

XAVIER BECERRA
Attorney General



State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6623
Facsimile: (213) 897-2802
E-Mail: Julia.Forgie@doj.ca.gov

November 26, 2019

Via Overnight Mail and Email

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

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

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

Dear Administrator Wheeler and Mr. Lieske:

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

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

Sincerely,

A handwritten signature in blue ink that reads "Julia K. Forgie".

JULIA K. FORGIE
Deputy Attorney General

(Attachment)

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

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

Submitted by:

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

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INTRODUCTION

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

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

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

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

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

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

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

BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

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

LEGAL STANDARD

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Only in its Final Action does EPA elaborate some on its purported reason for its change of course, stating: “the unique situation in which EPA and NHTSA, coordinating their actions to avoid inconsistency between their administration of their respective statutory tasks, address in a joint administrative action the issues of the preemptive effect of EPCA and its implications for EPA’s waivers, has no readily evident analogue. EPA will not dodge this question here.” 84 Fed. Reg. at 51,338. In fact, EPA states, it “will not disregard” NHTSA’s conclusion that EPCA preempts California’s GHG and ZEV standards because doing so “would place the United States Government in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*.” *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

These actions and statements include the following:

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

⁵ Andrew R. Wheeler, *News Conference on California Fuel Economy Standards*, CSPAN at 6:48-51, 10:20-43 (Sept. 19, 2019), <https://www.c-span.org/video/?464472-1/epa-administrator-wheeler-secretary-chao-hold-news-conference-california-fuel-standards>.

⁶ Prepared Remarks for U.S. Sec’y of Transp. Elaine L. Chao, “One National Program Rule” Press Conference (Sept. 19, 2019), <https://www.transportation.gov/briefing-room/one-national-program-rule-press-conference>, attached as Exhibit 4.

⁷ See Timothy Puko, *Justice Department Launches Antitrust Probe Into Four Auto Makers*, WALL ST. J., Sept. 6, 2019, attached as Exhibit 5.

⁸ Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES, Sept. 6, 2019, <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html>, attached as Exhibit 6; see also *Antitrust Experts Say DOJ Probe Of Auto Deal Appears Aimed At Intimidation*, INSIDE EPA (Sept. 11, 2019), <https://insideepa.com/daily-news/antitrust-experts-say-doj-probe-auto-deal-appears-aimed-intimidation>, attached as Exhibit 7; Tim Brennan, *When Politics Meets Antitrust*, MILKEN INSTITUTE REVIEW (Sept. 9, 2019), <http://www.milkenreview.org/articles/when-politics-meets-antitrust>, attached as Exhibit 8.

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

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

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

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

¹⁰ *See* Coral Davenport & Hiroko Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. TIMES, Oct. 30, 2019, <https://www.nytimes.com/2019/10/30/climate/general-motors-toyota-emissions-white-house.html>, attached as Exhibit 15.

¹¹ Donald Trump (@realDonaldTrump), Twitter (Oct. 30, 2019, 10:19 AM), <https://twitter.com/realDonaldTrump/status/1189592785311223815>, attached as Exhibit 16.

¹² Statements by the President through his official Twitter account are official statements subject to judicial review. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The comments relevant to EPA's waiver analysis include:

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

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

- e. California Transportation Commission Letter, June 26, 2019 (Docket #EPA-HQ-OAR-2018-0283-7585)
 - f. Stanislaus Council of Governments Letter, Aug. 22, 2019 (Docket #NHTSA-2018-0067-12438)
2. Comments regarding EPA's failure to consult states on federalism as required under E.O. 13132: Attorneys General of New York, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Vermont, and Washington Letter, July 23, 2019 (Docket #EPA-HQ-OAR-2018-0283-7589)
3. Comments regarding climate impacts, including recent studies:
- a. Letters discussing and submitting the United States Global Change Research Program's (USGCRP) Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States, Nov. 23, 2018: EPA's single mention of the Fourth National Climate Assessment in its Final Action failed to address the findings and analysis in the report or the stakeholder comments that addressed it.
 - i. NGO Letter, Dec. 14, 2018 (Docket #EPA-HQ-OAR-2018-0283-7438)
 - ii. Multi-state and city Letter, Dec. 11, 2018 (Docket #EPA-HQ-OAR-2018-0283-7440)
 - iii. Multi-state and city Letter, Dec. 21, 2018 (Docket #EPA-HQ-OAR-2018-0283-7447)
 - iv. Pennsylvania Department of Environmental Protection Letter, Jan. 29, 2019 (Docket #NHTSA-2018-0067-12370)
 - b. Letters regarding additional climate studies:

