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Washington, DC 20460
Docket No. EPA-HQ-OAR-2021-0257

Comments of Twelve Public Interest Organizations on the Environmental Protection Agency's Reconsideration of a Previous Withdrawal of a Waiver of Preemption for California State Motor Vehicle Pollution Control Standards

Docket No. EPA-HQ-OAR-2021-0257

I. OVERVIEW

Twelve public interest groups—Center for Biological Diversity, Chesapeake Bay Foundation, Communities for a Better Environment, Conservation Law Foundation, Earthjustice, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, Natural Resources Defense Council, Inc., Public Citizen, Inc., Sierra Club, and Union of Concerned Scientists (collectively, Commenters)—submit these comments on the proceeding of the U.S. Environmental Protection Agency (EPA) entitled "California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption," and published at 86 Fed. Reg. 22,421 (Apr. 28, 2021).

Commenters support, and urge EPA to finalize, a rescission of the Trump EPA's 2019 decision to partially withdraw the 2013 grant of a Clean Air Act Section 209(b) preemption waiver for the State of California's Advanced Clean Car (ACC) program (hereinafter, Waiver Withdrawal); and a rescission of the Trump EPA's concurrent determination that Section 177 of the Act, contrary to its unambiguous language, does not authorize other States to adopt or enforce standards identical to certain California emission standards for which EPA has granted a Section 209(b) waiver (hereinafter, Section 177 Determination).

II. EPA SHOULD RESCIND THE 2019 WAIVER WITHDRAWAL AND SECTION 177 DETERMINATION BECAUSE THEY EXCEEDED THE AGENCY'S AUTHORITY

As Commenters have explained in court filings, *see* Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 27–38, *Union of Concerned Scientists v. NHTSA* (*UCS*), No. 19-1230 (D.C. Cir. Oct. 27, 2020) (A-001); Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 2–7, *UCS*, *supra* (Oct. 27, 2020) (A-0155), the Trump EPA lacked statutory authority for its Waiver Withdrawal. Rescinding the Waiver Withdrawal is nondiscretionary because retaining an *ultra vires* action is, by definition, "in excess of statutory … authority." 5 U.S.C. § 706(2)(C).

As further explained in the briefing cited above and comments submitted in this proceeding, EPA lacked authority to partially withdraw California's ACC waiver for *any* reason—and the Trump EPA certainly could not do so for the reasons it gave in 2019. *See* Comments of States and Cities in Support of EPA Reversing its SAFE1 Actions, pt. II (July 6, 2021) (State/City Comments). As the Trump EPA acknowledged, nothing in the text of the Clean Air Act grants EPA authority to withdraw a waiver previously issued under Section 209(b). And, even if the Act had granted EPA some *implicit* authority to withdraw a waiver in certain circumstances,

those circumstances would not include either (i) departing from the construction of the Clean Air Act the Obama EPA had applied when issuing the waiver, which construction the Trump EPA did not deem unreasonable, *see* 84 Fed. Reg. 51,310, 51,340 (Sept. 27, 2019), or (ii) basing a waiver withdrawal on a factor not among the specific decisionmaking criteria enumerated in Section 209(b), *see id.* at 51,338.

Nor did the Trump EPA have authority to determine which California emission standards that have been granted a waiver under Clean Air Act Section 209(b) may be adopted or enforced in identical form by other States pursuant to Section 177 of the Act. EPA thus should rescind the Trump EPA's "finaliz[ed] … determination," 84 Fed. Reg. at 51,350, that Section 177 does not allow other States to adopt or enforce vehicular greenhouse gas emission standards identical to standards for which EPA has granted California a Section 209(b) waiver.[1] As Commenters have explained in litigation over the Section 177 Determination, States have exclusive discretion to adopt and enforce *any* EPA-waived standards, subject only to Section 177's condition that the State has a plan under Part D and the section's requirements of identicality and lead time. *See* Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 65–70, *UCS*, *supra*; Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 29–31, *UCS*, *supra*. EPA's "single, narrow responsibility" related to Section 177, *Motor Vehicle Mfrs. Ass'n v. NYSDEC*, 17 F.3d 521, 535 (2d Cir. 1994), is defining the commencement of a model year for use in measuring the lead time for State emission standards.

