolis, MD 21403  
Phone: (443) 482-2153  
Fax: (410) 268-6687  
[jmueller@cbf.org](mailto:jmueller@cbf.org)  
[amcdonnell@cbf.org](mailto:amcdonnell@cbf.org)

Attorneys for Chesapeake Bay  
Foundation, Inc.

*Dan Galpern* <sup>22</sup>

---

Dan Galpern  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
Phone: (541) 485-2471  
Fax: (541) 485-2457  
[galpern@westernlaw.org](mailto:galpern@westernlaw.org)

*Matt Kenna* <sup>27</sup>

---

Matt Kenna  
Western Environmental Law Center  
679 E. 2nd Ave., Suite 11B  
Durango, CO 81301  
(970) 385-6941  
[kenna@westernlaw.org](mailto:kenna@westernlaw.org)  
<http://www.westernlaw.org/>

Attorneys for Washington  
Environmental Council, Environment  
Washington, Environment Oregon,  
Climate Solutions, Oregon Wild,  
3EStrategies, Angus Duncan, Center  
for Biological Diversity, Friends of  
the Earth, and Oregon Environmental  
Council

David Bookbinder <sup>82</sup>

David Bookbinder  
Sierra Club  
408 C Street, NE  
Washington, DC 20002  
202-548-4598  
fax: 202-547-6009  
[david.bookbinder@sierraclub.org](mailto:david.bookbinder@sierraclub.org)

Attorney for Sierra Club,  
Conservation Law Foundation,  
Environment America, Environment  
California, Environment Colorado,  
Environment Connecticut,  
Environment Florida, Environment  
Georgia, Environment Illinois,  
Environment Iowa, Environment  
Maine, Environment Maryland,  
Environment Michigan, Environment  
Massachusetts, Environment New  
Hampshire, Environment New Jersey,  
Environment New Mexico,  
Environment North Carolina,  
Environment Ohio, Environment  
Rhode Island, Environment Texas,  
PennEnvironment, Wisconsin  
Environment, Arizona PIRG

James B. Tripp <sup>82</sup>

James B. Tripp  
Environmental Defense Fund  
257 Park Avenue South  
17th Floor  
New York, NY 10010  
212-505-2100  
[jtripp@edf.org](mailto:jtripp@edf.org)

Vickie Patton <sup>82</sup>

Vickie Patton  
Environmental Defense Fund

2334 North Broadway  
Boulder, CO 80304  
303-447-7215  
vpatton@edf.org

Attorneys for Environmental Defense  
Fund

Dated: May 5, 2008

## CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2008, a copy of the foregoing Petition for Review and Accompanying Rule 26.1 Disclosure Statement was served via overnight mail to the following:

Michael B. Mukasey, United States Attorney General  
U.S Department of Justice  
10<sup>th</sup> and Constitution Avenue, N.W.  
Washington, DC 20530-0001

Ronald J. Tenpas  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Ben Franklin Station  
P.O. Box 7415  
Washington, DC 20044-7415

Norman L. Rave, Jr.  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, DC 20026-3986

Stephen L. Johnson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building, Room 3000  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Patricia K. Hirsh  
Acting General Counsel  
U.S. Environmental Protection Agency  
Ariel Rios Building, Room 3000  
1200 Pennsylvania Avenue, N.W. (2310A)  
Washington, DC 20460

David Bookbinder <sup>xs</sup>  
David Bookbinder

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE ISSUES.....	3
STATUTORY BACKGROUND .....	4
STATEMENT OF FACTS .....	5
SUMMARY OF ARGUMENT .....	12
STANDING .....	14
STANDARD OF REVIEW .....	15
ARGUMENT.....	16
I.    The Administrator Erred In Failing To Apply Section 209(B)(1)(B) To California’s Motor Vehicle Emissions Program As A Whole. ....	16
II.   Excluding Climate Change From “Compelling And Extraordinary Conditions” Violates The Plain Meaning Of Section 209(B).....	21
III.  The Administrator’s Interpretation Of Section 209(B)(1)(B) Is Not Reasonable Under The Clean Air Act. ....	26
A.   The Administrator’s Interpretation Of Section 209 Is Not Reasonable Because It Conflicts With Massachusetts V. Epa, The Language Of Section 209(B), And Congress’s Intent To Give California The Broadest Possible Discretion.....	26
B.   Any Deference To The Administrator’s Interpretation Of Section 209(B) Is Extremely Limited. ....	29
IV.  The Administrator Failed To Carry His Burden Of Proof In Overriding California’s Determinations On Smog Reduction Benefits. ....	32
V.   The Administrator Failed To Carry His Burden Of Proof To Overcome California’s Determination That The State’s Global Warming Conditions Are Compelling And Extraordinary.....	36
CONCLUSION.....	40

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Advanced Pharm., Inc. v. United States</i> , 391 F.3d 377 (2nd Cir. 2004).....	22
<i>Air Conditioning &amp; Refrigeration Inst. v. Energy Res. Conservation &amp; Devel. Comm'n</i> ("ACRI"), 410 F.3d 492 (9th Cir. 2005).....	29
<i>Am. Bankers Ass'n</i> , 271 F.3d at 267 .....	23, 25
<i>Bates v. Dow Agrosciences LLC</i> , 544 U.S. 431 (2005).....	15, 30
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	passim
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992).....	29
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	15
<i>Clark v. Martinez</i> , 543 U.S. 371, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005).....	19
<i>Engine Mfrs. Ass'n</i> , 88 F.3d at 1089.....	24
<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963).....	30
<i>Ford Motor Co. v. EPA</i> , 606 F.2d 1293 (D.C. Cir. 1979).....	4, 5, 30
<i>Good Samaritan Hosp. v. Shalala</i> , 508 U.S. 402 (1993).....	31
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	29

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>International Brotherhood of Elec. Workers, Local Union 474 v. Nat'l Labor Relations Bd.</i> , 814 F.2d at 712 .....	22
<i>Immigration &amp; Naturalization Service v. Cardoza-Fonseca</i> , 408 U.S. 421 (1987).....	31
<i>John v. United States</i> , 247 F.3d 1032 (9th Cir. 2001) .....	30
<i>Lorillard v. Pons</i> , 434 U.S. at 580-81 .....	31
<i>Massachusetts v. EPA</i> , 549 U.S. 497, 127 S. Ct. 1438 (2007).....	passim
<i>Massachusetts v. U.S. Dep't of Transportation</i> , 93 F.3d 890 (D.C. Cir. 1996).....	15, 30
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996).....	29
<i>Motor &amp; Equip. Mfrs. Ass'n v. Nichols</i> , 142 F.3d 449 (D.C. Cir. 1998).....	4
<i>Motor and Equipment Manufacturers Association, Inc. v. EPA</i> , 627 F.2d 1095 (D.C. Cir. 1979).....	passim
<i>Motor Vehicle Mfrs. Ass'n v. N.Y. St. Dep't of Env'tl. Conservation</i> , 17 F.3d 521 (2nd Cir. 1994).....	25
<i>New Jersey v. EPA</i> , 517 F.3d 574 (D.C. Cir. 2008).....	22, 24
<i>Pa. Dept. of Corr. v. Yeskey</i> , 524 U.S. 206 (1998).....	22
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947).....	29
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	22

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 124 (1944).....	31
<i>Spector v. Norwegian Cruise Line Ltd.</i> , 545 U.S. 119 (2005).....	19
<i>United States v. Hardman</i> , 297 F.3d 1116 (10th Cir. 2002) .....	22
<i>United States v. Santos</i> , 128 S. Ct. 2020 (2008) (plurality opinion) .....	19
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981).....	31
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	22
 <b>STATUTES</b>	
2002 Cal. Stat. Chapter 200, § 1(a), (c) .....	5
42 U.S.C. §§ 7401(a)(3), (c), 7402(a).....	4
42 U.S.C. § 7507.....	25
42 U.S.C. § 7507.....	4
42 U.S.C. § 7543(a), (b).....	14
42 U.S.C. § 7543(b).....	1, 3
42 U.S.C. § 7543(b)(1) .....	4, 17
42 U.S.C. § 7543(b)(1)(B).....	12
42 U.S.C. § 7602(h).....	27
Cal. Health & Safety Code §§ 43000-44299.91. 2002 .....	5
Cal. Health & Safety Code § 43018.5(a).....	5, 6
Title 13 of the California Code .....	6

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
California Health and Safety Code § 43018.5 .....	5
Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1).....	2
Energy Independence and Security Act of 2007.....	11
§ 177, 42 U.S.C. § 7507 .....	9, 13, 25
§ 209(b), 42 U.S.C. § 7543(b) .....	passim
§ 706 of the Administrative Procedure Act, 5 U.S.C. § 706.....	15
Section 202(a) .....	20, 21, 24
Section 209(a) .....	4
Section 302(g).....	20
Stat. Chapter 200.....	5
 <b>COURT RULES</b>	
Federal Rule of Appellate Procedure 15 .....	2
 <b>OTHER AUTHORITIES</b>	
40 Fed. Reg. at 23,103 .....	31
49 Fed. Reg. at 18,890 n.24 .....	18
49 Fed. Reg. at 18,890 .....	17
49 Fed. Reg. 18,887, 18,889-90 (May 3, 1984).....	16
72 Fed. Reg. 20,586, 20,589 (Apr. 25, 2007) .....	35
72 Fed. Reg. 21,260 (Apr. 30, 2007) .....	9
73 Fed. Reg. at 12,164 .....	38, 39
73 Fed. Reg. at 12,168 & n.73 .....	38
73 Fed. Reg. at 12,168 & n.71 .....	37

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
73 Fed. Reg. at 12,167 & n 70 .....	37
73 Fed. Reg. at 12,167 & n 69 .....	37
73 Fed. Reg. at 12,167 & n.68 .....	37
73 Fed. Reg. at 12,167 .....	37
73 Fed. Reg. at 12,166 .....	36
73 Fed. Reg. at 12,165 .....	36, 39
73 Fed. Reg. at 12,168 n.71 .....	34
73 Fed. Reg. at 12,158 .....	23, 34, 35
73 Fed. Reg. at 12,165-68 .....	23
73 Fed. Reg. at 12,163-64 .....	21
73 Fed. Reg. at 12,168 .....	21, 37, 38, 39
73 Fed. Reg. at 12,163 .....	21, 34, 35
73 Fed. Reg. at 12,164 n.29 .....	21
73 Fed. Reg. at 12,160 .....	20, 32
73 Fed. Reg. at 12161 .....	19
73 Fed. Reg. at 12,161 .....	18
73 Fed. Reg. at 12,159-62 .....	16
73 Fed. Reg. at 12,168 col. 2 .....	13
73 Fed. Reg. at 12,162-68 .....	11
73 Fed. Reg. at 12,157 .....	11, 25
73 Fed. Reg. at 12,159 .....	11, 23
73 Fed. Reg. at 12,156 .....	11, 15

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
73 Fed. Reg. at 12,156 -57 .....	2
73 Fed. Reg. 12,156 .....	3, 11
73 Fed. Reg. 12,156, 12,156 (Mar. 6, 2008) .....	1
73 Fed. Reg. 63,408, 63,409 (Oct. 24, 2008) .....	35
113 Cong. Rec. H 14405 (Cong. Holifield) (daily ed. Nov. 2, 1967) .....	28, 29, 31
Cal. Code Regs. Title 13, § 961.1(e)(4) .....	6
Cal. Code Regs. Title 13, § 1961.1(a)(1) .....	7
California State Motor Vehicle Pollution Control Standards: Notice of Decision Denying Waiver of Clean Air Act Preemption for California’s 2009 .....	1
California’s “Vehicular Air Pollution Control” .....	5
Cass R. Sunstein, <i>Law and Administration under</i> .....	30
Chevron, 90 Colum. L. Rev. 2071, 2114 (1990) .....	30
<b>EPA Administrator’s Decision</b> .....	11
H.R. Rep. 95-294, 1977 U.S.C.C.A.N. 1077 .....	5
H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 302 (1977) .....	18
Nina A. Mendelson, <i>The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld</i> , 57 Duke L.J. 2157, 2158-59 .....	30
S. Rep. No. 90-403 .....	28
Webster’s Third New Int’l Dictionary 807 (2002) .....	22

## INTRODUCTION

In this case, nineteen States and numerous environmental organizations challenge the U.S. Environmental Protection Agency (EPA) Administrator's denial of California's request for a waiver of preemption, under Clean Air Act section 209(b),<sup>1</sup> 42 U.S.C. § 7543(b), for its greenhouse gas emission regulations. California's regulations have been adopted by over a dozen other States and will require significant reductions in the motor vehicle emissions that lead to global warming. The Administrator denied California's waiver request based on his finding that the State's standards "are not needed to meet compelling and extraordinary conditions" under section 209(b)(1)(B). California State Motor Vehicle Pollution Control Standards: Notice of Decision Denying Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,156 (Mar. 6, 2008). His finding was arbitrary, capricious, and contrary to law.

