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Docket ID No. EPA–HQ–OAR–2018–0283

EPA Docket Center
William Jefferson Clinton West Building, Room 3334
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Washington, D.C. 20004

Mr. Andrew R. Wheeler
Acting EPA Administrator
United States Environmental Protection Agency
EPA Headquarters
Mail Code 1101A
William Jefferson Clinton Building (North)
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RE: Comments on The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 FED. REG. 42986 (AUG. 24, 2018), Docket ID No. EPA–HQ–OAR–2018–0283.

Dear Administrator Wheeler:

On behalf of Dalton Trucking Company, Inc., Loggers Association of Northern California, Robinson Industries, Inc., Nuckles Oil Co., Inc. dba Merit Oil Company, Construction Industry Air Quality Coalition, Western States Trucking Association, Inc., Delta Construction Company, Inc., Southern California Contractors Association, Inc., Ron Cinquini Farming, and United Contractors (the "California Commenters"), Texas Public Policy Foundation ("TPPF") hereby submits comments on the Environmental Protection Agency's ("EPA's" or the "Agency's") proposed rescission of EPA's waiver granted to California for its "Advanced Clean Car" regulations, composed of its greenhouse gas standards, its "Low Emission Vehicle" ("LEV") program, and its "Zero Emission Vehicle" ("ZEV") mandate (the "Greenhouse Gas Waiver Grant"). The California Commenters generally support EPA's new standards for evaluating applications from California for waiver from federal preemption under the Clean Air Act and specifically (1) support EPA's proposed rescission of the Greenhouse Gas Waiver Grant, and (2)

request that EPA also rescind the waiver granted to California for its nonroad diesel emissions standards (the "Nonroad Diesel Waiver Grant"), 78 Fed. Reg. 58,090 (Sept. 20, 2013), by using an analysis similar to that set forth in the proposed rescission of the Greenhouse Gas Waiver Grant.

I. EPA'S PROPOSED REEVALUTION OF THE CALIFORNIA WAIVER PROVISIONS OF THE CLEAN AIR ACT IS BOTH LAWFUL AND APPROPRIATE

A. The Interests of the California Commenters

The California Commenters are parties to pending litigation in the United States Court of Appeals for the Ninth Circuit, *Dalton Trucking, Inc. v. EPA*, Case No. 13-74019, challenging the Nonroad Diesel Waiver Grant. On May 5, 2017, EPA filed a motion with the Court seeking to stay the challenge pending EPA's reevaluation of that waiver grant. To provide EPA with time to reevaluate the Nonroad Diesel Waiver Grant, the California Commenters did not object to the motion. The Court issued its stay order on May 10, 2017. Thereafter, on July 19, 2017, the California Commenters filed an administrative petition with EPA formally seeking the rescission of the Nonroad Diesel Waiver Grant. Over a year later, the administrative petition is still pending at EPA.

Importantly, EPA's current proposed rescission of the Greenhouse Gas Waiver Grant is buttressed by many of the arguments set forth by the California Petitioners in the litigation and echoed in their administrative petition asking for a rescission of the Nonroad Diesel Waiver Grant. Accordingly, the California Petitioners support EPA's arguments in favor of the proposal to rescind the Greenhouse Gas Waiver Grant. At the same time, the California Commenters believe it is now time for EPA to take action on the administrative petition seeking a rescission of the Nonroad Diesel Waiver Grant by establishing a formal regulatory docket to address the petition.

B. The Waiver Provisions

There are two separate waiver provisions, one governing onroad vehicles and the other governing nonroad vehicles, but they are virtually identical is language. For the sake of brevity, these comments set forth the statutory language regarding emissions from nonroad vehicles. Section 209(e)(2)(A)(ii) (the "Waiver Provision") of the Clean Air Act provides that EPA may authorize California to adopt and enforce on a case-by-case basis standards for nonroad engines and vehicles that differ from the federal ones, but "no such authorization shall be granted if [EPA] finds that . . . California does not need such California standards to meet compelling and extraordinary conditions." Thus, to deviate from federal standards California must (1) apply for a waiver from federal standards for each nonroad mobile source emission standards it seeks to enforce, and (2) EPA may not grant any waiver application unless California makes a showing that it has "compelling and extraordinary conditions" necessitating the standards for which the waiver is sought.

C. EPA's Past Practices and Current Proposed Revisions

In the past, including in connection with the Greenhouse Gas Waiver Grant and the Nonroad Diesel Waiver Grant, EPA took the position that California's "need" for any particular emissions standards refers not to the need for the standards for which a waiver application is made, but to the "need" for California to have its own motor vehicle air emissions program "as a whole." *See* 74 Fed. Reg. 32744, 32,761 (July 8, 2009). Such an interpretation is impermissible under the Clean Air Act, because the plain language of Section 209(e)(2)(A)(ii) refers to California's need for the particular standards for which a waiver application is made. There is no indication in the Act that by using the term "standards" Congress really meant California's mobile source program "as a whole."

In the proposed rescission of the Greenhouse Gas Waiver Grant, EPA is correctly seeking to reject the "program as a whole" interpretation of the Waiver Provision and to evaluate the propriety of California's waiver applications based on the need for the particular proposed standards in the specific application. The Agency also states that it "may in future actions consider whether this proposal, if finalized, makes it appropriate or necessary *to revisit past grants of other waivers* beyond those granted with respect to California's [greenhouse gases] and ZEV program." 83 Fed. Reg. at 43240 n. 551 (emphasis added). Among other things, the California Commenters ask the Agency specifically to apply the proposed new interpretation to the Nonroad Diesel Waiver Grant.

D. Implications for the Nonroad Diesel Waiver Grant

For nonroad vehicles, CARB's rules establish statewide performance standards for in-use, non-road diesel vehicles in California with a maximum horsepower ("hp") of 25 hp or greater. 78 Fed. Reg. at 58,091. The Nonroad Engine Rules apply to engines used in fleets of nonroad vehicles, defined, inter alia, as vehicles that cannot be registered and driven safely on-road, or vehicles that were not designed to be driven on-road, even if modified so they can be driven on-road safely. ORD Decision docket 0691-0292, at 1 (CARB Final Regulation Order, promulgating Cal. Code Regs. tit. 13, § 2449(b)(1)).

The Nonroad Engine Rules require PM and NOx reductions for qualifying fleets on a phased-in basis, with reductions imposed on large fleets (defined as fleets with a total horsepower greater than 5,000 hp) in 2014, medium fleets (between 2,500 and 5,000 hp) in 2017, and small fleets (2,500 hp or less) in 2019. ORD Decision docket 0691-0292, at 40-42, 49-50. (promulgating Cal. Code Regs. tit. 13, § 2449.1(a) & Tables 3-4).