For these reasons, Commenters urge EPA to find that the Trump EPA lacked statutory authority for the Waiver Withdrawal and Section 177 Determination and rescind both actions accordingly.

III. EPA SHOULD RESCIND ITS WAIVER WITHDRAWAL AND SECTION 177 DETERMINATION EVEN IF THEY DID NOT EXCEED THE AGENCY'S AUTHORITY

Even if EPA had statutory authority for its Waiver Withdrawal and Section 177 Determination, it should now rescind those 2019 actions, both because the actions were arbitrary, capricious, and

[1] Although the Trump EPA indicated in litigation that its Section 177 Determination extended to California's zero-emission-vehicle mandate, Resp. Br. 108 n.29, *UCS*, *supra* (Oct. 27, 2020) (A-0236), the Determination itself does not so state. When rescinding the Determination, EPA should clarify that it had encompassed only greenhouse gas standards. If, on the other hand, EPA maintains (as the Trump EPA did in litigation) that the Determination extends to zero-emission-vehicle laws, then EPA should rescind that aspect of the Determination as well, for the reasons stated herein.

contrary to law, and because rescinding them is otherwise an appropriate and advisable exercise of EPA's discretion—and EPA should so find.

A. NHTSA's Preemption Rule was not a proper basis for EPA's Waiver Withdrawal

The Trump EPA's reliance on NHTSA's Preemption Rule as one basis to partially withdraw the Clean Air Act Section 209(b) waiver for California's ACC program—and the *sole* basis as applied to vehicles of model years 2017-2020—was improper, both because the Preemption Rule is itself unlawful and because it is impermissible under Clean Air Act Section 209(b) for EPA to revoke a waiver based on another federal agency's views on the preemptive effects of another federal law. *See* Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 62–65, *UCS*, *supra* (Oct. 27, 2020); Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 27–28, *UCS*, *supra* (Oct. 27, 2020); State/City Comments pt. III.

NHTSA has proposed to repeal its Preemption Rule in a separate proceeding, *see* 86 Fed. Reg. 25,980 (May 12, 2021), and Commenters have explained in that proceeding why NHTSA must finalize a repeal of its regulations respecting preemption, *see* Comments of Twelve Public Interest Organizations, NHTSA-2021-0030-0369 (June 11, 2021), https://downloads.regulations.gov/NHTSA-2021-0030-0369/attachment_1.pdf (A-0371). A repeal of the Preemption Rule would eliminate this asserted ground for the Trump EPA's Waiver Withdrawal. *See* 84 Fed. Reg. at 51,338.

But the Waiver Withdrawal should be rescinded regardless whether NHTSA has yet repealed the Preemption Rule when EPA reaches a decision in this proceeding. The Clean Air Act orders EPA to "waive application of" Section 209(a) of the Act to California's emission standards unless the agency makes one of three findings—that the State's protectiveness determination is arbitrary and capricious; that the State does not need such State standards to meet compelling and extraordinary conditions; or that such standards and accompanying enforcement procedures are inconsistent with Section 202(a) of the Act. 42 U.S.C. § 7543(b)(1). Whether EPCA preempts a particular state law is not a question for EPA to resolve in a waiver decision; it is a question for a court to resolve in an appropriate case.

Irrespective of EPA's (or NHTSA's) views on that question, it is reasonable and appropriate for EPA to revert to its own "historical practice of disregarding issues of consistency with EPCA in the context of evaluating California's waiver applications." 84 Fed. Reg. at 51,338. The Trump EPA's abrupt departure from its traditional interpretation and application of Section 209(b) was a

particularly inappropriate basis for withdrawal of a six-year-old waiver, and it conflicts with the federal court decisions holding that EPCA does not preempt greenhouse gas standards applicable by reason of Section 209(b), *see id.* at 51,314 & n.53. EPA should not pass upon disputes over an interpretative issue concerning a statute EPA does not administer when implementing another statute that indisputably does not *require*, and, in Commenters' view, does not even *permit*, the agency to consider the issue in its decisionmaking.

B. Clean Air Act Section 209(b)(1)(B) was not a proper basis for the Waiver Withdrawal

The Trump EPA's withdrawal of the 2013 waiver for California's ACC greenhouse gas and zero-emission-vehicle standards on Section 209(b)(1)(B) grounds was likewise unlawful. Commenters have explained why in court filings, *see* Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 38–62, *UCS*, *supra*; Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 8–27, *UCS*, *supra*, and concur with the comments of States and Cities explaining various reasons why EPA should rescind the Waiver Withdrawal, *see* State/City Comments pts. I-IV. Commenters elaborate below on a few reasons the full California ACC waiver should be restored.