The Administrator has committed the same error of statutory interpretation rejected in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007): he has reasoned backward from a pre-determined policy conclusion, instead of starting with the terms of the statute. In *Massachusetts*, EPA started with its pre-determined conclusion that Congress did not intend the Clean Air Act to regulate carbon dioxide and other greenhouse gas pollutants. From this premise, EPA concluded that greenhouse gases were not "air pollutants," even though that statutory term includes "any" chemical substance emitted into the air. The Supreme Court found that EPA had it backwards: "Rather than relying on statutory text, EPA invokes postenactment

---

<sup>1</sup> All statutory references are to the Clean Air Act unless otherwise specified.

congressional actions and deliberations it views as tantamount to a congressional command to refrain from regulating greenhouse gas emissions.” 127 S. Ct. at 1461.

This case is little different. As EPA did in *Massachusetts*, here the Administrator began the conclusion that congress did not intend to allow California to regulate GHGS:

While I recognize that global climate change is a serious challenge, I have concluded that section 209(b) was intended to allow California to promulgate state standards applicable to emissions from new motor vehicles to address pollution problems that are local or regional. I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems.

73 Fed. Reg. at 12,156 -57 (footnote omitted). This is exactly the path EPA took in *Massachusetts*. Here the Administrator concluded that Congress did not intend California to regulate greenhouse gases, and based on that conclusion, read into the statute the non-existent limitations that California’s authority is limited to “pollution problems that are local or regional” and excludes “global climate change problems.”

The Administrator also offered an “alternative” legal rationale driven by the same erroneous pre-determined policy imperative. “[N]or, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary *compared to the effects in the rest of the country.*” *Id.* at 12,157 (emphasis added). The Administrator’s “comparative” test lacks any statutory foundation.

The Administrator’s reasoning conflicts with the Clean Air Act and *Massachusetts v. EPA*, violates both *Chevron* step one and *Chevron* step two, and is arbitrary and capricious.

## STATEMENT OF JURISDICTION

This Court has jurisdiction under Clean Air Act section 307(b)(1), 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15. This action challenges the EPA Administrator’s

final action denying California's request for a waiver of preemption under section 209(b), 42 U.S.C. § 7543(b), for the State's standards for emissions of greenhouse gases (GHGs) from new motor vehicles. 73 Fed. Reg. 12,156. This action was timely filed on May 5, 2008.

### **STATEMENT OF THE ISSUES**

Whether the Administrator acted arbitrarily and capriciously, abused his discretion, or acted contrary to law in denying California's request for a waiver of preemption under section 209(b), 42 U.S.C. § 7543(b), for California's regulations to control greenhouse gas emissions from new motor vehicles, in concluding that California's regulations are not needed "to meet compelling and extraordinary conditions" under section 209(b)(1)(B), because:

- The Administrator misconstrued the phrase "such State standards" in Clean Air Act section 209(b)(1)(B) to refer not to California's motor vehicle standards in the aggregate, but to the State's greenhouse gas standards in isolation.
- The Administrator construed the phrase "compelling and extraordinary conditions" to exclude conditions related to climate change or, in the alternative, to require California to demonstrate climate change impacts that are "sufficiently different" from those elsewhere in the United States.
- The Administrator failed to carry his burden of proving by at least a preponderance of the evidence that California erred in determining (1) that global warming conditions within the State are compelling and extraordinary; and (2) that its greenhouse gas standards will contribute to reducing both global warming and smog in California.
- The Administrator concluded that conditions related to global warming are not "sufficiently different" in California, as compared to the rest of the nation, even though the Administrator's own factual findings demonstrate that the number, magnitude, and cumulative

nature of the global warming impacts in California is “substantially different” from the other States.

## STATUTORY BACKGROUND

Consistent with the Clean Air Act’s cooperative federalism framework, *see* 42 U.S.C. §§ 7401(a)(3), (c), 7402(a), the Act sets up a two-car system providing both “federal” and “California” emission standards for cars and light duty vehicles. *See Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998). While the Act generally prohibits state regulation of emissions from new motor vehicles, it provides California with special authority to regulate those emissions through its own program. *See id.* § 7543(a), (b). Section 209(b) states:

The Administrator shall, after notice and opportunity for public hearing, waive application of [Section 209(a) preemption] 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.

*Id.* § 7543(b)(1). California is the only state qualified to obtain a waiver under section 209(b).

*See Ford Motor Co. v. EPA*, 606 F.2d 1293, 1296 (D.C. Cir. 1979). Other States may, however, adopt standards identical to California’s if certain conditions are met. 42 U.S.C. § 7507.

The legislative history of section 209(b) is discussed in *Motor and Equipment Manufacturers Association, Inc. v. EPA* (“MEMA I”), 627 F.2d 1095 (D.C. Cir. 1979). Section 209 was first enacted in 1967. *Id.* at 1109-10. “Congress intended the State to continue and

expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation.” *Id.* at 1111.

In 1977, Congress “ratif[ied] and strengthen[ed]” section 209(b) “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.” *MEMA I*, 627 F.2d at 1110 (*quoting* H.R. Rep. 95-294 at 301-02, 1977 U.S.C.C.A.N. 1077, 1380); *see also Ford Motor Co.*, 606 F.2d at 1294, 1296-97 (further explaining 1977 amendments).

EPA has granted California over forty waivers since section 209 was enacted in 1967. While lead-time delays were imposed in a few early waiver decisions, until this decision EPA has never denied a California waiver outright.

## STATEMENT OF FACTS

**The California GHG Regulations.** In 2002, the California Legislature enacted California Health and Safety Code section 43018.5 as part of California’s “Vehicular Air Pollution Control” provisions, Cal. Health & Safety Code §§ 43000-44299.91. 2002 Cal. Stat. ch. 200 (A.B. 1493). The law requires the California Air Resources Board (CARB) to adopt regulations to reduce greenhouse gas emissions from motor vehicles. Cal. Health & Safety Code § 43018.5(a). The California Legislature found that “[g]lobal warming is a matter of increasing concern for public health and the environment in the state” and that “[t]he control and reduction of emissions of greenhouse gases are critical to slow the effects of global warming.” 2002 Cal. Stat. ch. 200, § 1(a), (c). The California Legislature identified several specific “compelling and extraordinary impacts” of global warming in California: (1) reductions in the state’s water supply; (2) adverse impacts from increased air pollution caused by higher temperatures; (3) adverse impacts to food

production caused by changes in water supply and a significant increase in pestilence outbreaks; (4) the doubling of catastrophic wildfires; (5) potential damage to the state's coastline and ocean ecosystems from increased storms and sea level rise; and (6) adverse economic impacts due to such things as the increased costs of food. *Id.* § 1(d).

The Legislature emphasized California's opportunity and responsibility to address the motor vehicle sources that cause global warming. It noted that California has the world's fifth largest economy and that its motor vehicle emissions account for 40 percent of the state's greenhouse gases. *Id.* § 1(b), (e). It also found that "California has a long history of being the first in the nation to take action to protect public health and the environment, and the federal government has permitted the state to take those actions," and that "[t]echnological solutions to reduce greenhouse gas emissions will stimulate the California economy and provide enhanced job opportunities." *Id.* § 1(f), (g).

After a two year process of holding workshops and hearings, and considering public comment, CARB adopted the greenhouse gas global change regulations on August 4, 2005. (Deferred Appendix ("DA") at \_\_\_\_ [4].) The new standards are embodied as amendments to CARB's overall motor vehicle emissions regulations in title 13 of the California Code of Regulations, specifically amendments to sections 1900 and 1961, and new section 1961.1. The regulations address the four greenhouse gas emitted by motor vehicles: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. Cal. Code Regs. tit. 13, § 961.1(e)(4). They require gradual reductions in fleet-wide average greenhouse gas emissions until in model year 2016 those emissions are about thirty percent below the emissions of the model year 2002 fleet. (DA at \_\_\_\_ [422.11 at 43].) These reductions will be achieved by automobile manufacturers adding various technologies to their cars and trucks, at an estimated cost of up to approximately \$1,000

by model year 2016, and/or alternatively using low life-cycle carbon fuels (such as ethanol).<sup>2</sup> (DA at \_\_\_\_ [4.1 at 27-28, 39], [10.116 at 11].) These advanced technologies will reduce the lifetime operating costs by at least \$3,000 (based on \$1.74/gal. gasoline). (DA at \_\_\_\_ [10.116 at 409-10].)

In the course of developing the regulation, CARB also made specific findings about the dangers to California from global warming. CARB found that “average temperatures in California have increased 0.7° F, sea levels have risen by three to eight inches, and spring run-off has decreased 12 percent” and that “[t]hese observed and future changes are likely to have significant adverse effects on California’s water resources, many ecological systems, as well as on human health and the economy.” (DA at \_\_\_\_ [10.107 at 9].)

**California’s Waiver Request.** After CARB formally adopted the regulation, the agency submitted a request to EPA for a waiver under Section 209(b) on December 21, 2005. (DA at \_\_\_\_ [4, 4.1, 4.2, 17].) The waiver request met the Clean Air Act’s statutory criteria. (DA at \_\_\_\_ [4.1].) CARB made the factual finding required by Section 209(b)(1), that California’s regulatory program was more protective of public health and welfare than the federal standards. (DA at \_\_\_\_ [10.107 at 15].)

The waiver request described California’s compelling and extraordinary conditions as they relate to global warming caused by greenhouse gas emissions. For example, the request stated that the Bay Delta region of California is particularly vulnerable to sea level rise due to global warming, which would cause saltwater intrusion and increase the risk of levee collapse and

---

<sup>2</sup> California’s regulations provide automobile manufacturers with flexibility. California’s requirements apply to a manufacturer’s fleet-wide average emissions, not emissions of individual vehicles. Cal. Code Regs. tit. 13, § 1961.1(a)(1). Manufacturers may also trade credits, and equalize credits and debits over five years. *Id.* § 1961.1(b)(3)(A). Thus, the earliest any manufacturer will be subject to penalties is model year 2014. *Id.*

flooding that would severely tax California's increasingly fragile water supply system. (DA at \_\_\_\_ [4.1 at 18].) Global warming is also predicted to reduce snowfall and increase rainfall in the Sierra Nevada mountains, which would both increase springtime flooding and reduce summertime snowmelt runoff that is critical for municipal and agricultural uses. (DA at \_\_\_\_ [4.1 at 18].) These conditions are fully documented in the record. (*See, e.g.*, DA at \_\_\_\_ [10.44 at 19-25, 421 at 139-44, 421.8, 422.11 at 56-59, 1686 atts. 42-46, 55, 60-64].)

CARB's waiver request also demonstrated that its standards will help reduce the State's high ozone smog levels – which Congress recognized as compelling and extraordinary as long ago as 1967 -- in two different ways. First, the regulations will decrease ozone smog by reducing the total amount of fuel consumed in the state, which reduces the amount of smog-forming emissions released due to fuel evaporation and combustion. By 2020, the decreases in non-methane organic gases and oxides of nitrogen are estimated to be 4.6 and 1.4 tons per day, respectively (additional reductions of carbon monoxide are expected to be 0.2 tons per day). (DA at \_\_\_\_ [10.44 at 146-47, 10.132 at 18].) California has an “ongoing need for dramatic emission reductions generally and from passenger vehicles specifically.” (DA at \_\_\_\_ [4.1 at 16, 17].) Every reduction in smog forming emissions helps meet California's need to address its compelling and extraordinary ozone pollution. Second, CARB has also shown that higher temperatures due to global warming will accelerate the formation of ozone. (DA at \_\_\_\_ [421 at 27, 96-100, 154-60, 421.10, 421.11, 422 at 34-35, 1686 at 8, 1686 atts. 52-54].) The record includes recent scientific research by Mark Z. Jacobson, an engineering professor at Stanford University, demonstrating that higher temperatures caused by emissions of carbon dioxide and other greenhouse gases “increase U.S. surface ozone, carcinogens, and particulate matter, thereby increasing death, asthma, hospitalization, and cancer rates.” (DA at \_\_\_\_ [4409.1 at 7].)

This research was funded by an EPA grant, and presented at an EPA workshop in October 2007. (DA at \_\_\_\_ [4409.1 at 8, 4409.3 at 1].)