The Nonroad Engine Rules apply to any qualifying vehicles operating within California. The rules define "fleet" as "all off-road vehicles and engines owned by a person, business or government agency that are operated within California and are subject to the regulation. A fleet may consist of one or more vehicles. A fleet does not include vehicles that have never operated in California." ORD Decision docket 0691-0292, at 6 (promulgating Cal. Code Regs. tit. 13, §

2449(c)(20)). At EPA's September 2012, public hearing on CARB's waiver application, a CARB official (Eric White, Assistant Chief, CARB Mobile Source Control Division) stated that:

> The regulation applies equally to all equipment that is operated in the state, regardless of where the fleet itself is located. So if you are a fleet that is wholly contained within the State of California, all of your equipment would be subject to this regulation. If you're a fleet that is a multi-state, has a multistate presence, only the equipment that you would operate within the state of California would be subject to this regulation.

ORD Decision docket 0691 at 122-23 (Sept. 20, 2012 public hearing transcript).

After EPA approved the Waiver Grant on September 20, 2013, 78 Fed. Reg. 58,090, et seq., the California Commenters filed a petition for review on November 19, 2013, in the United States Court of Appeals for the Ninth Circuit. After years of litigation on procedural and substantive issues, oral argument was scheduled by the Ninth Circuit for May 18, 2017. As indicated, on May 10, 2017, EPA filed a motion asking the court to indefinitely postpone the argument and any further proceedings so the Agency could reconsider the Nonroad Diesel Waiver Grant, stating that "recently-appointed EPA officials in the new Administration will be closely scrutinizing the Off-Road Diesel Decision to determine whether it should be maintained, modified, or otherwise reconsidered." Dkt. No. 71, 05/05/2017, Respondent EPA's Motion to Continue Oral Argument, *Dalton Trucking, Inc. v. EPA*, Case No. 13-74019. Wishing to provide EPA with the opportunity to resolve the litigation administratively, the California Petitioners did not object to the motion. The Ninth Circuit granted EPA's motion, pausing the case while EPA reconsiders the Waiver Grant. Dkt. No. 74, 05/10/2017, Order, *Dalton Trucking, Inc. v. EPA*, Case No. 13-74019. As interested parties in the reconsideration process, the California Commenters later filed an administrative petition requesting EPA to rescind the Nonroad Diesel Waiver Grant for the reasons summarized below.

To encourage interstate travel and commerce, the Clean Air Act preempts individual states from adopting standards relating to the control of air emissions from motor vehicles. The preemption provisions apply to vehicles used on roads, such as automobiles and trucks, and to nonroad vehicles, such as tractors and excavators. Section 209 of the Clean Air Act generally governs the waiver process for both on-road and nonroad vehicles. To obtain an EPA waiver, California must submit a waiver application each time it wishes to adopt and enforce a new mobile source emissions standard. The proposed California standard must meet two tests: (1) the Protectiveness Test and (2) the Needs Test. In the litigation, the California Commenters challenge the criteria EPA used under the Needs Test to make the Nonroad Diesel Waiver Grant. The Protectiveness Test is not at issue with regard to the nonroad engine emission waiver.

Subsection 209(e)(2)(A)(ii) of the Clean Air Act is the specific provision setting forth the circumstances under which EPA may grant a waiver application for a proposed California nonroad engine emission standard under the Needs Test. The subsection provides that EPA may not grant

a waiver unless California makes a showing that it has "compelling and extraordinary conditions" necessitating the standard for which the waiver is sought. The record shows that (1) EPA used the wrong criteria to grant the waiver application, and (2) California does not need its own statewide nonroad diesel engine emissions standard to meet compelling and extraordinary conditions. Accordingly, the Waiver Grant was improperly issued.

The record does not show that California needs the statewide Nonroad Engine Rules to meet statewide compelling and extraordinary conditions. Accordingly, the Clean Air Act prohibited EPA from granting the waiver application.

In issuing the Nonroad Diesel Waiver Grant, EPA did not make its waiver decision based on California's need for the emissions standards set forth in the nonroad engine rules. Rather it made the waiver decision based upon whether California needs its own motor vehicle regulatory program "as a whole." In so doing, EPA used the wrong test to grant the waiver. That is what happened also in connection with the issuance of the Greenhouse Gas Waiver Grant.

In response to comments submitted by the California Commenters at the time, EPA offered what it called an "alternative" rationale for granting the waiver application, justifying its decision by stating that the waiver would help bring two California air quality control regions into attainment with the federal standards for PM 2.5 and 8- hour ozone. 78 Fed. Reg. at 58098. But California has 14 air quality control regions, a fact EPA conveniently ignored in the Waiver Grant. EPA never justified the application of statewide standards to solve two localized concerns.

Indeed, as both CARB and EPA have acknowledged, the nature of California's topography and geography create a situation in which air quality issues are particularly localized. *See* 78 Fed. Reg. at 58098 (justifying more stringent nonroad emissions standards to address "localized health risk") (citing CARB Resolution 10–47 at EPA–HQ–OAR– 2008–0691–0283). Stringent controls beyond the federal standards for PM 2.5 and NOx (a precursor to 8-hour ozone) in the two nonattainment areas may theoretically assist those two areas in reaching attainment status. But neither CARB nor EPA have taken the position that applying those controls to the twelve other regions are required to achieve attainment with the State Implementation Plan. Therefore, there are no "compelling or extraordinary circumstances" necessitating statewide application of the emissions standards. Accordingly, under the so-called "alternative" test applied by EPA, there is no rational connection between the facts found and the choice made to grant a statewide waiver from federal preemption.

In light of the previous Administration's errors, the new EPA Administration has the opportunity now to correct not only the improper Greenhouse Gas Waiver Grant but also the improper Nonroad Diesel Waiver Grant. As explained below, EPA's new proposed interpretation of the Waiver Provision is generally correct. Accordingly, the Greenhouse Gas Waiver Grant should be rescinded and the Agency should act expeditiously to open an administrative docket in connection with the administrative petition filed by the California Commenters, leading to a proposed and then final decision to rescind the Nonroad Diesel Waiver Grant.

II. EPA'S PAST INTERPRETATION OF THE WAIVER PROVISION, SECTION 209(e)(2)(A)(ii), WAS CONTRARY TO THE PLAIN MEANING OF THE STATUTORY TEXT

The Clean Air Act was enacted by Congress to protect human health and welfare from the adverse impacts of air emissions. *Motor and Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 n. 47 (D.C. Cir. 1979) ("*MEMA I*"). At the same time, by preempting state regulation of emissions from mobile sources, the Act requires EPA to establish uniform, national emissions controls for such sources, to ensure that interstate commerce is not unduly burdened as a result of potentially conflicting state emissions standards. *Id*. at 1109.