1. The doctrine of equal sovereignty did not support EPA's Waiver Withdrawal

a. The Trump EPA's argument

When finalizing the Waiver Withdrawal, the Trump EPA asserted that, because (in its mistaken view) vehicular greenhouse gas emissions do not affect California differently than other States, the constitutional principle of equal sovereignty "support[ed]" the agency's "conclusion that Congress did not intend the waiver provision … to be applied to California measures that address pollution problems of a national or global nature," while other States cannot develop their own standards. 84 Fed. Reg. at 51,347 (citing *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009)). That argument is wrong, both because the Trump EPA's factual premise is wrong (as detailed in the comments of States and Cities, *see* State/City Comments pt. IV.C.2.a), and because the equal-sovereignty principle would not apply even if that premise were correct.

The Constitution makes no explicit reference to equal sovereignty. The doctrinal basis for such a principle is described in *Shelby County v. Holder*, 570 U.S. 529 (2013), which concerned burdens placed on certain States by the pre-clearance provisions of the Voting Rights Act. The provisions imposed requirements on nine States (and some intrastate areas) that maintained discriminatory tests or devices as prerequisites to voting, and experienced low voter registration

or turnout, in the 1960s and early 1970s. *Shelby County* held Section 4 of the Voting Rights Act unconstitutional based on the proposition that, though Section 4 initially was justified by the subject States' discriminatory history, those practices did not continue to exist fifty years later. The "current burdens" Section 4 imposed on some geographic regions were not "justified by current needs," and not "sufficiently related to the problem that it targets" to comport with "the fundamental principle of equal sovereignty." 570 U.S. at 542 (quoting *Nw. Austin*, 557 U.S. at 203).

Shelby County does not govern here. *See* Amicus Br. of Prof. Leah Litman 12-17, *UCS*, *supra* (July 6, 2020) (A-0384). First, Clean Air Act Section 209(b) places no extraordinary burden or disadvantage on one or more States. Rather, the statute benefits California by allowing the exercise of its police power authority to address its particular pollution control needs. Second, the foundation for reserving California's authority has not waned over time. California had in 1967, and continues to have, the Nation's absolute worst air quality. For example, the South Coast air basin, home to 17 million people, typically leads the Nation in ozone (smog) pollution. The American Lung Association's 2021 "State of the Air" report on national air pollution shows that seven of the ten worst areas for ozone pollution in the country are in California, as are six of the worst ten for small particulate matter. Am. Lung Ass'n, *Most Polluted Cities*, https://www.lung.org/research/sota/city-rankings/most-polluted-cities (last visited July 2, 2021) (A-0422).

As States and cities explain in this proceeding, *see* State/City Comments pt. IV.A, Section 209(b) calls for EPA to determine whether California needs its own vehicle emissions program as a whole -- its suite of standards -- to meet compelling and extraordinary conditions. But even if that were not so, the State in fact does experience particularly dangerous effects from greenhouse gases emitted from vehicles located therein. For example, atmospheric heating due to global warming can increase the production of ground-level ozone in California, which suffers from extraordinary amounts of locally reacting nitrogen oxides and volatile organic compounds. *See* State/City Comments pt. I.B.2 (citing 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016); 74 Fed. Reg. 32,744, 32,763 (July 8, 2009); Multi-State SAFE Comments at 24 (EPA-HQ-OAR-2018-0283-5481)).[2] Moreover, the California Legislature has found that global warming will cause the State

[2] *See also* California's Fourth Climate Change Assessment, Statewide Summary Report at 40, *available at* https://www.energy.ca.gov/sites/default/files/2019-11/Statewide_Reports-SUM-CCCA4-2018-013_Statewide_Summary_Report_ADA.pdf (citing Jacob & Winner, 2009;

to suffer reductions in water availability, damage to its coastline from sea-level rise, increases in large-scale wildfires, and reduced agricultural production. 2002 Cal. Legis. Serv. Ch. 200 (A.B. 1493). Californians experience many of these effects now and suffer from extreme heat that harms agriculture and State forests, and from a spread of new infectious diseases attributable to climate change. *See* State/City Comments pt. IV.C.2.