After California adopted these standards, thirteen other States adopted them under the authority provided by Section 177, 42 U.S.C. § 7507, which permits other States to adopt motor vehicle emission regulations identical to California's. *Id.* The States that have adopted California's greenhouse gas regulations are: Arizona, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. (DA at \_\_\_\_ [4587 at 6].) Several other States have committed to, or are considering, adopting the standards, including Colorado, Florida, Illinois, New Hampshire, and North Carolina. (DA at \_\_\_\_ [1463 at 7].) Together with California, these States comprise over half the new motor vehicle market in the United States. (DA at \_\_\_\_ [4587 at 7].)

**EPA's Waiver Determination Proceedings.** By letter dated February 21, 2007, EPA advised CARB that it would not rule on this waiver request until after the Supreme Court decided *Massachusetts v. EPA*. (DA at \_\_\_\_ [2].) EPA had asserted that the Clean Air Act provided no authority for EPA to regulate greenhouse gases. (DA at \_\_\_\_ [2].) On April 2, 2007, however, the Supreme Court rejected EPA's position. *Massachusetts v. EPA*, 127 S. Ct. at 1459-62.

On April 30, 2007, EPA solicited public comment on California's waiver request. *See* California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21,260 (Apr. 30, 2007). EPA held two public hearings, on May 22 and 30, 2007. (DA at \_\_\_\_ [421, 422] (transcripts).) Every participant, aside from an auto industry lawyer and the automobile trade group representative, testified in favor of granting the waiver. (*See* DA at \_\_\_\_ [421, 422].)

Following these public hearings, EPA technical and legal staff analyzed the full range of issues involved in the waiver. This culminated in a series of briefings with the Administrator in September and October 2007. (*See* Request for Judicial Notice (“RJN”), filed concurrently herewith, Exh. A at 7-16.) After its review, EPA technical and legal staff unanimously recommended that, consistent with the over thirty-year history of EPA treatment of California waivers, the Administrator should grant the waiver. (RJN, Exh. B at 14:25-15:4, 23:2-22, 24:13-20; Exh. A at 1.) At a September 2007 briefing, the Administrator polled a group of his most senior technical and legal staff and each person recommended granting the waiver. (RJN, Exh. B at 22:5-8, 23:2-22, 24:13-20; Exh. A at 11-12.) Specifically, EPA staff found that California had met the requirements of Section 209(b), including whether it has compelling and extraordinary conditions to justify the waiver based on both the need to address climate change conditions in California and California’s ozone conditions. (RJN, Exh. C at 9, 22; *see also* DA at \_\_\_\_ [6400.1, 6400.6].) Notably, EPA’s career legal staff assessed the full panoply of legal arguments for and against the waiver and concluded that there were not any good arguments against granting the waiver. (RJN, Exh. D; Exh. A at 8.) Based in part on these unanimous recommendations, the Administrator was initially inclined to grant the waiver in full. (RJN, Exh. B at 60:8-11, 118:10-19, 119:5-15; Exh. A at 17.) Thereafter, the Administrator changed his mind in favor of granting the waiver for the first few model years and deferring a decision on the later years. (RJN, Exh. B at 25:13-15, 27:16-18, 118:22-119:4, 119:21-25.)

However, following communications with the White House, the Administrator abruptly changed course, and decided to deny the waiver. (RJN, Exh. B at 59:7-19, 60:1-20, 120:12-21; Exh. A at 17-18.) White House staff helped the Administrator develop the rationale contained in the Administrator’s December 19, 2007, letter announcing his decision. (RJN, Exh. B at 140:14-

17; Exh. A at 18.) The Administrator's sudden turnabout apparently caught EPA staff by surprise, as evidenced by the fact that the day after the December 19th public announcement of the waiver denial, the internal draft decision document circulating within the agency was still written to grant the waiver in full. (RJN, Exh. E; Exh. A at 18.)

**The EPA Administrator's Decision.** On December 19, 2007, just hours after the President signed the Energy Independence and Security Act of 2007 (EISA) into law, the Administrator sent a two-page letter to Governor Schwarzenegger announcing his decision to deny the waiver, and held a press conference to announce the decision. (DA at \_\_\_\_ [4702]; see RJN, Exh. F.) More than two months later, EPA issued its formal decision on the waiver, in a 14-page Federal Register Notice. See 73 Fed. Reg. 12,156. The Administrator based the decision entirely on a finding that California's greenhouse gas regulations "are not needed to meet compelling and extraordinary conditions" under section 209(b)(1)(B). 73 Fed. Reg. at 12,156. First, while acknowledging that the agency's past practice was to consider California's "program as a whole" when determining compliance with section 209(b)(1)(B)," the Administrator announced that for this decision "I find that it is appropriate to review whether California needs its GHG standards to meet compelling and extraordinary conditions *separately* from the need for the remainder of California's motor vehicle [emission control] program." 73 Fed. Reg. at 12,159. (emphasis added) The Administrator made two alternative findings:

I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.

73 Fed. Reg. at 12,157; see also 73 Fed. Reg. at 12,162-68.

## SUMMARY OF ARGUMENT

The question before the Court is whether the EPA Administrator properly determined that California “does not need such State standards to meet compelling and extraordinary conditions,” 42 U.S.C. § 7543(b)(1)(B), in denying California’s request for a waiver of preemption for its greenhouse gas emission standards for new motor vehicles. He did not. The Administrator’s decision runs afoul of the plain text of the Clean Air Act, *Chevron*, *Massachusetts v. EPA*, principles of statutory construction, and decades of EPA’s own interpretation of section 209. His decision must be vacated and remanded back to the agency.

First, the Administrator’s decision fails step one of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because he violated the plain text of section 209(b)(1)(B) by evaluating the need for these particular regulations in isolation rather than California’s complete motor vehicle emission control program. In so doing, the Administrator rejected his own agency’s longstanding conclusion that the plain language of section 209 requires him to consider California’s “program as a whole” when evaluating a waiver request.

The phrase “such State standards” in section 209(b)(1)(B) refers to all of California’s motor vehicle emissions standards, not just those for which a new waiver is being sought. The Administrator maintained that while the historical “program as a whole” interpretation still applies to all California’s other emission standards, because Congress did not intend California to regulate greenhouse gases, the need for those standards will be examined separately. Yet nothing in the text of section 209(b)(1)(B) even hints at such a distinction. The Court need not go any further to vacate and remand this case to EPA.

Second, having decided to evaluate greenhouse gas standards separately, the Administrator concluded that Congress did not authorize California to regulate greenhouse gases. To reach this conclusion, he limited the statutory language of “compelling and extraordinary conditions” to mean “local pollution problems.” He then determined that conditions related to global climate change in California are not “sufficiently different” from conditions in the nation as a whole to justify California’s standards. 73 Fed. Reg. at 12,168 col. 2. Imposing these two new requirements even though neither is in the statute also fails *Chevron* step one. The Administrator’s extra-statutory gloss is based on his policy preferences, not the Clean Air Act. Just as in *Massachusetts v. EPA*, EPA’s policy preference was that “Congress did not intend to grant Clean Air Act regulatory authority over motor vehicle greenhouse gas emissions.” This reasoning was rejected in *Massachusetts v. EPA*. In *Massachusetts*, the question was EPA’s authority; here, it is California’s.

Moreover, the Administrator’s new “sufficiently different” test also conflicts with the explicit language of section 177, which allows other states to adopt California’s regulations. Had Congress intended to limit California’s authority to problems that are “sufficiently different” from problems elsewhere in the country, it would make little sense for Congress to also expressly allow other states to adopt California’s emission standards.

Third, the Administrator’s decision fails *Chevron* step two because his interpretations are unreasonable. They rely on snippets of legislative history in disregard for the statutory language (discussed above) and conflict with Congress’s clear intent to grant California authority to address all kinds of air pollution problems. Moreover, *Chevron* deference in this case is extremely limited, if it exists at all, because: (1) section 209 is a preemption provision and our federalist system requires preemption to be narrowly construed; (2) in enacting section 209(b),

Congress meant to allow California to make the policy judgments as to what problems to address, and how to do so; and (3) the Administrator's interpretations are contrary to decades-long interpretations of this provision.

Fourth, even if the Administrator's new "compelling and extraordinary conditions" test were authorized by the Clean Air Act, his decision is arbitrary and capricious because the Administrator fails to carry his burden of proof. The Administrator fails to properly account for the effects this regulation will have on smog in California, a pollution problem even he agrees California can address. The record contains clear evidence that California's greenhouse gas regulation will decrease smog-related emissions due to reduced gasoline use, and will mitigate increases in smog due to increased temperatures due to global warming. The Administrator nowhere denies these links, yet unreasonably dismisses these links as "indirect."

Last, the Administrator's claim that California's global warming problems are not "sufficiently different" is contradicted by the factual statements he makes throughout his decision. His conclusion on this point does not follow from the facts, and so the Administrator has not met his burden to deny this waiver. The Administrator's own findings show that no other State will be affected by global warming in the same way as California, and that the effects in California are more severe than the effects in any other State.

For all of these alternative reasons, EPA's decision must be vacated and remanded.

## STANDING

California has standing to pursue this action because the Administrator denied its request for a waiver of preemption, without which California's own law will not be enforceable. *See* 42 U.S.C. § 7543(a), (b). The state petitioners that have adopted regulations identical to California's have standing for the same reason. *See id.* § 7507. All Petitioners have standing

because these regulations will reduce greenhouse gases, reducing the effects and risks of global warming. See *Massachusetts v. EPA*, 127 S. Ct. at 1452-58; 73 Fed. Reg. at 12,156.

## STANDARD OF REVIEW

The Administrator's construction of section 209(b) is reviewed under the two-part test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court must first determine if Congress has directly spoken to the precise question at issue. *Id.* at 842. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 843.

The deference to be given the Administrator under Chevron step two should be especially limited because section 209 is a preemption provision. Moreover, "[t]ime-honored canons of construction" like preemption "constrain the possible number of reasonable ways to read an ambiguity in a statute." *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (emphasis in original). The Court has "a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, also governs the Court's examination of the Administrator's action. *MEMA I*, 627 F.2d at 1105. The Court must invalidate the Administrator's action if it finds that it is "arbitrary and capricious . . . or otherwise not in accordance with law' or if (it) fails to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (quoting 5 U.S.C. § 706); see also *MEMA I*, 627 F.2d at 1105. "The Administrator must give reasoned consideration to the issues before him and reach a result which rationally

flows from this consideration.” *MEMA I*, 627 F.2d at 1106. In considering the issues, California’s regulations “are presumed to satisfy the waiver requirements and [] the burden of proving otherwise is on whoever attacks them.” *Id.* at 1121.

## ARGUMENT

### I. THE ADMINISTRATOR ERRED IN FAILING TO APPLY SECTION 209(B)(1)(B) TO CALIFORNIA’S MOTOR VEHICLE EMISSIONS PROGRAM AS A WHOLE.

In order to reject California’s greenhouse gas standards, the Administrator first had to reverse EPA’s longstanding construction of section 209(b)(1)(B) so that he could review California’s greenhouse gas emissions standards separately under the “compelling and extraordinary conditions” test. (DA at \_\_\_\_ [1686 at 7 & att. 36].) For more than two decades, however, EPA has consistently held that the question posed by the plain language of 209(b)(1)(B) is not whether California needs any particular standard to meet compelling and extraordinary conditions, but rather it is whether California needs its separate *program* of vehicle emission standards to meet compelling and extraordinary conditions. *See, e.g.*, California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18,887, 18,889-90 (May 3, 1984) (waiver decision for diesel emission standards). This inquiry is so limited because the Administrator must allow California considerable discretion in managing its program. (RJN, Exh. G at 34 (Congress “creat[ed] a limited review of California’s determinations that California needs its own separate standards [] to ensure that the federal government not second-guess the wisdom of state policy”).) Instead, for this waiver request only, the Administrator found that “such State standards” refers solely to the regulations at issue in this waiver request. 73 Fed. Reg. at 12,159-62. In order to reach this conclusion, he asserted an ambiguity in the statutory text which simply is not present. As in *Massachusetts v.*

*EPA*, however, the plain language of section 209(b) by its explicit terms provides that EPA must evaluate whether California's whole program of emission standards – “the State standards . . . in the aggregate” – are needed to meet compelling and extraordinary conditions. As shown below, the Administrator ran afoul of the plain text of the statute, *Chevron*, and more than 20 years of the agency's own interpretation, and *Massachusetts v. EPA*.