California is provided with a special dispensation in the statutory scheme due to its geography and topography, which can trap emissions in certain localities. *See* S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (committee recognized California's "unique problems" with regard to localized air pollution). This is particularly true in the Los Angeles and Central Valley air basins. 78 Fed. Reg. at 58098. Thus, with regard to mobile source emissions controls in California, Congress made a policy judgment to strike a balance between the interests of health protection and interstate commerce.

The key statutory text is set forth in Section 209(e)(2)(A)(ii), which provides that EPA may authorize California to adopt standards for nonroad engines and vehicles, but that "no such authorization shall be granted if [EPA] finds that . . . California does not need such California standards to meet compelling and extraordinary circumstances." Importantly, California must apply for waivers from federal mobile source standards on a case-by-case basis. *MEMA I*, 627 F.2d at 1111; *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1090 (D.C. Cir. 1996).

To avoid constitutional issues, statutes that treat one state or jurisdiction differently from others are construed so as to minimize the differences in treatment. "[A] departure from the fundamental principle of equal sovereignty [among the states] requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets." *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (emphasis added). In *N.W. Austin*, the Supreme Court was asked to determine whether the bailout provision of the Voting Rights Act applied to a certain municipal entity seeking protection. The Court refused to defer to the federal government's interpretation, noting that the Voting Rights Act created a constitutional tension by treating some states differently from others, and that, accordingly, the statute should be read to avoid such tension, to the extent possible.

The Court concluded that the government's interpretation did not adequately address the constitutional tension. *Id*. at 206-11. In reaching its decision, the Court looked carefully at the statutory text of Section 4(b), as well as its statutory history—particularly the history of that section's amendments. *Id*. at 210. ("[A]fter the 1982 amendments, the government's position is untenable.").

As in *N.W. Austin*, the Waiver Provision at issue creates a constitutional anomaly, whereby one state, California, is treated differently than the others under the Clean Air Act's mobile source provisions. California's special position harms other states in two ways: (1) it gives California an outsized role in determining future federal emission regimes since it is the only state that can act as a laboratory; and (2) differing emissions standards harm the flow of interstate commerce by limiting the degree to which (a) existing vehicles can move interstate into California without first complying with California's distinct requirements and (b) engine manufacturers can build to one national standard. *See Engine Mfrs. Ass'n*, 88 F.3d at 1079 (federal preemption necessary because motor vehicles "readily move across state boundaries," and subjecting them to potentially 50 different sets of state emissions requirements raises the spectre of "an anarchic patchwork" of regulation that could threaten both interstate commerce and the automobile manufacturing industry); *see also Motor Vehicles Mfrs. Ass'n of the U. S., Inc. v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521,526 (2d Cir. 1994) (federal preemption of state motor vehicle emissions standards is "cornerstone" of Title II of the CAA). The Waiver Provision cuts across the grain of federal preemption by allowing California to impact interstate commerce in a unique way not available to other states. Such impacts on interstate commerce can have substantial economic and political significance.

The avoidance canon cautions against EPA interpreting the Needs Test broadly in favor of the disparate treatment granted to California compared to other states. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *See Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001) ("*Chevron* principles are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe.") (citations omitted). Even if EPA's prior broad construction of the Needs Test were stronger than it is, the avoidance canon requires EPA to adopt the narrower interpretation of California' autonomy. *See U. S. v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (rejecting the "most natural, grammatical reading" of a statute to avoid constitutional doubt).

Under EPA's past interpretation of the Needs Test, California is granted sole authority to promulgate standards without EPA review of whether those particular standards are needed to deal with California's extraordinary circumstances. Other states have no direct or indirect power (political or otherwise) over California's administrative agencies, and thus no influence over their promulgation of emission standards other than on a take-it-or-leave-it basis. *See U.S. West Communications, Inc. v. Hix*, 986 F.Supp. 13, 16-17 (D. Colo. 1997) (noting that "[state] agencies are not subject to congressional oversight," and contrasting with federal agencies that have "their activities [] subject to continuous congressional supervision by virtue of Congress's powers of advice and consent, appropriation, and oversight") (quoting *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988)). Where EPA has not promulgated any standards desired by a particular state, that state's only choice is between (1) no such standards at all, or (2) those promulgated by the power of a single state (California), with no substantive review by the only actor over which other states may have some influence: EPA. As the Supreme Court recently held:

> Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of equal sovereignty" among the States. . . . [T]he fundamental principle of equal sovereignty remains highly pertinent in assessing . . . disparate treatment of States."

Shelby County, Ala. v. Holder, 570 U.S. 529, 544 (2013) (quoting *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)) (emphasis in original). Because EPA's interpretation of the Needs Test raises the constitutional issue of equal sovereignty, the canon of constitutional avoidance trumps the *Chevron* deference doctrine.

Congress would not leave the implementation and interpretation of such an important "cornerstone" statutory provision solely, or even substantially, to agency discretion. *See Util. Air Reg. Group v. EPA* ("*UARG*"), 134 S.Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1315 (2000) ("[I]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."). This Court should ensure that EPA's interpretation of the waiver provisions does not disturb the delicate balance Congress established between the needs of all states in the free flow of interstate commerce against the needs of one particular state, California, in protecting the health and welfare of its residents. *See United States v. States of La., Tex., Miss., Ala. And Fla.*, 363 U.S. 1, 16 (1960) (referring to the historic tradition that states enjoy "equal sovereignty").

As noted in the proposed rule, EPA's position has been that California's "need" for any particular emissions standards refers not to the need for the specific standards for which a waiver application is made, but rather, to the need for California to have its own motor vehicle air emissions program "as a whole." *See* 74 Fed. Reg. at 32,761. That broad interpretation is at odds with the "equal sovereignty" principle articulated in *N.W. Austin* and *Louisiana*, as well as the "clear statement" principle articulated in *UARG* and *Brown & Williamson*. It is also contrary to the actual language and plain meaning of the statute and its amendment history.

A. "Standards" is not the textual equivalent of "standards, in the Aggregate"

The term "such California standards," as used in Section 209(e)(2)(A)(ii), does not refer to the entire California mobile source emissions program, because the term "program" is not used even once in Section 209. Nor has it ever been used in Section 209's legislative predecessors.

Furthermore, the term "in the aggregate" appears in Section 209 only as part of a separate sentence addressing the Protectiveness Test, and is set off by commas, evidencing that the term refers solely to the Protectiveness Test established in that sentence:

> [T]he Administrator shall . . . authorize California to adopt and enforce standards and other requirements . . . if California

> determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

On the other hand, the Needs Test appears in a subsequent sentence, embedded in a clause that is prefaced by proscriptive language that does not appear in the Protectiveness Test:

> No such authorization shall be granted if the Administrator finds that:
> (i) . . .
> (ii) California does not need such California standards to meet compelling and extraordinary condition.