In 2013, the Obama EPA correctly concluded that California's climate change conditions were compelling and extraordinary. The administrative record for the Trump EPA's Waiver Withdrawal fails to controvert that conclusion. Accordingly, in this proceeding, EPA should reinstate and update its factual findings about the compelling and extraordinary danger to California from climate change *and* criteria pollution, which underscore that *Shelby County* does not govern in this waiver proceeding and that the equal-sovereignty doctrine poses no barrier to reinstatement of California's full ACC waiver.

b. Ohio's argument

Ohio, joined by several other States (Alabama, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, Utah, and West Virginia), pressed in the now-stayed litigation over the Trump EPA's actions a far more sweeping equal-sovereignty argument than the one the agency had made. The Trump EPA did not challenge application of Section 209 in circumstances where the agency conceded that California has special air pollution problems, *e.g.*, those arising from ozone or particulate matter. But Ohio argued that Clean Air Act Section 209(b) is *facially* unconstitutional, whether or not California has compelling and extraordinary need, because, in combination with the preemption provision in Section 209(a), it takes away the sovereign power of States other than California to enact their own vehicular emission standards.

Mickley, 2007; Rasmussen et al., 2013) (A-0426); Analysis in Support of Comments of the California Air Resources Board on the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks at 371-2, Docket ID: EPA-HQ-OAR-2018-0283-5054 (A-0559); Jacob, Daniel J., and Darrel A. Winner, *Effect of Climate Change on Air Quality*, 43:1 ATMOS. ENVIRON. 51 (Jan. 2009), *available at* https://dash.harvard.edu/handle/1/3553961 (A-0974); Wu, et al., *Effects of 2000−2050 Global Change on Ozone Air Quality in the United States*, 113, D06302, J. GEOPHYS. RES.-ATMOS. (Mar. 19, 2008), *available at* https://doi.org/10.1029/2007JD008917 (A-0988); Rasmussen, et al., *The Ozone-climate Penalty: Past, Present, and Future*, 47:24 ENVTL. SCI. & TECH. 14258 (Dec. 17, 2013), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3990462/ (A-1000).

Ohio's theory, if correct, would apply whether or not California has special pollution problems of *any* kind. Further, one potential outcome of striking down Section 209(b) as unconstitutional is that Section 209(a) also would be invalidated. In that case, each State would be able to enact its own vehicular emission standards, meaning that automakers might need to design, build, and sell fifty different models of every vehicle. It is notable that Ohio and its co-litigating States do not claim to want to enact their own, more protective vehicle standards, which Sections 209(a) and (b) collectively deny them authority to do. Instead, Ohio and its companion States aim to block California from taking action that might result in the sale of less-polluting vehicles in their States too. But the notion that the Constitution requires Congress to withhold regulatory authority from a State to address its own compelling and extraordinary need if that authority could be exercised in a manner that has indirect effects on consumers in other States that lack regulatory authority finds no support whatsoever in *Shelby County*, *Northwest Austin*, or any other case discussing the equal-sovereignty principle.

Commenters strongly disagree with Ohio's argument, *see* Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 29-31, *UCS*, *supra*, but the argument is for courts to consider. As "regulatory agencies are not free to declare an act of Congress unconstitutional," *Springsteen-Abbott v. SEC*, 989 F.3d 4, 8 (D.C. Cir. 2021), EPA cannot determine whether a statute Congress directed it to implement contravenes the equal-sovereignty principle. Thus, EPA should proceed to rescind the Waiver Withdrawal and leave Ohio's argument for review by an appropriate court.