Starting with the statutory text, the phrase “such State standards” in section 209(b)(1)(B) plainly refers directly to the phrase “the State standards . . . in the aggregate” found in section 209(b)(1). That phrase directs the Administrator to waive federal preemption for new motor vehicle emission standards adopted and enforced by California “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.” 42 U.S.C. § 7543(b)(1). The “State standards . . . in the aggregate” means all of California's motor vehicle emissions standards – the ones already benefitting from prior waivers, and the one (or ones) for which a new waiver is being sought. See *MEMA I*, 627 F.2d at 1110 & n.32.

More than two decades ago, EPA Administrator William Ruckelshaus explained why the statute's plain meaning compels reviewing the need for California's program as a whole:

The interpretation that my inquiry under (b)(1)(B) goes to California's need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statute as well. Specifically, if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase “\* \* does not need *such* state standards” (emphasis supplied), which apparently refers back to the phrase “State standards \* \* in the aggregate,” as used in the first sentence of section 209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e., “standards,” further confirms that Congress did not intend EPA to review the need for each individual standard in isolation.

49 Fed. Reg. at 18,890 (emphasis in original, footnotes omitted). He further explained that the plain meaning of the statute foreclosed any different interpretation:

Indeed, to find that the “compelling and extraordinary conditions” test should apply to each pollutant would conflict with the amendment to section 209 in 1977 allowing California to select standards “in the aggregate” at least as protective as federal standards. In enacting that change, Congress explicitly [*sic*] recognized that California’s mix of standards could include some less stringent than the corresponding federal standards. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 302 (1977). Congress could not have given this flexibility to California and simultaneously assigned to the state the seemingly impossible tasks [*sic*] of establishing that “extraordinary and compelling conditions” exist for each less stringent standard. Since no such specific finding is required for [each] less stringent standard, no such finding should be required for each more stringent standard.

49 Fed. Reg. at 18,890 n.24.

EPA has followed this construction in its subsequent waiver decisions. Indeed, just two years ago, the agency endorsed this construction under the *present* Administrator, Steven Johnson:

EPA has long held that the question under section 209(b)(1)(B) is not whether every element in CARB’s regulatory program is needed to address compelling and extraordinary conditions, but whether conditions in California continue to justify separate emissions standards for new motor vehicles. EPA has previously recognized the intent of Congress in creating a limited review of California’s determinations that California needs its own separate standards was to ensure that the federal government not second-guess the wisdom of state policy.

RJN Exh. G at 34 (Dec. 21, 2006).

Despite this long-held understanding that “such State standards” unambiguously means all of California’s motor vehicle standards in the aggregate, in this decision the Administrator suddenly asserts that “such State standards” is open to a different interpretation: “The text of section 209(b)(1)(B) does not limit EPA to its previous practice as the language of the statute is ambiguous on this point.” 73 Fed. Reg. at 12,161. The language of the statute, however, is *not* ambiguous: As demonstrated, plain textual analysis shows that “such State standards” can mean only California’s motor vehicle emissions program, its “State standards . . . in the aggregate.”

As the Supreme Court observed last term:

[O]ne undefined word, repeated in different statutory provisions, can have different meanings in each provision. But that is worlds apart from giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*. Not only have we never engaged in such interpretive contortion; just over three years ago, in an opinion joined by Justice STEVENS, we forcefully rejected it. *Clark v. Martinez*, 543 U.S. 371, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), held that the meaning of words in a statute cannot change with the statute's application. *See id.*, at 378, 125 S.Ct. 716. To hold otherwise “would render every statute a chameleon,” *id.*, at 382, 125 S.Ct. 716, and “would establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases,” *id.*, at 386, 125 S.Ct. 716.

*United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion) (emphasis in original); *see also Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) (“*Martinez* held that statutory language given a limiting construction in one context must be interpreted consistently in other contexts, ‘even though other of the statute's applications, standing alone, would not support the same limitation.’”). The Administrator’s interpretation flouts bedrock rules of statutory construction.

The Administrator’s only basis for his reinterpretation of the statute is his claim that Congress did not intend for California to regulate global warming pollutants in its motor vehicle emissions program: “Congress did not justify this provision based on pollution problems of a more national or global nature in justifying this provision.” 73 Fed. Reg. at 12161. At best, the Administrator confuses the motivating purposes for the original waiver provision with how those purposes are effectuated. It is thus not surprising that the legislative history discusses the smog problems in California that were worse than other parts of the country. But such legislative history does not limit the reach of the statute; courts must look at the actual words of the statute. As this Court found – with regard to section 209(b) – “legislative history is not required to cover every aspect of a statute’s application.” *Id.*, 627 F.2d at 1108 n.22.

The Administrator's rationale also runs afoul of *Massachusetts v. EPA*, in that he ignores the plain meaning of the text in favor of an extra statutory policy consideration. Just as in *Massachusetts*, the Administrator reasons backward from citations to legislative history discussing other forms of pollution to the conclusion that Congress intended to limit facially broad statutory language. This backwards reasoning no more supports excluding greenhouse gas standards from "such State standards" under section 209(b) than it did EPA's failed attempt to exclude greenhouse gases from "air pollutant" as defined in section 302(g) and used in section 202(a).

The application of the Administrator's new "separate evaluation" interpretation to only greenhouse gas standards would also be unreasonable. EPA concedes that the "whole program" construction is the right interpretation for all other pollutants that California has regulated. *See* 73 Fed. Reg. at 12,160 ("EPA's prior interpretation has been and continues to be a reasonable and appropriate interpretation of the second criterion, and EPA is not reconsidering or changing it here for local or regional air pollution problems.") The Administrator has pointed to no reasonable basis – only his pre-determined policy against climate change regulation – to support a different view. There cannot be one interpretation of "such State standards" for some pollutants and another interpretation for others.

The Administrator's isolation of California's greenhouse gas standards from the motor vehicle emissions program of which they are a part, and his failure to evaluate California's need for its standards on the basis of California's program as a whole is an error sufficient on its own to require vacating this decision.

## II. EXCLUDING CLIMATE CHANGE FROM “COMPELLING AND EXTRAORDINARY CONDITIONS” VIOLATES THE PLAIN MEANING OF SECTION 209(B).

After erroneously interpreting section 209(b)(1)(B) to allow him to look at California’s GHG regulations in isolation, the Administrator also interpreted section 209(b)(1)(B) to have two new requirements – but, again, only for this particular waiver request. The Administrator posited these two requirements as alternative reasons to deny the waiver. 73 Fed. Reg. at 12,164 n.29. First, he said that section 209(b) was intended only to allow California “to address pollution problems that are local or regional,” and that climate change conditions are not “local or regional.” 73 Fed. Reg. at 12,163. Second, he said that even if California has authority to address climate change, California must have climate change impacts that are “sufficiently different” from climate change impacts in the rest of the Nation as a whole to justify having its own standards. 73 Fed. Reg. at 12,168. The Administrator based both of these limitations on 1967 legislative history discussing the smog problems as they existed in California when the waiver provision was first enacted. 73 Fed. Reg. at 12,163-64. There is no statutory foundation for either limitation.

The similarity to EPA’s failed reasoning rejected in *Massachusetts v. EPA* is apparent. The Supreme Court recognized that when Congress enacts a broadly worded statute, the reach of the statutory terms is not limited by the mention of particular examples in legislative history:

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

127 S. Ct. at 1462. Likewise, while the Clean Air Act's 1967 legislative history contained specific comments about California's then-dominant smog problems, those comments do not limit the scope of the broad terms Congress employed in the Clean Air Act. "Compelling and extraordinary conditions" is a phrase worded broadly enough to cover new air pollution problems as they are recognized and empower California to accommodate to new situations. *See Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (quoted in *Massachusetts v. EPA*, 127 S. Ct. at 1462). *See also IBEW 474*, 814 F.2d at 712 ("courts have no authority to *enforce* principles gleaned *solely* from legislative history that has no statutory reference point" (emphasis in original)); *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (finding EPA "deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text").<sup>3</sup>

The Administrator simply did not dispute the California's Legislature's and CARB's findings that the California faces "compelling and extraordinary conditions" due to the magnitude and wide range of global warming impacts on the health and well being of California's citizens and on the state's natural resources – including sea level rise, impacts on fresh water supplies, increased smog, greater risks of wildfires, impacts on agriculture, and other consequences. *See supra* at 9-11. Indeed, in his decision, the Administrator enumerates the

---

<sup>3</sup> Climate change fits easily within the natural scope of the term "compelling and extraordinary conditions." The term "compelling" means "of the highest order" and "paramount." *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). The term "extraordinary" has a "common meaning" of "not of the usual order or pattern" or "beyond what is usual, regular, common, or customary." *Advanced Pharm., Inc. v. United States*, 391 F.3d 377, 392 (2nd Cir. 2004) (quoting Webster's Third New Int'l Dictionary 807 (2002)).

wide variety and seriousness of the health and environmental impacts in California related to global warming. 73 Fed. Reg. at 12,165-68. It should also be without controversy that California's regulations -- especially when adopted by other States -- will help address global warming. "[R]educing domestic automobile emissions is hardly a tentative step" in addressing global warming. *Massachusetts v. EPA*, 127 S. Ct. at 1457. "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Id.* at 1458. The Supreme Court also noted that "[t]he risk of catastrophic harm, though remote, is nevertheless real" and "[t]hat risk would be reduced to some extent if" GHG regulations existed. *Id.* The federal government, in fact, has specifically stated that California's GHG regulations (together with the other States' identical regulations) would "be globally significant." (DA at \_\_\_\_ [3601 att. 159 at 300]; see also [1686 at 13-15, 3601 at 19-22.]) As the Chairman of the Council on Environmental Quality said in reference to actions to address global warming, "We need it all." (DA at \_\_\_\_ [1686 att. 78].) The Administrator did not deny the efficacy of these regulations. 73 Fed. Reg. at 12,158. Thus, the greenhouse gas standards, even if viewed in isolation, meet the test imposed by the plain meaning of Section 209(b)(1)(B).

The Administrator asserts that his recourse to legislative history is "appropriate" in order to "give[] meaning to Congress's decision to include this provision." 73 Fed. Reg. at 12,159 (emphasis added); see also *id.* at 12,164, 12,168. The Administrator has it exactly backwards. He must begin his analysis with the language of the statute. *Am. Bankers Ass'n*, 271 F.3d at 267. Only if the statutory text reveals ambiguities may he look to statutory purposes and other factors to inform his construction of the statute. *Id.* But here the Administrator starts with isolated pieces of legislative history and uses it to justify his interpretation of the statute. As this Court has explained, "the court's role is not to 'correct' the text so that it better serves the statute's

purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them.” *Engine Mfrs. Ass’n*, 88 F.3d at 1089. The Administrator’s insistence on reading limitations into “compelling and extraordinary,” is no different from what the agency attempted to do in *Massachusetts v. EPA* and *New Jersey v. EPA*: import extra-statutory limitations into an expansive statutory term. Like in those cases, the Administrator cannot start with isolated pieces of legislative history and attempt to modify the plain meaning of the statutory text.

The Administrator’s limiting rationale is inconsistent with *Massachusetts v. EPA* in an additional way. In that case, the Supreme Court determined that carbon dioxide and other greenhouse gases are unambiguously “air pollutant[s]” under the Clean Air Act, and thus may be regulated under section 202(a) of the Act. 127 S. Ct. at 1460. Section 209(b)(1)(C) – which the Administrator ignored in this decision -- requires a waiver be granted unless EPA determines that California’s standards are “inconsistent” with section 202(a), the provision at issue in *Massachusetts v. EPA*. *Id.* § 7543(b)(1)(C). Section 202(a) authorizes California to regulate any pollutant that EPA is authorized to regulate at the Federal level. Had Congress wanted to limit California’s authority to reach pollutants that are subject to Federal regulation, it would not have written section 209(b)(1)(C) as it did. *See, e.g., Engine Mfrs. Ass’n*, 88 F.3d at 1090 (referring to the “Congressional history of permitting California to enjoy coordinate regulatory authority over mobile sources with the EPA”). Since section 202(a) unambiguously gives EPA authority to address global warming, there is no reasonable basis for construing the scope of California’s authority any less expansively. Thus, the Administrator has no basis for concluding, in his first alternative rationale, that “section 209(b)(1)(B) was [not] intended to allow California to

promulgate state standards for emissions from new motor vehicles designed to address global climate change problems.” 73 Fed. Reg. at 12,157.