The "in the aggregate" language appearing in the sentence establishing the Protectiveness Test is independent of and does not modify the language in the separate sentence establishing the Needs Test, as is made clear by three specific textual details showing that the term "standards" cannot be read to equate to "standards in the aggregate." First, the outcome of the Protectiveness Test depends on whether *California* makes a protectiveness finding, while the outcome of the Needs Test depends on whether *EPA* makes a needs finding. Thus, not only are the findings different but they must be made by different entities. Accordingly, the language modifying the Protectiveness Test finding should not be conflated with language addressing the Needs Test finding, which contains no such modifying language. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Second, the language in the sentence establishing the Protectiveness Test affirmatively *mandates* that EPA approve the waiver application if California makes the requisite protectiveness finding, while the language in the sentence establishing the Needs Test expressly *prohibits* EPA from granting a waiver application unless EPA makes the requisite needs finding. Thus, the Protectiveness Test is drafted to *increase* the likelihood of granting a waiver, while the Needs Test is drafted to *decrease* the likelihood of granting a waiver. In enacting the 1977 Amendments, Congress engaged in a legislative trade-off. Any California standard that was less stringent than its corresponding federal standard could be approved if all the California standards, "in the aggregate," were at least as stringent as all the federal standards in the aggregate. On the other hand, Congress prohibited EPA from approving any waiver application if California did not have a need for the emissions standards set forth in the application based upon "extraordinary and compelling conditions" in the state. The two different tests were intended to address entirely different issues, and Congress gave greater authority to EPA to approve waivers under the Protectiveness Test, but lesser authority to approve waivers under the separate and grammatically independent Needs Test.

Third, the sentence establishing the Protectiveness Test applies to both "standards *and other requirements*" (emphasis added), while the sentence establishing the needs test refers only

to "standards," further evidencing that the sentence establishing the Protectiveness Test was drafted to address California's regulatory efforts holistically. On the other hand, to ensure that California did not abuse the privilege of veering from a uniform national system governing emissions from motor vehicles, Congress insisted that EPA deny a waiver application if it found under the Needs Test that California did not need a particular emissions standard to meet "compelling and extraordinary conditions" in the state.

Accordingly, the fact that Congress chose in 1977 to insert the "in the aggregate" language into the Protectiveness Test but not into the Needs Test shows that the modifier is intended to apply to the former but not to the latter, and nothing in the Clean Air Act suggests otherwise. "In statutory interpretation, . . . the plain language of a statute [must be given effect] unless 'literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 563 F.Supp. 2d 1158, 1163 (E.D. Cal. 2008) (quoting *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1236 (9th Cir. 1994)). Referring to similar differences in the language Congress chose to include or exclude from the Clean Air Act, the D.C. Circuit observed that "Congress was certainly capable of adding the phrase 'accompanying enforcement procedures' wherever the word 'standards' appeared if it desired the statutory findings to apply to both. We see no reason to assume that its failure to do so is attributable to sloppy draftsmanship." *MEMA I*, 627 F.2d at 1113. Just as Congress intentionally inserted the phrase "accompanying enforcement procedures" to modify some terms and not others, Congress intentionally inserted the modifying phrase "in the aggregate" in the Protectiveness Test and not in the Needs Test.

The line drawn by Congress is eminently sensible. Section 209 gives California discretion to enforce a portfolio of standards that collectively maximizes overall "protectiveness" by allowing some individual standards to be more stringent than the federal ones, while allowing other standards to be less stringent. That flexibility afforded to California is balanced by a requirement that EPA confirm that each component of the portfolio is actually "needed" to protect the health and welfare of California residents. This gives California leeway to enact a "mix" of emission standards that furthers its interests, yet ensures that EPA protects the national interest in the mobility of motor vehicles against California imposing regulations that do not address California's local needs. Other aspects of the statutory text further clarify the meaning.

B. If "standards" means "standards, in the aggregate," then the statute's "in the aggregate" language is surplusage

If "standards" in the Needs Test means "standards, in the aggregate," then the 1977 amendments of Section 209 that included the term "in the aggregate" as part of the Protectiveness Test would be surplusage. Although the term "standards" appears in both the Needs Test and the Protectiveness Test, Congress attached the modifier only to the Protectiveness Test, while the term "standards," stands alone in the Needs Test, without the modifier. If Congress had intended the term "standards" to mean all the California standards collectively, rather than the specific standards for which a waiver application is made, there would have been no need to add the "in the aggregate" language to the Protectiveness Test, making the term mere surplusage. We must

"give effect, if possible, to every clause and word of a statute." *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955). An interpretation that renders a term meaningless surplusage should be avoided. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). That is especially so when the term occupies a "pivotal [] place in the statutory scheme." *Id*. Certainly the determination of whether EPA must apply the Needs Test on a case-by-case basis or on the basis of the need for the mobile source program "as a whole" is pivotal to the balance struck by Congress in Section 209 with regard to the interests of all of the states in the free flow of interstate commerce and the interests of California in regulating the health and safety of its residents. *See Motor Vehicles*, 17 F.3d at 526 (federal preemption is "cornerstone" of Title II of the Clean Air Act).

Amendments to statutes are generally viewed in the context of the statute prior to their adoption, to determine whether an interpretation would render the amendment surplusage. *See, e.g., Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221-22 (2008) (looking to amendment history to determine meaning of statute); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1306 (U.S. 2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statue.")

Prior to its amendment in 1977, the Clean Air Act's waiver provision provided that "The Administrator shall…waive application of this section to [California] . . . unless he finds that [California] . . . does not require standards more stringent than applicable Federal standards . . . ." Clean Air Act. Pub. L. No. 90-148, 81 Stat. 485 (Nov. 21, 1967).

Under this language, each California emission standard had to be equally stringent or more stringent than the federal standard. For example, California's carbon monoxide emissions standards, as well as its NOx standards, had to match or exceed the corresponding federal standards.

The 1977 amendment changed this provision to allow California to adopt a lower standard for a given pollutant, provided that California's emissions "standards" would be, "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." Thus, under the then-new Protectiveness Test, California would no longer have to justify each individual standard against its corresponding federal standard, provided that California's standards, taken together, were just as protective as the federal standards.

California took advantage of this new leeway in its first waiver application after the 1977 amendments took effect. In 1979, California proposed a "NOx standard [for 1983 and subsequent years that was] 0.4 grams per mile while the comparable federal standard [was] 1.0 grams per mile." *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1306 n. 38 (D.C. Cir. 1979). The proposed "California carbon monoxide standard for 1983 [was] 7.0 grams per mile while the federal standard [was] 3.4 grams per mile." *Id*. (emphasis added). EPA approved the waiver. The DC Circuit

noted that this loosening of the standard-by-standard approach was "precisely what Congress anticipated" when it adopted the aggregation principle for the Protectiveness Test. *Id*. at 1306.

Under EPA's past interpretation of "standards," however, the 1977 amendments were wholly unnecessary. If the term "standards" means standards "as a whole," *see* 74 Fed. Reg. at 32,761 or "emissions program," then aggregation was possible prior to the 1977 amendment. But in 1977 Congress disagreed, by adding the modifier "in the aggregate" to the sentence establishing the Protectiveness Test.