- i. NGO Letter, Apr. 5, 2019 (Docket #EPA-HQ-OAR-2018-0283-7452):
submitting Rhodium Group study regarding climate impact on smog;
Gertler & O’Gorman study on climate and rainfall; Barnard, et al. (2019)
on the underestimation of sea-level rise impacts of climate change
 - ii. NGO Letter, May 31, 2019 (Docket #EPA-HQ-OAR-2018-0283-7566):
describing the Intergovernmental Science-Policy Platform on Biodiversity
and Ecosystem Services (IPBES) Global Assessment Report on
Biodiversity and Ecosystem Services
 - iii. CARB Letter, May 31, 2019 (Docket #NHTSA-2018-0067-12411):
submitting Northcott, et al. (2019) study on localized carbon dioxide
impacts on ocean acidification; Gleason, et al. (2019) study on feedback
loop of increasingly severe wildfires in the face of climate change
 - iv. NGO Letter, Aug. 14, 2019 (Docket #EPA-HQ-OAR-2018-0283-7591):
discussing new evidence of the impacts of rising temperatures, including
ice melt, rising ozone levels, and economic impacts
 - v. CARB Letter, Aug. 21, 2019 (Docket #EPA-HQ-OAR-2018-0283-7594):
submitting Williams, et al. (2019) study on the increasing scope and
severity of wildfires in California and their link to climate change
4. Comment regarding automakers’ request for resuming negotiations between the
Administration and California: NGO Letter, June 14, 2019 (Docket #EPA-HQ-OAR-
2018-0283-7574)
5. Comment addressing undisclosed meetings between EPA and the Alliance of Automobile
Manufacturers: EDF Letter, Aug. 7, 2019 (Docket #EPA-HQ-OAR-2018-0283-7592)

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

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

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

CARB, the States and Cities, and other stakeholders submitted comments in October 2018 demonstrating the compelling and extraordinary conditions for which California needs its motor vehicle program and, specifically, its GHG and ZEV standards. More recent evidence only adds support. In January 2019, Pacific Gas & Electric (PG&E), California’s largest utility company, filed for bankruptcy to address its liabilities stemming from the devastating fires of 2017 and 2018.¹⁶ In the past month, millions of Californians have suffered planned power outages as PG&E attempts to avoid even more harmful fires in the face of unusually forceful and dry winds and the absence of much, if any, rain in many places in the State. Even President Trump has recognized the uniquely harmful fires California faces, tweeting, “[y]ou don’t see close to the level of burn in other states...”¹⁷ The connection between California’s expanding and worsening fire seasons and climate change is well documented, as CARB identified in its

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

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

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

RELIEF REQUESTED

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

Dated: November 26, 2019

Respectfully Submitted,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California
ROBERT W. BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
RYAN HOFFMAN
JENNIFER KALNINS TEMPLE
M. ELAINE MECKENSTOCK
DAVID ZAFT
Deputy Attorneys General

/s/ Julia K. Forgie

JULIA K. FORGIE
Deputy Attorney General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013
(213) 269-6623
Julia.Forgie@doj.ca.gov

*Attorneys for the State of California, by and
through Attorney General Xavier Becerra and
the California Air Resources Board*