Finally, the Administrator’s alternative rationale that California needs climate change conditions “sufficiently different” from those in the rest of the nation is plainly inconsistent with another part of the Clean Air Act. The interpretation of a statutory provision must take into account other related provisions. *Am. Bankers Ass’n*, 271 F.3d at 267. Section 177 of the Act allows other States to enforce motor vehicle emission standards identical to California standards that have a waiver. 42 U.S.C. § 7507. As already noted, thirteen States have already enacted such standards and more States are in the process of doing so. Section 177 was enacted “so that states attempting to combat their own pollution problems could adopt California’s more stringent emission controls.” *Motor Vehicle Mfrs. Ass’n v. N.Y. St. Dep’t of Envtl. Conservation*, 17 F.3d 521, 531 (2nd Cir. 1994). It would make no sense to allow other states to adopt California’s standards if California’s authority were limited to addressing problems “sufficiently different” from those in other states. The core premise of section 177 is that States which share California’s pollution problems, whether in the same or lesser degree, and may share in California’s pioneering solutions to those same problems.

As the Supreme Court stated in *Massachusetts v. EPA*, “[t]here is no reason, much less a compelling reason, to accept EPA’s invitation to read ambiguity into a clear statute.” 127 S. Ct. at 1462. Thus, even if the Administrator had authority to examine California’s greenhouse regulations in isolation, both of his alternative rationales for denying the waiver fail *Chevron* step one.

### **III. THE ADMINISTRATOR’S INTERPRETATION OF SECTION 209(B)(1)(B) IS NOT REASONABLE UNDER THE CLEAN AIR ACT.**

Even if the Administrator’s decision were to survive *Chevron* step one analysis, it would fail under *Chevron* step two. *Chevron* step two asks whether the agency’s interpretation is reasonable. *Chevron*, 467 U.S. at 843. The Administrator’s interpretation is not reasonable when examined in light of the text of section 209(b) and a fair reading of the legislative history.

#### **A. The Administrator’s Interpretation of Section 209 is Not Reasonable Because It Conflicts With *Massachusetts v. EPA*, the Language of Section 209(b), and Congress’s Intent to Give California the Broadest Possible Discretion.**

The Administrator’s denial of California’s waiver request is arbitrary, capricious and contrary to law because his interpretation of section 209(b) is unreasonable. His interpretation is primarily based on two grounds: (1) that global warming pollution is materially different from other types of air pollution;<sup>4</sup> and (2) that Congress intended to exclude greenhouse gases from California’s regulatory authority because smog pollution problems are discussed in the waiver provision’s legislative history. The Administrator’s reliance on these policy arguments is misplaced and unreasonable.

The Supreme Court has already ruled that global warming is within the scope of the Clean Air Act. *Massachusetts v. EPA*, 127 S. Ct. at 1459-62. In doing so, the Court recognized the broad scope of the Act’s motor vehicle provisions. *Id.* at 1462. It noted that Congress, while not necessarily having global warming in mind, meant for the Act to apply to newly appreciated pollution problems. *Id.* In fact, Congress used the word “climate” in defining “language

---

<sup>4</sup>A strict dichotomy between local and global air pollution problems does not exist. For example, as CARB pointed out in its waiver application, “pollutants currently regulated by both U.S. EPA and CARB, e.g., particulates, can and do cross international boundaries, sometimes across oceans.” (DA at \_\_\_\_ [4.1 at 17 n.33].)

referring to effects on welfare.” 42 U.S.C. § 7602(h). The Clean Air Act provides no basis for interpreting the California waiver provision to exclude global warming pollutants. Greenhouse gases are “air pollutants” under the Act. *Massachusetts v. EPA*, 127 S. Ct. at 1459-62.

Congress gave California authority to maintain its own motor vehicle emissions program because it is a “laboratory for innovation.” *MEMA I*, 627 F.2d at 1111. California has the “broadest possible discretion in selecting the elements of its emissions control program.” *Id.* at 1108 n.22. It would not make sense to constrain California’s authority as EPA seeks to do.

As discussed above (in the *Chevron* step one sections), the statutory language of section 209(b) also does not support EPA’s interpretation. *See supra* Sections I, II, III. The provision speaks to “State standards” not a “State standard” when framing the analysis for the “compelling and extraordinary conditions” criteria. It says nothing about limiting California’s authority to local or unique pollution problems. Rather, California is entitled to a waiver if it meets the criterion specified in the statute.

Moreover, the overall purposes and justifications for the Clean Air Act and the waiver provision run contrary to limiting California’s authority. The Clean Air Act is a forward-looking statute with broad scope. *Massachusetts v. EPA*, 127 S. Ct. at 1460, 1462. This Court has found, looking at the totality of the legislative history, that California has the “broadest possible discretion” under section 209 to implement its own motor vehicle emissions program. *MEMA I*, 627 F.2d at 1108 n.22. It is without dispute that California still has a large number of cars and trucks, and continues to act as a laboratory for innovation in addressing all kinds of pollution problems. (DA at \_\_\_\_ [1686 att. 26] (NAS Report).) These broader purposes recognized in the Act’s legislative history, and by this Court, refute the Administrator’s selective analysis.

A fair review of the legislative history makes this apparent. The Senate committee report explained that it enacted a broad preemption provision because “Senator Murphy convinced the committee that California’s unique problems *and* pioneering efforts justified a waiver . . . .” S. Rep. No. 90-403 at 33 (emphasis added). There is abundant evidence within the legislative history indicating the provision was intended to benefit the nation as a whole, not only California, by using California’s special expertise in the area of pollution control as a laboratory for testing more stringent pollution control policies. For example, Representative Allen Smith remarked:

The Nation will have the benefit of California’s experience with lower standards which will require new control systems and design. In fact California will continue to be a testing area for such lower standards and should those efforts . . . be successful it is expected that the Secretary will, if required to assure protection of the national health and welfare, give serious consideration to strengthening Federal Standards . . . . In the interim periods, when California and the Federal Government have different standards, the general consumer of the Nation will not be confronted with increased costs associated with new control systems.

*Id.*; see also 113 Cong. Rec. 30,941 (1967) (statement of Rep. Smith) (“Other States that may later be faced with the problem will be years ahead in being able to base their decisions on the efforts and results which take place in California.”); *id.* at 30,954 (statement of Rep. Moss) (“There is offered to this Nation the ideal laboratory, where the demonstrated initiative exists and where the resources exist to solve this problem and contribute significantly to the entire nation. I believe we should take advantage of this unique opportunity.”); *id.* at 30,975 (statement of Rep. Moss) (“[California] offers a unique laboratory, with all of the resources necessary, to develop effective control devices which can become a part of the resources of this Nation and contribute significantly to the lessening of the growing problems of air pollution throughout the Nation.”).

Furthermore, in the sole comment regarding the waiver provision in the Senate conference report, *MEMA I*, 627 F.2d at 1110 n.31, Senator George Murphy stated,

I am firmly convinced that the United States as a whole will benefit by allowing California to continue setting its own more advanced standards for control of motor vehicle emissions. In a sense, our State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.

113 Cong. Rec. 32,478.

Given the broad scope of the Clean Air Act and the waiver provision, and the Supreme Court's recognition of the Act's importance as a tool in combating global warming, section 209(b) can only reasonably be interpreted to allow California to adopt its own GHG emission standards. California's authority is not narrowly limited to addressing the State's smog problem. EPA's decision cannot withstand even *Chevron* step two.

**B. Any Deference to the Administrator's Interpretation of Section 209(b) Is Extremely Limited.**

Section 209 is a preemption provision, and therefore additional interpretive principles should inform the Court's examination of the Administrator's decision. Courts have been reluctant to find state provisions preempted because such a finding impacts principles of federalism and state sovereignty. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Because of this, there is a presumption against preemption in "all preemption cases." *Medtronic*, 518 U.S. at 485. Especially in areas States have traditionally regulated, a reviewing court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Therefore, courts narrowly construe federal laws which are claimed to preempt an exercise of state police power. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Devel. Comm'n* ("ACRI"), 410 F.3d 492, 496, 497 (9th Cir. 2005).

Thus, for a state statute to be preempted, there must be “an unambiguous congressional mandate to that effect.” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). Over ten years ago, this Court recognized that *Chevron* deference may be affected by “traditional presumptions about the parties or the topic in dispute” – such as preemption principles – and that “time-honored canons of construction may similarly constrain the possible number of *reasonable* ways to read an ambiguity in a statute.” *Massachusetts v. U.S. Dep’t of Transp.*, 93 F.3d at 893 (explaining, without deciding, whether *Chevron* even applied in the preemption context) (emphasis in original).<sup>5</sup> In 2005, the Supreme Court strengthened these principles: the courts’ “duty [is] to accept the reading [of a statute] that disfavors pre-emption.” *Bates*, 544 U.S. at 449. The existence of such a duty leaves EPA with little, if any, room to interpret the preemption provision of section 209(b).

Congress’s intention to impose a “minimum of federal oversight” on California under section 209(b), *e.g.*, *Ford Motor Co.*, 606 F.2d at 1297, indicates that it had these kinds of federalism concerns in mind in enacting this particular provision. EPA explained its understanding of deference and judicial review of its waiver denial decisions in 1975:

One congressman indicated that a decision to deny a waiver should be subject to considerably less deference on judicial review than the Administrative Procedures Act normally provides, a view which would

---

<sup>5</sup> Narrowly construing preemption is consistent with the basic federalism principles upon which this Nation was based. Those bedrock principles should trump the administrative law principles under *Chevron* because agencies have no expertise “in deciding the proper allocation of power between the federal and state governments.” *John v. United States*, 247 F.3d 1032, 1046 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting) (citing Cass R. Sunstein, *Law and Administration under Chevron*, 90 Colum. L. Rev. 2071, 2114 (1990)); *see also* Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld*, 57 Duke L.J. 2157, 2158-59 (explaining that none of the academic commentators looking at the interplay between preemption doctrines and deference to agency decision believe *Chevron* should apply).

necessarily imply that the agency discretion to deny [a] waiver is considerably narrower than is its discretion to act or not act in other contexts. 113 Cong. Rec. H 14405 (Cong. Holifield) (daily ed. Nov. 2, 1967).

40 Fed. Reg. at 23,103 (emphasis added).<sup>6</sup>

In addition, the Administrator conceded this decision departs from the agency's historical practice. While an agency is not estopped from changing its interpretation of a statute, the consistency of an agency's position is a factor in assessing the weight that position is due. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Immigration & Naturalization Service v. Cardoza-Fonseca*, 408 U.S. 421, 447 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). This is especially relevant here, when the agency admits that the prior interpretation remains correct for the purposes of other pollutants. *See supra* at 22.

For all of these reasons, together or independently, little if any deference should be given to the Administrator's interpretations newly developed for this decision.<sup>7</sup> Instead, deference should continue to be accorded to California's policy judgments.<sup>8</sup>

---

<sup>6</sup> Congress has implicitly adopted this view (*see Lorillard v. Pons*, 434 U.S. at 580-81) because it amended the waiver provision in 1977 – after 1975, when these principles were explicitly reiterated by EPA – to significantly increase the discretion credited to California. *See MEMA I*, 627 F.2d at 1110.

<sup>7</sup> Without *Chevron* deference, EPA must rely on its power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 124 (1944). As set forth in Sections I, II, and III.B., EPA's interpretations are not persuasive.

<sup>8</sup> If the Court gives full meaning to *Bates*'s admonition that its "duty" is to accept a plausible interpretation that avoids preemption, or to Congress's intent to give California the "broadest possible discretion," this would mean that the question in this case turns not on whether *the Administrator* has put forth a plausible interpretation of the statute, as under *Chevron*, but rather whether *California* has put forth a plausible interpretation of the statute. If  
(continued...)

#### **IV. THE ADMINISTRATOR FAILED TO CARRY HIS BURDEN OF PROOF IN OVERRIDING CALIFORNIA'S DETERMINATIONS ON SMOG REDUCTION BENEFITS.**

Even assuming *arguendo* the reasonableness of the Administrator's new interpretations of section 209(b), his denial of California's waiver is still arbitrary and capricious. California explained in its waiver request that these regulations will not only address global warming, but will also remediate so-called "traditional" pollutants related to smog. (*See, e.g.*, DA at \_\_\_\_\_ [1686 at 7-13].) The Administrator's decision fails to "give reasoned consideration" to this issue, *see MEMA I*, 627 F.2d at 1106, because he fails to overcome the burden on *him* to prove a waiver should be denied.