2. Such state standards

As noted above, the Trump EPA erroneously departed from the agency's longstanding interpretation that Clean Air Act Section 209(b)(1)(B) calls for a consideration of California's need for a separate motor vehicle emissions program rather than its need for particular standards. EPA previously had acknowledged that the program-level interpretation is "the most straightforward reading of the text and legislative history." 78 Fed. Reg. 2112, 2127 (Jan. 9, 2013); *see also* 49 Fed. Reg. 18,887, 18,889–90 (May 3, 1984), 44 Fed. Reg. 38,660, 38,661 (July 2, 1979). The Trump EPA in turn acknowledged that this longstanding interpretation of Section 209(b)(1)(B) was a reasonable one, 84 Fed. Reg. at 51,341, but nonetheless replaced it with a new, standard- and pollutant-specific interpretation. That new interpretation was wrong on the merits. *See* Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 39–46, *UCS*, *supra*; Reply Br. of State and Local Gov't Petrs. & Public Interest Org. Petrs. 8–14, *UCS*, *supra*. But even if the interpretation was a permissible one, the Trump EPA did not justify changing its

preexisting interpretation in the revocation of a waiver granted six years prior. The serious reliance interests that California and other Section 177 States had placed on the 2013 waiver—a waiver that no party ever challenged in court—supply sufficient reason to reinstate that waiver irrespective of whichever interpretation of Section 209(b)(1)(B) EPA may now consider to be the best one. *See* State/City Comments pt. I.

That said, to the extent it informs EPA's deliberations about the meaning of Section 209(b)(1)(B) in this or some future proceeding, Commenters observe that—contrary to an assumption made by the Trump EPA, *see* 86 Fed. Reg. at 22,425 & n.31 (citing 84 Fed. Reg. at 51,345)—the phrase "such State standards" is best read consistently in subparagraphs (B) and (C) to encompass California's entire program. The phrase "such State standards" refers to the antecedent "State standards … in the aggregate" described in Section 209(b)(1)'s protectiveness inquiry. *See Motor & Equip. Mfrs. Ass'n v. Nichols* (*MEMA II*), 142 F.3d 449, 464 (D.C. Cir. 1998) (consistency of California standards "is to be evaluated 'in the aggregate,' rather than on a one-to-one basis").

An aggregate approach to the consistency inquiry also makes sense under Section 209(b)(1)(C) because technological feasibility is effectively evaluated on a program basis. The feasibility of a new standard cannot be evaluated on its own if there are interactions with pre-existing standards. Such interactions between standards are what prompted Congress to add the "in the aggregate" phrase to section 209 in the first place. *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA* (*MEMA I*), 627 F.2d 1095, 1110 n.32 (D.C. Cir. 1979) (explaining that the "intent of the 1977 amendment" was to address the problem that it would have been technologically infeasible for automakers to comply with both California's nitrogen oxide standard and the federal carbon monoxide standard); *see also* H.R. Rep. No. 94-1175, at 248 (1976) (explaining that EPA must "grant a waiver for *the entire set of California standards* unless" the State's conclusion that "its set of standards are at least as protective" as federal standards is arbitrary, or "*the entire set of California standards*" is not "technologically feasible" (emphases added)).

Moreover, functional (rather than interpretive) differences in the inquiries called for under Section 209(b)(1)(B) and (C) can explain why the focus of such analyses may differ in practice. For example, under subparagraph (B), EPA has declined to question whether California needs individual standards in a waiver request because that answer would not bear on the pertinent statutory question whether California continues to have compelling and extraordinary conditions that justify its need for a separate motor vehicle emissions program. *See*, *e.g.*, 49 Fed. Reg. at

18,889–90; 44 Fed. Reg. at 38,661. Under subparagraph (C), by contrast, EPA's feasibility analysis may focus on new standards or even specific model-year standards in a given waiver request because those standards' feasibility bears on whether the overall California motor vehicle emission program, which includes the new standards, is consistent with Section 202(a). In other words, because EPA has previously considered whether the remainder of California's standards are consistent with section 202(a) and concluded that they were consistent, EPA may seek to determine in a new waiver proceeding whether the new standards would cause the California motor vehicle emission standards—*i.e.*, California's whole program—to be inconsistent with section 202(a). Put another way, if it were infeasible to comply with a newly added standard while complying with the previous standards, compliance with the standards *as a whole* would have become infeasible.

This is similar to how, in the protectiveness context, EPA has explained that "the phrase 'State[] standards' means the entire California new motor vehicle emissions program," and that the agency conducts its protectiveness inquiry "within the broader context of the previously waived California program." 78 Fed. Reg. at 2121. Thus, even if EPA focuses its protectiveness inquiry on new standards "at issue in a given waiver request," it does so "within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA previously found were not arbitrary and capricious," 77 Fed. Reg. at 9243, to ultimately determine whether new standards would undermine the protectiveness of California's program as a whole.