FOR THE STATE OF COLORADO

PHIL WEISER
Colorado Attorney General

/s/ Eric R. Olson

ERIC R. OLSON
Solicitor General
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6562
eric.olson@coag.gov

Attorneys for Petitioner State of Colorado

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut
MATTHEW I. LEVINE
Assistant Attorney General

/s/ Scott N. Koschwitz

SCOTT N. KOSCHWITZ
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Telephone: (860) 808-5250
Fax: (860) 808-5386
Scott.Koschwitz@ct.gov

Attorneys for Petitioner State of Connecticut

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of the State of Delaware

/s/ Kayli H. Spialter

KAYLI H. SPIALTER
CHRISTIAN WRIGHT
Deputy Attorneys General
Delaware Department of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
Telephone: (302) 395-2604
Kayli.spialter@delaware.gov

Attorneys for Petitioner State of Delaware

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

/s/ David S. Hoffmann

DAVID S. HOFFMANN
Assistant Attorney General
Public Integrity Section
Office of the Attorney General
for the District of Columbia
441 4th Street, NW
Suite 650 North
Washington, D.C. 20001
Telephone: (202) 442-9889
david.hoffmann@dc.gov

Attorneys for Petitioner District of Columbia

FOR THE STATE OF HAWAII

CLARE E. CONNORS
Attorney General

/s/ William F. Cooper

WILLIAM F. COOPER
Deputy Attorney General
State of Hawaii Office of the Attorney
General
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-4070
Bill.F.Cooper@Hawaii.gov

Attorneys for Petitioner State of Hawaii

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois
MATTHEW J. DUNN
Chief, Environmental Enforcement/ Asbestos
Litigation Division
DANIEL I. ROTTENBERG
Assistant Attorney General

/s/ Jason E. James

JASON E. JAMES
Assistant Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
Telephone: (312) 814-0660
Jjames@atg.state.il.us

Attorneys for Petitioner State of Illinois

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General

/s/ Laura E. Jensen

LAURA E. JENSEN
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333
Telephone: (207) 626-8868
Laura.Jensen@maine.gov

Attorneys for Petitioner State of Maine

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

/s/ Roberta R. James

ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
Telephone: (410) 537-3748

JOHN B. HOWARD, JR.
JOSHUA M. SEGAL
STEVEN J. GOLDSTEIN
Special Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (410) 576-6300

Attorneys for Petitioner State of Maryland

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection Division
CAROL IANCU
Assistant Attorney General
MEGAN M. HERZOG
Special Assistant Attorney General

/s/ Matthew Ireland
MATTHEW IRELAND
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 727-2200
matthew.ireland@mass.gov

*Attorneys for Petitioner Commonwealth of
Massachusetts*

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

/s/ Peter N. Surdo
PETER N. SURDO
Special Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN, 55101
Telephone: (651) 757-1061
Peter.Surdo@ag.state.mn.us

Attorneys for Petitioner State of Minnesota

FOR THE PEOPLE OF THE STATE OF MICHIGAN

DANA NESSEL
Attorney General of Michigan

/s/ Neil D. Gordon
NEIL D. GORDON
GILLIAN E. WENER
Assistant Attorneys General
Michigan Department of Attorney General
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
gordonn1@michigan.gov

*Attorneys for Petitioner People of the State of
Michigan*

FOR THE STATE OF NEVADA

AARON D. FORD
Attorney General

/s/ Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
HStern@ag.nv.gov

Attorneys for Petitioner State of Nevada

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General of New Jersey

/s/ Aaron A. Love

AARON A. LOVE
Deputy Attorney General
25 Market St., PO Box 093
Trenton, NJ 08625-0093
Telephone: (609) 376-2762
Fax: (609) 341-5031
aaron.love@law.njoag.gov

Attorneys for Petitioner State of New Jersey

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

/s/ Anne E. Minard

ANNE E. MINARD
Special Assistant Attorney General
State of New Mexico Office of the Attorney
General
Consumer & Environmental Protection
Division
408 Galisteo Street
Santa Fe, NM 87501
Telephone: (505) 490-4045
aminard@nmag.gov