This Court has made clear that California's regulations "are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them." *Id.* at 1121. While *MEMA I* did not determine the exact standard of proof "in every waiver proceeding," the opinion indicates that it lies somewhere in the range of a "preponderance of the evidence" and "clear and convincing evidence." *Id.* at 1122. Setting a high burden "accords with the congressional intent to provide California with the broadest possible discretion." *Id.* To paraphrase *MEMA I*, a waiver denial is arbitrary and capricious if the Administrator "ignores evidence demonstrating that the waiver [should] be granted," or if he "seeks to overcome that evidence with unsupported assertions of his own." *Id.* at 1123.

The Administrator conceded that regulations addressing "traditional" pollutants meet the requirements of section 209(b)(1)(B)'s "compelling and extraordinary conditions" test. 73 Fed. Reg. at 12,160. The Administrator observed that he "should give deference to California's

---

(...continued)

this is the question, then the Administrator's interpretations clearly are not appropriate. After all, he admits that the opposite interpretations are appropriate for other California waiver requests.

policy judgments, as it has in past waiver decisions, on the mechanisms used to address local and regional air pollution problems.” 73 Fed. Reg. at 12,158. California has an “ongoing need for dramatic [smog-related] emission reductions generally and from passenger vehicles specifically.” (DA at \_\_\_\_ [4.1 at 16, 17].)

The Administrator did not prove – or even assert – that California’s GHG regulations will not help reduce California’s smog conditions. California found that they will do so, in two ways. First, California’s regulations will reduce smog by decreasing ozone precursors, due to reduced fuel cycle emissions. Record evidence shows that by 2020, the regulation will provide decreases in non-methane organic gases and oxides of nitrogen at an estimated 4.6 and 1.4 tons per day, respectively (additional reductions of carbon monoxide are expected to be 0.2 tons per day). (DA at \_\_\_\_ [10.44 at 146-47, 10.132 at 18].) Second, California’s regulations will reduce smog by mitigating global warming, thereby slowing temperature rise within California, and thus reducing the number of days that will be conducive to ozone formation and particulate matter suspension. (DA at \_\_\_\_ [421 at 27, 96-100, 154-60, 421.10, 421.11, 422 at 34-35, 1686 at 8, 1686 atts. 52-54]; *see also* DA at \_\_\_\_ [4409.1 at 7] (“[C]limate-air pollution model showed by cause and effect” that CO<sub>2</sub> increases increase ozone, carcinogens, and particulate matter.); *see also* DA at \_\_\_\_ [4409.2, 4409.3] (“Increased water vapor and temperatures from higher CO<sub>2</sub> separately increase ozone more with higher ozone; thus global warming may exacerbate ozone most in already-polluted areas.”.) The impact of greenhouse gas reductions on “traditional” pollutants is thus significant.

The Administrator did not meet his burden to show by at least a preponderance of the evidence why California’s determinations were in error. Instead, he dismissed the scientific evidence in the record and pronounced that California vehicle greenhouse gas emissions are “not

a causal factor for local ozone levels *any more than* GHG emissions from any other source of GHG emissions in the world,” 73 Fed. Reg. at 12,163 (emphasis added), and that reductions in upstream emissions are “indirect reductions” on which California cannot rely because it has other authority to regulate those emissions. *Id.*<sup>9</sup> Neither justification withstands scrutiny. The Administrator has not met his burden to deny the waiver.

EPA’s “causal factor” argument has no merit. The question under subsection 209(b)(1)(B) is whether California “need[s] such State standards to meet compelling and extraordinary conditions.” As discussed above, in addition to their ability to reduce GHG emissions, there are two distinct links between these standards and California’s smog problem. California’s greenhouse gas regulation will decrease smog-related emissions due to reduced gasoline use, and will mitigate increases in smog due to increased temperatures due to global warming. The Administrator does not deny that those links occur, and in fact that his agency “should give deference to California’s policy judgments, as it has in past [] waiver decisions, on the mechanisms used to address local and regional air pollution problems.” 73 Fed. Reg. at 12,158. The Administrator cannot, consistent with these principles, require that these regulations be “as effective” in addressing global warming as California’s past regulations have been in addressing smog, as he states. 73 Fed. Reg. at 12,163. Just like other emission standards for which California has received waivers, the evidence in the record shows that these standards will decrease ozone formation. They will ameliorate and compensate for the local conditions which cause smog. In fact, one of the links – upstream emission reductions of smog-forming pollutants – would even meet the Administrator’s “causal factor” test.

---

<sup>9</sup> Importantly, he has acknowledged the converse: that California’s greenhouse gas emissions are a “causal factor” for the local ozone emissions California is authorized to regulate, even under the Administrator’s new reading of the statute. 73 Fed. Reg. at 12,168 n.71.

Nor does the Administrator's other argument have merit. The Administrator dismisses the reductions in fuel cycle emissions from upstream stationary sources, because they are "indirect" and California has other, independent authority to regulate those emissions <sup>10</sup> 73 Fed. Reg. at 12,163. This, again, contradicts the Administrator's acknowledgment that California has the discretion to choose the "mechanisms" used to achieve its smog goals, and that it has the discretion to determine the efficacy of those mechanisms. 73 Fed. Reg. at 12,158 (also recognizing that the Administrator is not to substitute his judgment for California's). California need not choose only direct mechanisms to address its smog problem.<sup>11</sup> In fact, for purposes of meeting their obligations under the Clean Air Act, California's indirect measures count just like direct emission reduction limitations. With section 209(b)(1)(B), the question is whether emission reductions can be attributed to these regulations – whether these regulations help "meet compelling and extraordinary conditions." EPA cannot fail to answer that question, as the Administrator did, in the face of California's showing that these regulations will have an effect.

---

<sup>10</sup> These fuel cycle emissions are not only from stationary sources. They are also from shipping and transportation. (See DA at \_\_\_\_ [1686 att. 34].)

<sup>11</sup> In fact, the Administrator's argument is contrary to basic fundamentals of the Clean Air Act, since EPA and California address many air pollution problems by enacting controls on so-called precursor pollutants (that is, pollutants that lead to the formation of other pollutants). See Approval and Promulgation of Implementation Plans; State of California; 2003 State Strategy and 2003 South Coast Plan for One-Hour Ozone and Nitrogen Dioxide, 73 Fed. Reg. 63,408, 63,409 (Oct. 24, 2008) ("Ground-level ozone is formed when oxides of nitrogen (NO<sub>x</sub>), volatile organic compounds (VOC), and oxygen react in the presence of sunlight, generally at elevated temperatures. Strategies for reducing smog typically require reductions in both VOC and NO<sub>x</sub> emissions."); Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586, 20,589 (Apr. 25, 2007) ("Gas-phase precursors SO<sub>2</sub>, NO<sub>x</sub>, VOC, and ammonia undergo chemical reactions in the atmosphere to form secondary particulate matter. Formation of secondary PM depends on numerous factors including the concentrations of precursors; the concentrations of other gaseous reactive species; atmospheric conditions including solar radiation, temperature, and relative humidity (RH); and the interactions of precursors with preexisting particles and with cloud or fog droplets.").

For these reasons, even if the Court were to accept the Administrator's new interpretations of section 209(b)(1)(B), his decision denying California's waiver remains arbitrary and capricious.

**V. THE ADMINISTRATOR FAILED TO CARRY HIS BURDEN OF PROOF TO OVERCOME CALIFORNIA'S DETERMINATION THAT THE STATE'S GLOBAL WARMING CONDITIONS ARE COMPELLING AND EXTRAORDINARY.**

Even if the Administrator had authority to inquire into whether California has climate change conditions sufficiently different from those in the nation as a whole, it would still be his burden to prove by at least a preponderance of the evidence that California's "compelling and extraordinary" determinations were in error. His own conclusions are not supported by the administrative record, nor are they rationally connected to his own factual findings. To the contrary, the Administrator's own findings demonstrate that the effects of climate change in California are indeed compelling and extraordinary "compared to the effects in the rest of the country." Thus, his decision is arbitrary and capricious because it fails to give reasoned consideration to the issues and fails to carry the Administrator's burden to deny the waiver. *See MEMA I*, 627 F.2d at 1106, 1121-23.

For example, the Administrator concedes that California faces higher temperature increases than the Nation as a whole. He states that U.S. temperatures "are now approximately 1.0° F warmer than at the start of the 20th century, with an increased rate of warming over the past 30 years." 73 Fed. Reg. at 12,165. By comparison, he points out that "California itself has experienced a warming trend of 2.3° F over the period 1901 to 2005." *Id.* In terms of the future, average warming in the U.S. is projected to exceed 3.6° F by the end of the century with some models showing warming in excess of 7.2 degrees F. *See* 73 Fed. Reg. at 12,166. By contrast, over this century, temperatures in California "are projected to increase by 3° to 10.4° F." *Id.* In

addition, the middle to higher end of the projected range of sea level rise “would substantially exceed the historical rate of sea level rise observed at San Francisco and San Diego during the past 100 years.” 73 Fed. Reg. at 12,167.

The Administrator observes that while California is expected to experience many of the key risks and impacts of climate change experienced by the Nation as a whole, California, in addition, “has a number of physical and economic characteristics to consider when evaluating climate change impacts within the state, and how those impacts may compare to those in the rest of the country.” 73 Fed. Reg. at 12,167. These include:

- “California has the largest agricultural based economy (based on 13% of the U.S. market value of agricultural products sold).” 73 Fed. Reg. at 12,167 & n.68.
- It “has the largest state coastal population, representing 25% of the U.S. oceanic coastal population.” 73 Fed. Reg. at 12,167 & n 69.
- The State’s “agricultural sector is heavily dependent on irrigation, has the nation’s highest crop value and is the nation’s leading dairy producer. 73 Fed. Reg. at 12,167 & n 70. “[T]here is improved information on how livestock productivity may be affected by thermal stress and through nutritional changes in forage caused by elevated CO<sub>2</sub> concentrations. Wine is California’s highest value agricultural product; the wine grapes are very sensitive to temperature changes.” 73 Fed. Reg. at 12,168 & n.71.
- “The conditions which create California’s tropospheric ozone problems remain (e.g., topography, regional meteorology, number of vehicles). Climate change is expected to exacerbate tropospheric ozone levels.” 73 Fed. Reg. at 12,168.
- “Wildfires, which are already increasing in duration and intensity, may be exacerbated.” 73 Fed. Reg. at 12,168.

- California's water resources are already stressed due to competing demands from agricultural, industrial and municipal uses. Climate change is expected to introduce an additional stress to an already over-allocated system by increasing temperatures (increasing evaporation), and by decreasing snowpack, which is an important water source in the spring and summer." 73 Fed. Reg. at 12,168.

- "California has the greatest variety of ecosystems in the U.S., and the second most threatened and endangered species (of plants and animals combined) and the most threatened and endangered animal species, representing about 21% of the U.S. total. As noted above, climate change is expected to have a range of impacts on U.S. ecosystems." 73 Fed. Reg. at 12,168 & n.73.

These facts *support* a finding that the impacts of climate change on California are more severe than on the Nation's as a whole. Yet the Administrator does not offer a basis for any rational connection between the facts he cites concerning the effects of climate change in California and his conclusion that those effects are not "sufficiently different from those in the country as a whole." In fact, the Administrator highlights the comments of Dr. Stephen Schneider of Stanford University, a prominent climate scientist supporting California's waiver request, who concluded: "not only are California's conditions 'unique and arguably more severe' (e.g. temperature impacts from global warming are more certain for Western states like California) but also that no other state faces the combination of ozone exacerbation, wildfire emission's contributions, water system and coastal system impacts and other impacts faced by California." 73 Fed. Reg. at 12,164.

Nonetheless, the Administrator concludes that, while “the conditions related to global climate change in California are substantial, they are not sufficiently different from conditions in the nation as a whole to justify separate state standards.” 73 Fed. Reg. at 12,168.

The Administrator fails to carry his burden of demonstrating this conclusion even under a preponderance of the evidence standard. He provides no specific criteria or standards on which he bases this blanket conclusion that conditions in California are “not sufficiently different” from those in the nation to be “compelling and extraordinary” for purposes of 209(b)(1)(B). For example, with respect to differential temperature impacts, the Administrator notes vaguely that “Temperature increases have occurred in most parts of the United States, and while California’s temperatures have increased by more than the national average, there are other places in the United States with higher or similar increases in temperature.” Yet, the only such state identified in the decision is Alaska. 73 Fed. Reg. at 12,165. Although this finding actually corroborates Dr. Schneider’s testimony that “temperature impacts from global warming are more certain for Western states such as California,” 73 Fed. Reg. at 12,164, the Administrator does not say that “sufficiently different” means that conditions in California must be worse than any other State.