By contrast, the term "standards" was used in the sentence establishing the Needs Test without the modifier. The term "standards," standing alone, must mean the same thing in both the Protectiveness Test and the Needs Test unless something in the statute itself requires otherwise. Nothing in the CAA requires otherwise. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995) (a court must interpret the statute "as a symmetrical and coherent regulatory scheme,"); *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 389 (1959) (proper interpretation of a statute must "fit, if possible, all parts into a harmonious whole."). Accordingly, a careful reading of the text, as informed by the amendment history, shows that the term "in the aggregate" does not modify the term "standards" in the Needs Test. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221-22 (2008) ("[T]he amendment . . . is relevant because our construction of [related provisions] must, to the extent possible, ensure that the statutory scheme is coherent and consistent."); *see also Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).

Section 209(e)(2)(A)(ii) mandates that the EPA withhold its approval of waiver applications if California does not need particular air emission standards to meet "compelling and extraordinary conditions" in the state. "Congress intended the word 'standards' in section 209 to mean quantitative levels of emissions." *MEMA I*, 627 F.2d at 1112-13 (citing Senate Report on Air Quality of 1967, S. Rep. No. 403, 90th Cong., 1st Sess. 32 (1967)). There is no indication in the legislative or amendment history that by using the term "standards" Congress really meant "mobile source program as a whole." As stated by the Supreme Court with specific reference to Section 209 of the Clean Air Act, "a standard is a standard" and not something else. *Engine Mfrs. Ass'n*., 541 U.S. at 254. The origin, evolution, and current form of Section 209(e)(2)(A)(ii) is crucial to the issue of how far EPA should be permitted to bend the actual statutory text.

EPA's understanding of the Waiver Provision is contradicted by that understood by Judge Tatel's opinion in *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996), which explains the Waiver Provision as a two-stage process, involving first the Protectiveness Test and then the separate Needs Test:

> [U]nder the first stage, California may adopt the standards only if they are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." To survive second stage

> review, the EPA must conclude that . . . California needs the proposed standards to meet "compelling and extraordinary conditions."
> . . .
> [Under the second stage] if . . . California . . . does not have a compelling need to regulate that equipment, no federal or state agency in the nation may set emission standards for it.

Id. at 1100-02 (Tatel, J., concurring in part and dissenting in part; emphases added; citations omitted). Thus, the Needs Test applies not to standards "in the aggregate" but to whether California needs the "proposed standards" for the specific "equipment" set forth in the waiver application. EPA has in the past argued that the use of the plural "standards" rather than the singular "standard" in the Needs Test supports its interpretation. But if the use of the plural "standards" of itself were enough to require analyzing the program as a whole rather than the "proposed standards" in the waiver application, then the "in the aggregate" language in the Protectiveness Test is redundant, a construction contrary to the rule against surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). In fact, the plural "standards" is used in the Needs Test because, among other things, waiver applications frequently contain more than one emissions "standard." Here, the waiver application applies to the "proposed standards" for both NOx and particulate matter, each of which contains its own specific emissions limitations. Thus, context shows that the use of the plural does not support EPA's prior position. Moreover, the Clean Air Act and its implementing regulations frequently refer to "standards" in the plural when addressing a particular emission limitation for specific equipment, because such limitation often contains not only a single emissions limit but also a variety of other compliance requirements applicable to that particular equipment. *Id*.

The Agency has previously argued that the intent of Congress was to give California maximum flexibility to pursue its own mobile source emissions standards and that, therefore, EPA's role in granting waivers from federal preemption is an extraordinarily narrow one, namely, to determine whether California has a continuing need for its mobile source program "as a whole." But there would be no reason for Congress to require California to submit a waiver request to EPA each time it seeks to make a change to its mobile source emissions rules if EPA's only role is to examine California's need for a mobile source emissions program "as a whole." Congress already authorized California to have its own mobile source program "as a whole," and EPA is not delegated the responsibility to reverse that authorization. Rather, EPA was given the specific duty to determine whether California has a "compelling and extraordinary" need for the particular standard for which each waiver application is made. Watering down that duty to a determination of whether California needs its program "as a whole" makes the waiver application process a pointless formalistic exercise.

While it is true that the Protectiveness Test was added to the Waiver Provision to permit California to have emissions limitations for some pollutants that are not as stringent as federal ones in order to have more stringent standards for other pollutants, this does not mean that Congress intended to permit California to have any set of mobile source emissions standards it wishes

without meaningful EPA oversight. If Congress intended to give California free rein, it would not have required California to submit waiver applications for all new mobile source emission standards. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 33 (2001) ("We doubt that Congress, when it inserted a carefully worded exception to the main rule, intended simultaneously to . . . render that exception superfluous."). EPA is not permitted to rubber stamp waiver applications simply by virtue of the fact that the applications are submitted. Rather, the Protectiveness Test and the Needs Test provide distinct criteria by which EPA must judge each waiver application; those distinctions cannot be conflated by EPA, as they define the delicate balance Congress created between an expansive Protectiveness Test allowing California maximum flexibility and a more circumscribed Needs Test that protects the national interest in the free flow of commerce across state lines.

The Protectiveness Test gives California discretion to propose a portfolio of standards that collectively maximizes overall "protectiveness"—an aim that is entirely compatible with requiring EPA to confirm that each component of that portfolio is actually needed. This gives California leeway in developing a mix of emissions standards to protect the health of its citizens while ensuring that EPA protects the national interest against California imposing regulations that may interfere with commerce unless they are needed due to California's peculiar local conditions. *See Landgraf v USI Film Products, Inc*., 511 U.S. 244, 286 (1993) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.").

Again, if Congress intended to give California discretion to adopt whatever standards it likes, without EPA giving any consideration as to whether those standards are "need[ed]," Congress could easily have omitted the requirement for EPA approval of each and every new set of California standards. *Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) (no statute should be read to render any part "inoperative or superfluous, void or insignificant") (citation omitted). Congress did not do that.

Any attempt to bolster EPA's past characterization by reference to *MEMA I* conveniently neglects the fact that *that case* dealt with the enforcement aspects of the Waiver Provision under the Protectiveness Test for in-use maintenance regulations. Contrary to EPA's assertions, *MEMA I* does not suggest that a waiver could be granted for emissions limitations applicable to specific equipment under the Needs Test simply because California had a continuing need for its program "as a whole."

Moreover, EPA ignores the statutory context of the Waiver Provision. The "cornerstone of Title II is Congress' continued express preemption of state regulation of automobile emissions." *Motor Vehicles Mfrs. Ass'n v. New York State Dep't of Env't Conservation*, 17 F.3d 521, 526 (2d Cir. 1994). "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). EPA's prior interpretation eviscerates the preemption goals of Title II by essentially providing a carte blanche to California in the Needs Test to adopt whatever mobile source emissions standards it may choose regardless of need. *See Rodriguez*, 480 U.S. at 525-26 (competing purposes of statute must be honored).