Attorneys for Petitioner State of New Mexico

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York
YUEH-RU CHU
Chief, Affirmative Litigation Section
Environmental Protection Bureau
AUSTIN THOMPSON
Assistant Attorney General

/s/ Gavin G. McCabe

GAVIN G. MCCABE
Assistant Attorney General
28 Liberty Street, 19th Floor
New York, NY 10005
Telephone: (212) 416-8469
gavin.mccabe@ag.ny.gov

Attorneys for Petitioner State of New York

FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN
Attorney General
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General
FRANCISCO BENZONI
Special Deputy Attorney General

/s/ Asher P. Spiller

ASHER P. SPILLER
TAYLOR CRABTREE
Assistant Attorneys General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6400

*Attorneys for Petitioner State of North
Carolina*

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General Natural
Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

Attorneys for Petitioner State of Oregon

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
Special Assistant Attorney General
Office of Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400
gschultz@riag.ri.gov

Attorneys for Petitioner State of Rhode Island

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania

/s/ Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
JACOB B. BOYER
Deputy Attorney General
Office of Attorney General
1600 Arch St. Suite 300
Philadelphia, PA 19103
Telephone: (215) 560-2171
mfischer@attorneygeneral.gov

*Attorneys for Petitioner Commonwealth of
Pennsylvania*

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
Telephone: (802) 828-3171
nick.persampieri@vermont.gov

Attorneys for Petitioner State of Vermont

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General
PAUL KUGELMAN, JR.
Senior Assistant Attorney General
Chief, Environmental Section

/s/ Caitlin C. G. O'Dwyer
CAITLIN C. G. O'DWYER
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, VA 23219
Telephone: (804) 786-1780
godwyer@oag.state.va.us

Attorneys for Petitioner Commonwealth of Virginia

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General of Wisconsin

/s/ Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53702-7857
Telephone: (608) 266-7741
Fax: (608) 267-2223
vandermeusejl@doj.state.wi.us

Attorneys for Petitioner State of Wisconsin

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Emily C. Nelson
EMILY C. NELSON
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504
Telephone: (360) 586-4607
emily.nelson@atg.wa.gov

Attorneys for Petitioner State of Washington

FOR THE CITY OF LOS ANGELES

MICHAEL N. FEUER
Los Angeles City Attorney
MICHAEL J. BOSTROM
Assistant City Attorney

/s/ Michael J. Bostrom
MICHAEL J. BOSTROM
Assistant City Attorney
200 N. Spring Street, 14th Floor
Los Angeles, CA 90012
Telephone: (213) 978-1882
Fax: (213) 978-2286
Michael.Bostrom@lacity.org

Attorneys for Petitioner City of Los Angeles

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON
New York City Corporation Counsel
CHRISTOPHER G. KING
ROBERT L. MARTIN
Senior Counsel
SHIVA PRAKASH
Assistant Corporation Counsel

/s/ Christopher G. King
CHRISTOPHER G. KING
Senior Counsel
New York City Law Department
100 Church Street
New York, New York
Telephone: (212) 356-2074
Fax: (212) 356-2084
cking@law.nyc.gov

Attorneys for Petitioner City of New York

FOR THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

/s/ Robb Kapla
ROBB KAPLA
Deputy City Attorney
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Telephone: (415) 554-4647
robb.kapla@sfcityatty.org

*Attorneys for Petitioner City and County of
San Francisco*

FOR THE CITY OF SAN JOSE

/s/ Richard Doyle
RICHARD DOYLE
City Attorney
NORA FRIMANN
Assistant City Attorney
Office of the City Attorney
200 E. Santa Clara Street, 16th Floor
San Jose, CA 95113-1905
Telephone: (408) 535-1900
caomain@sanjoseca.gov

Attorneys for Petitioner City of San Jose