Nowhere does the Administrator state that a given “effect” or “condition” must occur solely in California to be “compelling and extraordinary.” If that were true, no effect of any kind of air pollution would qualify. Nor does he anywhere disagree with Dr. Schneider’s assessment that “no other state faces the combination of ozone exacerbation, wildfire emission’s contribution, water system and coastal system impacts and other impacts faced by California.” 73 Fed. Reg. at 12,164. Of course, the effects of climate change are generally evident throughout the nation. But, as the Administrator’s findings demonstrate, no other State will be affected in the same way as California.

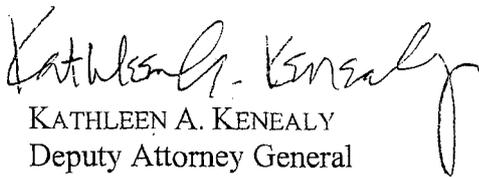
The Administrator's reasoning therefore, is arbitrary and capricious. For the same reason, the Administrator has acted arbitrarily in dismissing and disregarding the findings of the California Legislature and CARB in enumerating the compelling and extraordinary conditions of global warming in California, justifying its separate standards.

### CONCLUSION

For the foregoing reasons, Petitioners and Petitioner-Intervenor respectfully request that the Court (1) declare the Administrator's decision denying California's waiver request to be arbitrary, capricious, and inconsistent with law and (2) remand the matter to EPA to prepare a new waiver decision consistent with the Clean Air Act and this Court's decision.

Dated: November 10, 2008

Edmund G. Brown Jr.  
Attorney General of California  
Matt Rodriguez  
Chief Assistant Attorney General  
Mary Hackenbracht  
Senior Assistant Attorney General  
Gavin G. McCabe  
Mark Poole  
Marc N. Melnick  
Deputy Attorneys General



KATHLEEN A. KENEALY  
Deputy Attorney General  
Attorneys For Petitioner State of California

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### Parties and Amici.

Petitioner in case number 08-1178 is the State of California.

Petitioners in case number 08-1179 are the State of New York, the Commonwealth of Massachusetts, the States of Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the State of Florida Department of Environmental Protection, and the Commonwealth of Pennsylvania Department of Environmental Protection.

Petitioners in case number 08-1180 are Natural Resources Defense Council, Sierra Club, Conservation Law Foundation, International Center for Technology Assessment, Chesapeake Bay Foundation, Environmental Defense Fund, Environment America, Environment California, Environment Colorado, Environment Connecticut, Environment Florida, Environment Georgia, Environment Illinois, Environment Iowa, Environment Maine, Environment Maryland, Environment Michigan, Environment Massachusetts, Environment New Hampshire, Environment New Jersey, Environment New Mexico, Environment North Carolina, Environment Ohio, Environment Rhode Island, Environment Texas, PennEnvironment, Wisconsin Environment, Environment Washington, Environment Oregon, Arizona PIRG, Washington Environmental Council, Climate Solutions, Oregon Wild, 3EStrategies, Angus Duncan, Center for Biological Diversity, Friends of the Earth, and Oregon Environmental Council.

Respondents are the U.S. Environmental Protection Agency (EPA) and Stephen L. Johnson.

Intervening in support of Petitioners is the South Coast Air Quality Management District. Intervening in support of Respondents are the Alliance of Automobile Manufacturers, the National Automobile Dealers Association, and the Association of International Automobile

Manufacturers.

Amici curiae in support of Petitioners are Senators Dianne Feinstein and Barbara Boxer, Speaker of the House Nancy Pelosi, Former EPA Administrators Carol M. Browner, William K. Reilly, and Russell E. Train, Climate Scientists James Hansen, Mark Z. Jacobson, Michael Kleeman, Benjamin Santer, and Stephen H. Schneider, the Monterey Bay Aquarium Foundation, the American Jewish Committee, the Jewish Council for Public Affairs, the Jewish Reconstructionist Federation, Hadassah, the Women's Zionist Organization, Inc., the Union for Reform Judaism, B'nai B'rith International, the National Conference of State Legislatures, the National Association of Counties, the National League of Cities, the National Association of Clean Air Agencies, the International Municipal Lawyers Association, the American Planning Association, the City of New York, King County, Washington, the Province of British Columbia, PG&E Corporation, and Sempra Energy. Amici Curiae in support of Respondents are the Utility Air Regulatory Group, the Chamber of Commerce of the United States, the American Petroleum Institute, and Michigan Attorney General Michael A. Cox.

None of the above-named non-governmental petitioners has any outstanding shares or debt securities in the hands of the public, and does not have any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Ruling Under Review. The ruling at issue is an EPA final agency action which denied California's request, under section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b), for a waiver of federal preemption for California's regulations to control greenhouse gas emissions from motor vehicles. California State Motor Vehicle Pollution Control Standards: Notice of Decision Denying Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

Related Cases. This agency decision was the subject of an earlier, now-dismissed challenge in this Court. *See California v. EPA*, No. 08-1063 (D.C. Cir. filed Feb. 19, 2008).

The automobile industry has filed a mandamus challenge to California's regulation in California state court. *Fresno Dodge, Inc. v. Air Resources Board*, No. 04CECG03498 (Fresno County Superior Court). That case is set for hearing in January 2009.

The industry has also filed preemption challenges in four federal district courts, raising issues under the Energy Policy and Conservation Act and the Clean Air Act. The industry lost its challenge to Vermont's regulations after a sixteen day bench trial. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D.Vt. 2007), *appeal pending*, Nos. 07-4342 & 07-4360 (2nd Cir. briefing completed Aug. 21, 2008). It lost its challenge to California's regulations on summary judgment. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), *appeal pending*, Nos. 08-17378 & 08-17380 (9th Cir. docketed Oct. 30, 2008); *see also Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008), *appeal pending in same docket* (post-summary-judgment motions). Challenges in Rhode Island and New Mexico are pending. *See Ass'n of Int'l Automobile Mfrs. v. Sullivan*, No. 1:06-cv-00069-T-LDA (D.R.I. filed Feb. 13, 2006); *Zangara Dodge, Inc. v. Curry*, No. 1:07-cv-01305-MCA-LFG (D.N.M. filed Dec. 27, 2007).

**PROOF OF SERVICE**

**Case Name:** *State of California by and through Arnold Schwarzenegger, Governor of the State of California, the California Air Resources Board, and Edmund G. Brown Jr., Attorney General of the State of California v. United States Environmental Protection Agency*

**Case No.:** U.S. Court of Appeals for the District of Columbia Circuit,  
Case No. 08-1178 (Consolidated with Case Nos. 08-1179 and 08-1180)

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 300 South Spring Street, Ste 1702, Los Angeles, California 90013. On **November 10, 2008**, I served the following document(s):

**PETITIONERS' AND PETITIONER -INTERVENOR'S JOINT OPENING BRIEF**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Messenger Service:** I caused each such envelope to be delivered by a courier employed by ACE Courier, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Facsimile:** I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (E) **By Personal Service:** I caused such envelope to be hand delivered.
- (F) **By E-mail:** I caused such document to be served via electronic equipment transmission (E-mail) on the parties in this action by transmitting a true copy to the following E-mail addresses listed under each addressee below.

**TYPE OF SERVICE**

**ADDRESSEE**

A

NORMAN L. RAVE, JR.  
DAVID GUNTER  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P. O. Box 23986  
601 "D" Street, NW, Room 8012  
Washington, DC 20004  
202-616-7568  
fax: 202-514-8865  
[norman.rave@usdoj.gov](mailto:norman.rave@usdoj.gov)  
[david.gunter2@usdoj.gov](mailto:david.gunter2@usdoj.gov)

*Attorneys for Respondent U.S. Environmental Protection Agency*

F

KATHERINE KENNEDY  
MICHAEL MYERS  
YUEH-RU CHU  
Assistant Attorneys General  
BENJAMIN GUTMAN  
Deputy Solicitor General  
Attorney General of the State of New York  
120 Broadway, 26th Floor  
New York, NY 10271  
212-416-6588  
[yueh-ru.chu@oag.state.ny.us](mailto:yueh-ru.chu@oag.state.ny.us)

*Attorneys for Petitioner State of New York*

F

FREDERICK D. AUGENSTERN  
Assistant Attorney General  
Office of the Attorney General  
Environmental Protection Division  
1 Ashburton Place, 18<sup>th</sup> Floor  
Boston, MA 02108  
617-727-2200 x. 2427  
[fred.augenstern@state.ma.us](mailto:fred.augenstern@state.ma.us)

*Attorneys for Petitioner Commonwealth of Massachusetts*

F

JOSEPH MIKITISH  
JAMES SKARDON  
Assistant Attorneys General  
Office of the Attorney General  
1275 W. Washington  
Phoenix, AZ 85007  
602-542-8553  
[joseph.mikitish@azag.gov](mailto:joseph.mikitish@azag.gov)

*Attorneys for Petitioner State of Arizona*

F

KIMBERLY MASSICOTTE  
Assistant Attorney General  
Office of the Attorney General  
55 Elm Street  
P. O. Box 120  
Hartford, CT 06106  
860-808-5250  
[kimberly.massicotte@po.state.ct.us](mailto:kimberly.massicotte@po.state.ct.us)

*Attorneys for Petitioner State of Connecticut*

F

VALERIE S. CSIZMADIA  
Deputy Attorney General  
Office of the Attorney General  
102 W. Water Street, 3<sup>rd</sup> Floor  
Dover, DE 19904  
302-739-4636  
[valerie.csizmadia@state.de.us](mailto:valerie.csizmadia@state.de.us)

*Attorneys for Petitioner State of Delaware*

F

BARNEY J. "JACK" CHISOLM, JR.  
Deputy General Counsel  
Department of Environmental Protection  
Office of the Attorney General  
3900 Commonwealth Blvd. -- MS 35  
Tallahassee, FL 32399-3000  
850-245-2275  
fax: 850-245-2302  
[jack.chisolm@dep.state.fl.us](mailto:jack.chisolm@dep.state.fl.us)

*Attorneys for Petitioner State of Florida Department of  
Environmental Protection*

F

MATTHEW J. DUNN  
GERALD T. KARR  
Senior Assistant Attorneys General  
Attorney General of the State of Illinois  
Environmental Bureau  
69 West Washington Street, Suite 1800  
Chicago, IL 60602-3018  
312-814-3369  
[mdunn@atg.state.il.us](mailto:mdunn@atg.state.il.us)  
[gkarr@atg.state.il.us](mailto:gkarr@atg.state.il.us)

*Attorneys for Petitioner State of Illinois*

F

DAVID R. SHERIDAN  
Assistant Attorney General  
Environmental Law Division  
Office of the Attorney General  
Lucas State Office Bldg.  
321 E. 12<sup>th</sup> Street, Ground Flr.  
Des Moines, IA 50319  
515-281-5351  
fax: 515-242-6072  
[dsherid@ag.state.ia.us](mailto:dsherid@ag.state.ia.us)

*Attorneys for Petitioner State of Iowa*

F

GERALD D. REID  
Assistant Attorney General  
Office of the Attorney General  
6 State House Station  
Augusta, ME 04333  
207-626-8545  
[jerry.reid@maine.gov](mailto:jerry.reid@maine.gov)

*Attorneys for Petitioner State of Maine*

F

ROBERTA JAMES  
Assistant Attorney General  
Maryland Department of the Environment  
Office of the Attorney General  
1800 Washington Blvd.  
Baltimore, MD 21230  
410-537-3748  
[rjames@mde.state.md.us](mailto:rjames@mde.state.md.us)

*Attorneys for Petitioner State of Maryland*

F

KATHLEEN WINTERS  
RONALD M. GITECK  
Assistant Attorney General  
Office of the Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101-2130  
651-284-4066  
[Kathleen.Winters@state.mn.us](mailto:Kathleen.Winters@state.mn.us)

*Attorneys for Petitioner State of Minnesota*

F

LISA MORELLI  
Assistant Attorney General  
Office of the Attorney General  
Richard J. Hughes Justice Complex  
25 Market Street  
P. O. Box 093  
Trenton, NJ 08625  
609-633-8713  
[lisa.morelli@dol.lps.state.nj.us](mailto:lisa.morelli@dol.lps.state.nj.us)

*Attorneys for Petitioner State of New Jersey*

F

STEPHEN R. FARRIS  
Assistant Attorney General  
Office of the Attorney General  
P. O. Drawer 1508  
Santa Fe, NM 87504-1508  
505-827-6939  
[sfarris@ago.state.nm.us](mailto:sfarris@ago.state.nm.us)