Finally, the Identicality Provision, 42 U.S.C. § 7543(e)(2)(B), provides that any state other than California may adopt and enforce any particular California standard at any time after a waiver grant has been issued by EPA. *See* https://www.epa.gov/state-and-local-transportation/vehicle-emissions-californiawaivers-and-authorizations ("States are not required to seek EPA approval under the terms of section 177."). EPA's past interpretation presumes that Congress would have made preemption of state mobile source emissions standards the "cornerstone" of the statute, yet simultaneously provided for its potential nullification in the Waiver Provision, with no substantive review by EPA as to whether the particular standards were necessary, either in California or any other state.

With an understanding of the policy decisions Congress made in amending the waiver provision in 1977, it is evident that EPA's past interpretation that the term "standards" in the Needs Test means "program as a whole" or "standards, in the aggregate" is unsupportable. This is confirmed by a careful reading of the statutory text, applying traditional canons of statutory construction.

C. The rule of the last antecedent prevents "in the aggregate" from modifying "such California standards"

In addition to rendering the "in the aggregate" language of the 1977 amendments surplusage, EPA's past interpretation violates the rule of the last antecedent. "A limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (reversing lower court because its decision was "contrary to the grammatical 'rule of last antecedent.'"). "[I]n the aggregate" only appears in the Protectiveness Test, and it appears immediately after the phrase "standards."

Therefore, "in the aggregate" can modify only the immediately preceding word "standards" in the Protectiveness Test and not the subsequent and more remote term "standards" in the Needs Test. Accordingly, under the rule of the last antecedent the term "standards" in the Needs Test should be construed without reference to the modifier "in the aggregate," which appears only in the separate and preceding sentence setting forth the Protectiveness Test.

The construction principle of the last antecedent should be followed where, as here, the statutory text, context, and amendment history support its application. *See Lockhart v. United States*, 136 S.Ct. 958, 963 (2016) ("[H]ere the interpretation urged by the rule of the last antecedent is not overcome by other indicia of meaning. To the contrary, [the provision's] context fortifies the meaning that principle commands.").

D. "Standards" in the Plural Is of No Significance

Obviously, the term "standards" is the plural of the word "standard." Congress addressed the meaning of the singular vs. plural by providing that the plural form includes the singular and vice versa. 1 U.S.C. § 1 ("In determining the meaning of any act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties or

things; words importing the plural include the singular"). Accordingly, there is no particular magic in Congress's use of the plural "standards" in the Needs Test; this usage therefore does nothing to support' EPA's past interpretation that this requires an evaluation of California's need for its program "as a whole."

Moreover, a single word in a statute must not be read in isolation but instead is defined by reference to its statutory context. *See King v. St. Vincent's Hospital*, 502 U.S. 215, 221(1991) ("[T]he meaning of statutory language, plain or not, depends on context"); *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"); *Brown & Williamson Tobacco Corp*., 120 S.Ct. at 1300-01 (The "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.).

As explained earlier, the term "standards" appears in the plural because, from the very beginning in 1967, Congress recognized that California's "compelling and extraordinary circumstances" are "sufficiently different from the Nation as a whole to justify standards . . . [that] may, from time to time, need to be more stringent than national standards." S. Rep. No. 90-403 at 33 (1967). Congress thus required California to "justify" specific standards "from time to time" in waiver applications submitted to EPA. The periodic nature of the application process generated the use of the term "standards" in the plural, because Congress contemplated that the waiver process would not be conducted just once but, rather, "from time to time" when California wanted to promulgate and enforce new mobile source emissions standards. *Id*.

Moreover, the use of the plural term "standards" to refer to a single air emission regulation is common throughout the Clean Air Act. For example, the Act commands the Administrator to promulgate "standards which provide that emissions of carbon monoxide from a manufacturer's vehicles . . . may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in stringency to the standard applicable to light-duty vehicles." 42 U.S.C. § 7521(j)(1) (emphasis added). Even though this provision applies only to carbon monoxide emissions within a particular temperature range, the plural is employed because a single regulation governing carbon monoxide emissions is itself comprised of more than one emissions "standard" for carbon dioxide emissions (one for light-duty trucks and another for other light-duty vehicles). *See also id.* at § 7583(d) (governing emissions of a single pollutant applicable to various circumstances ("the standards . . . shall require that vehicle exhaust emissions of NMOG not exceed the levels (expressed in grams per mile) specified in the tables below . . .")). Thus, the use of the plural is consistent with the Clean Air Act's typical description of a single regulation that does more than just one thing. *See Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis").

This plural usage can also be seen in the portion of the Act's waiver provision that allows other states to adopt "standards" that are "identical…to the California standards." 42 U.S.C. §

7543(e)(2)(B). Even though "standards" is in the plural, it is clear that other states need not adopt all of the California standards, but may adopt some while rejecting others.

Given the clarity resulting from the traditional canon of construction regarding the doctrine of last antecedent and the rule against surplusage, coupled with the fact that traditional usage under the Clean Air Act recognizes that the term "standards" includes requirements set forth in a single regulation, the interpretation advanced in the proposed rule is sound: EPA should not read the term "standards" in a manner that contradicts the explicit congressional guidance laid out in 1 U.S.C. § 1 that the usage of the plural includes the singular. Accordingly, all waivers granted to California should be reevaluated in light of this interpretation.

E. The Operation of the Waiver Provision Indicates that Each Waiver Application Must be Evaluated Individually

The operation of the Waiver Provision further undercuts EPA's interpretation. EPA has interpreted the Needs Test as an inquiry into whether California needs its emissions program as a whole. 78 Fed. Reg. at 58099. That interpretation is in tension with the fact that the test is triggered each time California adopts a new standard. If EPA were required to evaluate the need for California's emission program as a whole, there would be no need for EPA to waive federal preemption every time California wanted to enforce a new set of mobile source emissions standards. Congress determined that "from time to time," as California became aware of a need to promulgate certain emissions standards different from the federal ones, it would apply to EPA for waivers. Nothing in the Act suggests that Congress delegated to EPA the policy decision of whether California needed its own mobile source program as a whole. Congress itself had already made that decision in the affirmative.

The absurd results of EPA's interpretation confirm its error. EPA's interpretation of "standards" to mean "program as a whole" leads to the anomalous situation in which the denial of a request for a waiver would contradict Congress's judgment in providing for the waiver process. Congress determined that California needs a more stringent emission program "as a whole" – that is why the Waiver Provision exists in the first place.