3. The Trump EPA's reasons for withdrawing the waiver for California's zero-emission-vehicle mandate are self-defeating

The Trump EPA, in contrast to the Obama EPA, declined to consider the substantial benefits of California's zero-emission-vehicle mandate in reducing emissions of criteria pollutants. The Trump EPA asserted that California's waiver application did not attribute any criteria emission benefits to that standard. 84 Fed. Reg. at 51,337. That is incorrect, as States and Cities explain in comments filed in this proceeding. *See* State/City Comments pt. IV.B. But even if the Trump EPA had correctly interpreted the State's application, that interpretation could not have supported a decision to withdraw a waiver for the zero-emission-vehicle mandate based on Section 209(b)(1)(B). If the mandate truly added nothing to the emission benefits of California's standards for vehicular emissions of criteria and greenhouse gas pollutants, the mandate would simply constitute the State's choice of means for automakers to comply with its standards. And

Section 209(b)(1)(B) does not authorize EPA to inquire into whether the means to comply with California emission standards, as opposed to the actual standards themselves, are needed to meet compelling and extraordinary conditions. *See MEMA I*, 627 F.2d at 1111-14. Thus, even under the Trump EPA's distorted view of California's statements about its zero-emission-vehicle mandate, the agency erred in withdrawing the waiver for that mandate under Section 209(b)(1)(B).

C. Clean Air Act Section 209(b)(1)(C) does not require or support retention of EPA's Waiver Withdrawal

The Trump EPA did not premise its Waiver Withdrawal on any finding under subparagraph (C) that California's ACC program was not consistent with Clean Air Act Section 202(a). In this proceeding to reconsider the Waiver Withdrawal, EPA may rescind its action without reopening the Obama EPA's 2013 finding that the ACC program *was* consistent with Section 202(a). *See generally Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (explaining that an agency does not "reopen … a settled aspect of some matter" merely by "solicit[ing] comments on unsettled aspects of the same matter"). Thus, EPA's current notice does not request comments on matters that were not evaluated by the Trump EPA. *See* 86 Fed. Reg. at 22,428-29. Commenters observe only that the extensive record reinforcing the feasibility of California's full ACC waiver, including its costs of compliance and the adequacy of lead time provided, confirms that the Obama EPA's 2013 Section 209(b)(1)(C) finding of consistency with Section 202(a) was correct. *See* State/City Comments pt. VI.

D. Reliance interests do not require or support retention of EPA's Waiver Withdrawal

1. Lead-time issues do not compel EPA to adhere to the Waiver Withdrawal

There is no legal principle or precedent that restricts the EPA from restoring California's waiver for all model years. The Clean Air Act simply requires consideration of the lead time necessary to "permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance." 42 U.S.C. § 7521(a); *see also id.* § 7543(b)(1)(C). The Obama EPA granted California's waiver to enforce its GHG standards and ZEV mandate in January 2013. Accordingly, automakers have had almost a decade of lead time at this point, and they had adjusted their business plans accordingly before the Waiver Withdrawal. *See* Motion of Coalition for Sustainable Automotive Regulation & Ass'n of Global Automakers for Expedited

Review 3, 12, *UCS*, *supra* (Dec. 24, 2019) ("Auto Mfr. Intervenors Motion to Expedite") (A-1015).

2. Automakers have neither claimed nor demonstrated significant reliance interests in the Waiver Withdrawal

Automakers have conceded they could not firmly rely on the Trump EPA's Waiver Withdrawal unless and until the legal challenges to the rule were resolved. *See, e.g.*, Ford Motor Co. Form 10-K 2020 Annual Report, at 9 ("The litigation over both standards and preemption, with uncertain outcomes, creates difficulty for purposes of Ford's future product planning.") (A-1040); Stellantis N.V. (formerly Fiat-Chrysler) Form 20-F 2020 Annual Report, at 56 ("a U.S. federal regulation … has resulted in litigation and uncertainty regarding the applicability of those state [vehicle emission] regulations.") (A-1238). The automakers further acknowledged in court filings that they might soon be subject to separate State standards: "[The California Air Resources Board] suggested … if California were eventually to prevail, it might try retroactively to enforce its regulations for the period in which the litigation was pending." Auto Mfr. Intervenors Mot. to Expedite at 9, 12. Automakers admitted that they "must make production planning decisions based on those competing federal and state regulations—planning decisions which cannot be reversed without material financial costs to [auto] companies." *Id.* at 16. These statements demonstrate the automakers' awareness of the Waiver Withdrawal's uncertain future and resultant hesitation to shift business models and invest significant resources in reliance on the rule.