*Attorneys for Petitioner State of New Mexico*

F

PHILIP SCHRADLE  
Special Counsel to the Attorney General  
PAUL S. LOGAN  
Assistant Attorney General  
Oregon Department of Justice  
Natural Resources Section  
1162 Court St. N.E.  
Salem, OR 97301  
503-378-6002  
[philip.schradle@doj.state.or.us](mailto:philip.schradle@doj.state.or.us)

*Attorneys for Petitioner State of Oregon*

F

KRISTEN M. FURLAN  
Assistant Counsel  
Commonwealth of Pennsylvania  
Department of Environmental Protection  
Rachel Carson State Office Bldg.  
P. O. Box 8464  
401 Market Street  
Harrisburg, PA 17105  
717-787-7060  
[kfurlan@state.pa.us](mailto:kfurlan@state.pa.us)

*Attorneys for Petitioner Commonwealth of Pennsylvania,  
Department of Environmental Protection*

F

PATRICIA K. JEDELE  
Special Assistant Attorney General  
Office of the Attorney General  
150 South Main Street  
Providence, RI 02903-2907  
401-274-4400, ext. 2400  
[tjedele@riag.ri.gov](mailto:tjedele@riag.ri.gov)

*Attorneys for Petitioner State of Rhode Island*

F

KEVIN O. LESKE  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05602  
802-828-6902  
[kleske@atg.state.vt.us](mailto:kleske@atg.state.vt.us)

*Attorneys for Petitioner State of Vermont*

F

LESLIE SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P. O. Box 40117  
Olympia, WA 98504  
360-586-6770  
[leslies@atg.wa.gov](mailto:leslies@atg.wa.gov)

*Attorneys for Petitioner State of Washington*

F DAVID DONIGER  
AARON COLANGELO  
Natural Resources Defense Council  
1200 New York Avenue, NW, Suite 400  
Washington, DC 20005  
202-289-6868  
fax: 202-289-1060  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

*Attorneys for Petitioner Natural Resources Defense Council*

F JON A. MUELLER  
AMY E. McDONNELL  
The Chesapeake Bay Foundation, Inc.  
6 Herndon Avenue  
Annapolis, MD 21403  
443-482-2153  
fax: 410-268-6687  
[jmueller@cbf.org](mailto:jmueller@cbf.org)  
[amcdonnell@cbf.org](mailto:amcdonnell@cbf.org)

*Attorneys for Petitioner Chesapeake Bay Foundation*

F DANIEL GALPERN  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401  
541-485-2471  
fax: 541-485-2457  
[galpern@westernlaw.org](mailto:galpern@westernlaw.org)

F MATT KENNA  
Western Environmental Law Center  
679 E. 2<sup>nd</sup> Ave., Suite 11B  
Durango, CO 81301  
970-385-6941  
[kenna@westernlaw.org](mailto:kenna@westernlaw.org)

*Attorneys for Petitioners Washington Environmental Council,  
Environment Washington, Environment Oregon, Climate Solutions,  
Oregon Wild, 3EStrategies, Angus Duncan, Center for Biological  
Diversity, Friends of the Earth, and Oregon Environmental Council*

F

DAVID BOOKBINDER  
Sierra Club  
408 C Street, NE  
Washington, DC 20002  
202-548-4598  
fax: 202-547-6009  
[david.bookbinder@sierraclub.org](mailto:david.bookbinder@sierraclub.org)

*Attorneys for Petitioners Sierra Club, Conservation Law Foundation, Environment America, Environment California, Environment Colorado, Environment Connecticut, Environment Florida, Environment Georgia, Environment Illinois, Environment Iowa, Environment Maine, Environment Maryland, Environment Michigan, Environment Massachusetts, Environment New Hampshire, Environment New Jersey, Environment New Mexico, Environment North Carolina, Environment Ohio, Environment Rhode Island, Environment Texas, PennEnvironment, Wisconsin Environment, Arizona PIRG, International Center for Technology Assessment.*

F

JAMES T. B. TRIPP  
Environmental Defense Fund  
257 Park Avenue South, 17<sup>th</sup> Floor  
New York, NY 10010  
212-505-2100  
[jtripp@edf.org](mailto:jtripp@edf.org)

F

VICKIE PATTON  
Environmental Defense Fund  
2334 North Broadway  
Boulder, CO 80304  
303-447-7215  
fax: 303-440-8052  
[vpattton@edf.org](mailto:vpattton@edf.org)

*Attorneys for Petitioner Environmental Defense Fund*

A  
STUART A.C. DRAKE  
ANDREW B. CLUBOK  
JEFFREY BOSSART CLARK  
LEE RUDOFISKY  
Kirkland & Ellis, LLP  
655 Fifteenth Street, N.W.  
Washington, DC 20005  
202-879-5000  
[jlark@kirkland.com](mailto:jlark@kirkland.com)

*Attorneys for Respondent-Intervenors Alliance Manufacturers and  
National Automobile Dealers Association*

A  
ELLEN J. GLEBERMAN  
Association of International Automobile Manufacturers, Inc.  
2111 Wilson Blvd., Suite 1150  
Arlington, VA 22201  
703-525-7788  
Fax: 703-525-9917

A  
RAYMOND B. LUDWISZEWSKI  
CHARLES H. HAAKE  
STACIE B. FLETCHER  
Gibson, Dunn & Crutcher LLP  
1050 Connecticut Ave. N.W.  
Washington, D.C. 20036  
202-955-8500  
Fax: 202-467-0539  
[chaake@gibsondunn.com](mailto:chaake@gibsondunn.com)

*Attorneys for Respondent-Intervenor Association of International  
Automobile Manufacturers*

F  
BARBARA BAIRD  
South Coast Air Quality Management District  
21865 Copley Drive  
Diamond Bar, CA 91765  
909-396-2302  
[bbaird@aqmd.gov](mailto:bbaird@aqmd.gov)

*Attorneys for Petitioner-Intervenor South Coast Air Quality  
Management District*

A NORMAN W. FICHTHORN  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, D.C. 20006  
202-955-1500

*Attorneys for Amicus Curiae (for Respondent) Utility Air  
Regulatory Group*

A HARRY M. NG  
MARTHA ELIZABETH COX  
American Petroleum Institute  
1200 L Street, N.W.  
Washington, DC 20005-4070  
202-682-8250

A ROBIN S. CONRAD  
AMAR D. SARWAL  
National Chamber Litigation Center, Inc.  
1615 H Street,  
Washington, DC 20062  
202-463-5337

A JEFFREY A. LAMKEN  
ROBERT K. KRY  
Baker Botts LLP  
1299 Pennsylvania Ave, N.W.  
Washington, DC 20004  
202-639-7700

A MATTHEW PAULSON  
AMBER MacIVER  
Baker Potts LLP  
98 San Jacinto Blvd., #1500  
Austin, TX 78701  
512-322-2500

*Attorneys for Amici Curiae (for Respondent) Chamber of  
Commerce of the United States of America & American Petroleum  
Institute*

A THOMAS L. CASEY  
Solicitor General  
Office of the Attorney General  
P. O. Box 30755  
Lansing, MI 48909  
517-373-7540

*Attorneys for Amicus Curiae (for Respondent) Michigan Attorney  
General Michael A. Cox*

F JENNIFER KEFER  
Coalition on the Environment and Jewish Life  
1775 K Street NW Suite 320  
Washington, DC 20006  
202-212-6034  
fax: 202-212-6002  
[jennifer@coejl.org](mailto:jennifer@coejl.org)

F MAXINE I. LIPELIS, Director  
Interdisciplinary Environmental Clinic  
Washington University School of Law  
One Brookings Drive, Campus Box 1120  
St. Louis, MO 63130  
314-935-5837  
fax: 314-935-5171  
[milipele@wulaw.wustl.edu](mailto:milipele@wulaw.wustl.edu)

*Attorneys for Amici Curiae (for Petitioners) American Jewish  
Committee, Jewish Council for Public Affairs, Jewish  
Reconstructionist Federation, Hadassah, the Women's Zionist  
Organization of American, Inc. Union for Reform Judaism, and  
B'nai B'rith International*

F RICHARD M. FRANK  
Executive Director  
California Center for Environmental Law & Policy  
School of Law  
University of California  
Berkeley, CA 94720  
[rfrank@law.berkeley.edu](mailto:rfrank@law.berkeley.edu)

*Attorney for Amici Curiae (for Petitioners) Senators Dianne  
Feinstein and Barbara Boxer, and Representative Nancy Pelosi*

F SEAN H. DONAHUE  
Donahue & Goldberg, LLP  
2000 L Street, NW Suite 80  
Washington, DC 20036  
202-466-2234  
[sean@donahuegoldberg.com](mailto:sean@donahuegoldberg.com)

A ELIZABETH B. WYDRA  
Chief Counsel  
Constitutional Accountability Center  
1301 Connecticut Ave., NW, Suite 502  
Washington, DC 20036  
202-296-6889

*Attorneys for Amici Curiae (for Petitioners) National Conference of State Legislatures, the National Association of Counties, the National League of Cities, International Municipal Lawyers Association, and the American Planning Association*

F BRIAN W. GRIMM  
JOHN B. SCHOCHET  
Dorsey & Whitney LLP  
1420 Fifth Avenue, Suite 3400  
Seattle, WA 98101  
206-903-8800  
fax: 202-903-8820  
[grimm.brian@dorsey.com](mailto:grimm.brian@dorsey.com)

*Attorneys for Amicus Curiae (for Petitioners) Province of British Columbia*

F MELANIE KLEISS BOEGER  
HOPE M. BABCOCK  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW, Suite 312  
Washington, DC 20001  
202-662-9535  
fax: 202-662-9634

*Attorneys for Amici Curiae (for Petitioners) Monterey Bay Aquarium Foundation and National Association of Clean Air Agencies*

F DARREN E. CARNELL  
JENNIFER M. STACY  
Senior Deputy Prosecuting Attorneys  
Attorneys for King County  
W400 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
206-296-9015  
Fax: 206-296-0191

*Attorneys for Amicus Curiae (for Petitioners) King County*

F HELEN H. KANG  
ASHLING P. McANANEY  
Environmental Law and Justice Clinic  
Golden Gate University School of Law  
536 Mission Street  
San Francisco, CA 94105  
415-442-6647  
fax: 415-896-2450  
[hkang@ggu.edu](mailto:hkang@ggu.edu)

*Attorneys for Amici Curiae (for Petitioners) James Hansen, Mark Z. Jacobson, Michael Kleeman, Benjamin Santer, and Stephen H. Schneider*

F MARK D. PATRIZIO  
JOHN W. BUSTERUD  
c/o Pacific Gas and Electric Company  
P. O. Box 7442  
San Francisco, CA 94120  
415-973-6344 (MDP)  
415-973-6617 (JWB)  
[MDP5@pge.com](mailto:MDP5@pge.com)  
[JWBb@pge.com](mailto:JWBb@pge.com)

F W. DAVID SMITH  
DAVID J. BARRETT  
Sempra Energy  
Office of the General Counsel  
101 Ash Street  
San Diego, CA 92101  
619-699-5076  
[DBarrett@sempra.com](mailto:DBarrett@sempra.com)

*Attorneys for Proposed Amici Curiae (for Petitioners) PG&E Corporation and Sempra Energy*

F

DEBORAH A. SIVAS  
LEAH J. RUSSIN  
Environmental Law Clinic  
Mills Legal Clinic at Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94306-8610  
650-723-0325  
fax: 650-723-44267  
[dsivas@stanford.edu](mailto:dsivas@stanford.edu)

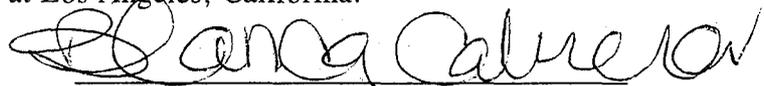
*Attorneys for Amici Curiae (for Petitioners) Former U.S. EPA  
Administrators Carol M. Browner, William K. Reilly, and Russell E.  
Train*

F

SCOTT PASTERNAK  
CARRIE NOTEBOOM  
CHRISTOPHER KING  
Environmental Law Division  
Corporation of the City of New York  
100 Church Street Room 6-143  
New York, NY 10007  
212-788-1235  
[spastern@law.nyc.gov](mailto:spastern@law.nyc.gov)  
[cnoteboo@law.nyc.gov](mailto:cnoteboo@law.nyc.gov)

*Attorney For Amicus Curiae (for Petitioners) City of New York*

I declare under penalty of perjury the foregoing is my true and correct and that this declaration was executed on **November 10, 2008**, at Los Angeles, California.



Blanca Cabrera