The decision Congress delegated to EPA was whether California met the requirements of the Protectiveness Test and Needs Test, and Congress mandated that California seek waivers from EPA each time it wanted to enforce new California-specific mobile source emissions standards. The policy decision that California's "need" for state standards different from the federal ones may arise "from time to time" because of "compelling and extraordinary conditions" in the state is embedded in Section 209 and was not delegated, because Congress made that judgment itself.

If EPA were intended to determine whether California needs the "program as a whole," EPA's determination would be redundant with that already made by Congress. Indeed, if EPA were to determine that California no longer needs a mobile source emissions program, it would be contradicting Congress's policy judgment. *See Brown & Williamson*, 529 U.S. at 125 (EPA may not substitute its judgment for that of Congress.).

On the other hand, applying the Needs Test on a standards-by-standards basis focuses EPA's attention on whether or not California's "compelling and extraordinary circumstances" lead to a conclusion that there is a need for the particular set of standards for which California is applying for a waiver. Even if EPA determines that there is no need for a given specific California standard and the waiver application is denied, EPA's judgment is consistent with Congress's judgment that California needs the opportunity to have its own state mobile source emissions program.

Reading the Clean Air Act in the manner advanced by EPA in the past leads to the untenable conclusion that EPA may act as a legislative, policymaking body without delegated authority from Congress, because the Act itself does not delegate to EPA the authority to determine whether California needs or does not need a mobile source emissions program that differs from the federal one. By making the decision that California does need such a program, Congress reserved that decision-making power for itself. *See* 78 Fed. Reg. at 58099; *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Given the fact that our entire system of governance is based on separation of powers and checks and balances, extending to EPA an implied power to reverse Congress's judgement regarding California's need for its own mobile source emissions program would be absurd. *See Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1215 (2015) (separation of powers, coupled with checks and balances, are the "core principles of our constitutional design, essential to the protection of individual liberty."). Indeed, California's unique topography and geography are unlikely to change any time soon. Where one interpretation of a statute leads to absurd results while another interpretation does not, the interpretation leading to absurd results must be abandoned. *Resolution Tr. Corp. v. Bayside Developers*, 43 F.3d at 1236 (9th Cir 1995); *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 468-69 (D.C. Cir. 1996). *Chevron* deference is not proper when the interpretation of a statutory provision raises a "question of deep 'economic and political significance.'" *King v. Burwell*, 135 S.Ct. at 2489 (citing *UARG*, 134 S.Ct. at 2444). In such circumstances, it is the court's "task to determine the correct reading" of the statute. *Id*. It is self-evident that statutes giving preferential treatment to one state over other states fall within the class of provisions that raise questions of deep "political significance." As the Supreme Court noted, "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith*, 221 U.S. 559, 580 (1911); *accord N.W. Austin*, 557 U.S. at 206-211.

Congress would not leave the implementation and interpretation of such an economically significant and politically controversial statutory provision as Section 209(e) to agency discretion. *See UARG*, 134 S.Ct. at 2444; *Brown & Williamson Tobacco Corp*., 120 S.Ct. at 1315. Moreover, the "cornerstone" role of the waiver provision in Title II of the Act highlights its significance. *See Motor Vehicles*, 17 F.3d at 526.

The interpretation advanced in the proposed rule is superior, as it assigns the same word, "standards" the same meaning in subsections (A) and (B). *See Gustafson v. Alloyd Co*., 513 U.S. 561, 569 (1995) (courts must interpret a statute "as a symmetrical and coherent regulatory scheme"); *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 389 (1959) (proper interpretation of a

statute must "fit, if possible, all parts into an harmonious whole."). Thus, the statute's operation and structure drives the required inquiry under the Needs Test: whether each new emissions regulation setting forth new standards is needed to meet "compelling and extraordinary circumstances."

EPA's proposed rule sets forth the proper standard, and all prior waivers granted to California should be reexamined.

III. EPA PROPERLY APPLIED THE CORECT INTERPRETATION OF THE WAIVER PROVISION TO THE PROPOSED RECISSION OF THE GREENHOUSE GAS WAIVER GRANT

The proposed rescission of the Greenhouse Gas Waiver Grant properly applies the correct standard to the determination of whether a waiver should be granted to California under the Needs Test. California does not "need" its own standards in this area because the effects of carbon emissions on California do not constitute "compelling and extraordinary conditions" peculiar to California. 83 Fed. Reg. at 43247 ("EPA believes that the term 'extraordinary' is most reasonably read to refer to circumstances that are specific o California and the term is reasonably interpreted to refer to circumstances that are primarily responsible for causing the air pollution problems that the standards are designed to address, such as thermal inversions resulting from California's local geography and wind patterns."). California's own greenhouse gas standards will do nothing to ameliorate the effects of the global phenomena of climate change due to carbon levels. 83 Fed. Reg. at 43242, 43245. Accordingly, the waiver previously granted to California for these standards should be withdrawn.

IV. UNDER THE CORRECT INTERPRETATION PROPOSED BY EPA, THE NONROAD DIESEL WAIVER GRANT SHOULD ALSO BE RESCINDED

A. The Nonroad Diesel Waiver Grant Was Issued Using an Impermissible Standard

Relating to California's Nonroad Engine Rules, EPA tried to justify the Nonroad Diesel Waiver Grant by an "alternative" argument, reasoning that it was properly issued because the emissions standards set forth in the waiver application are needed to solve emissions concerns in two localized areas in California. EPA Waiver Grant for California's Nonroad Engine Pollution Control Standards – 78 Fed. Reg. 58,090, 58,102-103 (Sept. 20, 2013). As a threshold matter, neither the California Commenters nor the general public received an opportunity to comment on EPA's application of the "alternative" test. EPA Notice of Opportunity for Public Hearing and Comment, 77 Fed. Reg. 50,500 (Aug. 21, 2012). EPA's Federal Register notice was silent regarding the extent to which EPA would use any criteria other than that which it had used in the past, namely, whether California has compelling and extraordinary conditions necessitating its own "program as a whole." The California Commenters at that time commented that the correct test was whether California had compelling and extraordinary conditions necessitating the specific

standards for which the waiver request was made – the same test that EPA is now proposing. EPA Hearing Transcript on California Waiver Application at pp.40-49 (Sept. 20, 2012). In response, EPA used both its past "program as a whole" test and, as an alternative, summarily concluded that California needed the particular nonroad diesel engine rules, without providing an opportunity for comment on the manner in which it was applying the so-called "alternative" Needs Test.

The sole rationale for granting the waiver based on the alternative test is striking. EPA stated that California had two specific air quality control regions, the Los Angeles South Coast region and the San Joaquin Valley region, that could not comply with the California State Implementation Plan unless the waiver application was granted. But in the Waiver Grant EPA neglected to mention that California has 14 air quality control regions. Thus, EPA determined that there are "compelling and extraordinary conditions" requiring the *statewide* Nonroad Diesel Waiver Grant because there are two out of 14 air quality districts that need the nonroad diesel standards to comply with the State Implementation Plan. Why the remaining 12 areas must be subjected to the emissions requirements based on conditions alleged to exist solely in two areas of the state was not addressed in the Nonroad Diesel Waiver Grant. Thus, there is no rational connection between the facts found and the decision made by EPA in its application of the "alternative" test, i.e., the test correctly proposed by the Agency here.