Nor did automakers claim reliance on the Waiver Withdrawal in their comments on NHTSA's proposed repeal of its Preemption Rule. Ford even emphasized in its comments the company's support for EPA's rescission of the Waiver Withdrawal. Comments of Ford Motor Co., Docket ID No. NHTSA-2021-0030-0001 (A-1617).

Reliance interests can be engendered by longstanding and previously settled policies. *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests" (internal quotations omitted)). But reliance on an agency's decision may be unreasonable when the decision is a departure from longstanding agency policy and the agency promptly reverts to the original policy. *Mozilla Corp. v. FCC*, 940 F.3d 1, 18-19 (D.C. Cir. 2019) (holding that reliance on a three-year-old definition was unreasonable where the agency merely reverted to the preceding definition that had been in effect for 13 years). Here,

EPA is proposing to reinstate a California waiver that had been in place for several years (and, in the case of a zero-emissions-vehicle mandate, several decades), and of the sort the agency had routinely granted to California for half a century prior to the Trump EPA's Waiver Withdrawal. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding that agency unlawfully failed to account for "decades of industry reliance" on a regulatory definition).

Reliance interests exist on a continuum wherein a reasonable actor would rely more on a rule that is longstanding and stable, and less on a rule that is unstable because of longstanding policy, case law and immediate litigation. *See Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) ("The rule does not upset petitioners' reasonable reliance interests. The state of the law has never been clear, and the issue has been disputed since it first arose."); *see also Mozilla*, 940 F.3d at 64 ("[R]eliance on the rules … would not have been reasonable unless tempered by substantial concerns for legal or political jeopardy."). The Trump EPA published the Waiver Withdrawal on September 27, 2019, *see* 84 Fed. Reg. 51,310, and several Commenters petitioned for review of that action the same day, *see* Pet. for Review, *Envtl. Def. Fund v. NHTSA*, No. 19-1200 (D.C. Cir. Sept. 27, 2019) (A-1618). EPA should make explicit in its decision here a finding that no alleged reliance interests preclude its change in course.

By contrast, California and the other States that have adopted its standards pursuant to Clean Air Act Section 177 have strong reliance interests in the 2013 waiver. For example, these States had a longstanding practice of relying on the waiver while designing their State Implementation Plans (SIPs) for compliance with the National Ambient Air Quality Standards (NAAQS). SIPs are a crucial tool these states use to protect the health and welfare of their residents and to avoid serious penalties from the EPA for non-compliance with the NAAQS standards. SIP design is an intensive, multi-year process, and upending these plans would have far-reaching consequences for the States' economic, environmental, and public health planning. If these States had to redesign their SIPs, they would need to devote several years of planning (and the resulting expenditure of State resources), and that process might result in unanticipated regulatory burdens on some parties in order to attain public health and welfare objectives. For all these reasons, California and the Section 177 States have developed significant reliance interests in the waiver that have developed and deepened over several decades.

E. The Trump EPA's Section 177 Determination is wrong

As Commenters have explained in litigation over the Section 177 Determination, and as States and Cities explain in this proceeding, *see* State/City Comments pt. V.B, the Trump EPA erred by

construing Section 177 not to allow adoption or enforcement by other States of California standards for greenhouse gases for which EPA has granted a Section 209(b) waiver. Section 177 states unequivocally that non-attainment States "may adopt and enforce for any model year" new motor vehicle emissions standards so long as those standards are "identical to the California standards for which a waiver has been granted for such model year," and the standards are adopted at least two years before the start of the model year. 42 U.S.C. § 7507. EPA cannot lawfully bar adoption of California's EPA-waived standards by States that concededly meet the statute's sole eligibility criterion—that such States have "plan provisions approved under" Clean Air Act Title I, part D. *Ibid.* Even if there were some ambiguity in Section 177, reverting to the most obvious and best reading of its text, and one that meets statutory objectives (like avoiding a "third vehicle") would be proper.

Respectfully submitted,

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