Bringing only two of 14 air quality control regions into attainment cannot justify a finding that California has "compelling and extraordinary conditions" requiring statewide standards. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) (vacating EPA rule because it lacked a "rational connection between the facts found and the choice made"). EPA cited no "compelling and extraordinary circumstances" requiring California to impose the expense of the more stringent standards on any air quality control regions other than the two regions noted by EPA in its waiver grant. The nature of California's topography and geography that gives rise to its special treatment under the Clean Air Act also creates a situation in which air quality problems are especially localized. *See* 78 Fed. Reg 183 at 58098 (justifying more stringent nonroad emissions standards to address "localized health risk") (citing CARB Resolution 10–47 at EPA–HQ–OAR–2008–0691–0283). Thus, EPA cannot find a "compelling and extraordinary" need for statewide standards based on local conditions in only two of 14 regions. *See* 78 Fed Reg at 58103. Although the California Petitioners did not raise this specific issue during the public comment period, they were not on notice that EPA would try to support the waiver grant under the "alternative test" on such a thin thread of reasoning. Specifically, the call for comments on the waiver application was utterly silent regarding these matters. The fact that the California Petitioners were given zero opportunity to comment on the "alternative" rationale for granting the waiver, obviates any potential requirement to comment on a rationale that was not available in the first instance for public comment. That is because, historically, EPA used the "program as a whole" test and, accordingly, the Agency should have provided notice and comment opportunity before applying a different test. *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982). Furthermore, nothing in the Clean Air Act requires EPA to grant a statewide waiver to California where the sole justification is comprised of an argument focusing on two localized regions. Conversely, nothing

in the Act forbids EPA from granting a waiver for specific areas within California where such "compelling and extraordinary conditions" do, in fact, occur. And there was nothing stopping California from making a waiver application limited to the two areas of concern.

It may be argued that the ability of other states to "adopt" the California standards prevents California from creating standards that apply only to particular air districts in California. However, just as California could create standards that apply only in districts that would not otherwise be able to achieve attainment with federal standards, so too, other states could adopt those limited standards in comparable nonattainment areas. If other states adopted standards only in such nonattainment areas, those standards would be "identical…to the California standards" as required by the Waiver Provision. 42 U.S.C. 7543(e)(2)(B).

Finally, EPA's prior administration repeatedly asserted that challengers had the burden of proof in this matter, invoking *MEMA I* for the proposition that the burden of proof lies with the parties favoring denial of the waiver. But *MEMA I* did not involve the Needs Test at issue here. *See MEMA I*, 627 F.2d 1095, 1122 (1979) ("Since this proceeding involved enforcement procedures, the only findings of relevance are whether the procedures impact on California's *protectiveness* determination . . .") (emphasis added). Furthermore, *MEMA I* addresses the evaluation of EPA's factual findings, not EPA's legal interpretation. *See* 627 F.2d at 1122 ("whether the parties favoring a denial of the waiver have shown that the *factual circumstances* exist in which Congress intended denial of the waiver") (emphasis added). In the Nonroad Diesel Waiver Grant, EPA made a factual finding that only two of fourteen air quality control regions in California needed the proposed standards for diesel engines in order to comply with the SIP, and EPA used that factual finding to support a statewide waiver, citing no reason why the other twelve regions needed the proposed standards. Accordingly, there is no rational connection between the facts found and the decision made to grant a waiver for the other twelve regions. By the same reasoning, the California Commenters met their burden of proof that the "factual circumstances" did not support a statewide waiver grant.

B. EPA Has Inherent Authority to Reconsider and Rescind California Waiver Grants

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125–26 (2016) (internal citations and quotation marks omitted). Further, "[a]n initial agency interpretation is not instantly carved in stone [although] reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation. So long as an agency adequately explains the reasons for a reversal of policy, its new interpretation of a statute cannot be rejected simply because it is new." *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014). As the Supreme Court has observed, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. . . . [I]n *Chevron*

itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy."). *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981-82 (2005) (citing *Chevron v. NRDC*, 467 U.S. 837, 857-58 (1984).

Accordingly, EPA may determine as a matter of policy that the Nonroad Diesel Waiver Grant should be rescinded due to the agency's prior flawed interpretation of the requirements of the Needs Test, and its invalid application of its "alternative test." *See Smiley v. Citibank (South Dakota), N. A*., 517 U.S. 735, 742 (1996) ("[regulatory] change is not invalidating. . . ."); *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 496 (D.C. Cir. 2016) ("An agency 'must consider varying interpretations and the wisdom of its policy on a continuing basis.'") (quoting *Brand X*, 545 U.S. at 981).

At the very least, EPA is duty-bound to act on the administrative petition filed by the California Commenters seeking a rescission of the Nonroad Diesel Rule, given the fact that the petition has been pending for over a year. The Administrative Procedure Act provides that each agency "shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The APA further provides that, "within a *reasonable time*, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (emphasis added). *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) ("a reasonable time for agency action is typically counted in weeks or months, not years"); *Nat'l Tank Truck Carriers, Inc. v. Fed. Highway Admin*., No. 96-1339, 1997 WL 150088, at *1 (D.C. Cir. Feb. 27, 1997) ("20-month delay in acting on the petition for rulemaking is disturbing"); *Pesticide Action Network N. Am. v. EPA*, 798 F.3d 809 (9th Cir. 2015) (granting mandamus where the EPA had not responded to an administrative petition). Opening a formal administrative docket regarding the petition would be a good start in dealing with the petition and would show good faith on the part of the Agency. Any further substantial delay in taking such a first step would be actionable under applicable case law.

Moreover, EPA has an obligation to the California Commenters and to the Ninth Circuit to act expeditiously in connection with the stay of the litigation authorized by the Court. *See Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 426 (D.C. Cir. 2018) (holding a case in abeyance is an "exercise [of] discretion"), *judgment entered*, No. 15-1219, 2018 WL 4158384 (D.C. Cir. Aug. 21, 2018); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (agency cannot stave off judicial review by unwarranted delaying tactics, otherwise "a savvy agency could perpetually dodge review").

CONCLUSION

In the proposed rescission of the Greenhouse Gas Waiver Grant, EPA has identified the flaws in its prior interpretation of the Waiver Provision of the Clean Air Act. The Agency should finalize the proposed rescission and apply this interpretation to a reevaluation of the Nonroad Diesel Waiver Grant at the earliest opportunity in light of the pending litigation and administrative petition.

Respectfully submitted,

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