
No. 13-74019

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALTON TRUCKING, INC., ET AL.,

Petitioners,

v.

UNITED STATES ENVIORNMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Appeal from the Environmental Protection Agency EPA
HQ-OAR-2008-0691
78 Fed. Reg. 58,090 (September 20, 2013)

OPENING BRIEF OF PETITIONERS DALTON TRUCKING, INC., ET AL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Petitioners provide the following disclosures:

Dalton Trucking, Inc., is a California corporation engaged in the business of operating and leasing loaders, dozers, blades, and water trucks and performs specialized services in open top bulk transportation, lowbed, general freight on flatbeds and vans, as well as rail, intermodal, and 3PL services. Dalton Trucking, Inc., has no parent companies. No publicly held corporation has 10% or greater ownership in Dalton Trucking, Inc.

Loggers Association of Northern California, Inc. ("LANC") is a nonprofit California trade association representing the interests of its members involved in the logging industry in Northern California. LANC has no parent companies. No publicly held corporation has 10% or greater ownership in LANC.

Robinson Enterprises, Inc. ("Robinson") is a California corporation engaged in various businesses, including forest products and fuels. Robinson has no parent companies. No publicly held corporation has 10% or greater ownership in Robinson.

Nuckels Oil Co., Inc. dba Merit Oil Company ("Merit Oil Company") is a California corporation and is a petroleum jobber, wholesaler, and distributor. Merit Oil Company has no parent companies. No publicly held corporation has 10% or greater ownership in Merit Oil Company.

Construction Industry Air Quality Coalition ("CIAQC") is a nonprofit California trade association representing the interests of other California nonprofit trade associations and their members whose air emissions are regulated by California state, regional, and local regulations, as well as federal regulations. CIAQC has no parent companies. No publicly held corporation has 10% or greater ownership in CIAQC.

Western Trucking Association, Inc. ("WTA") is a nonprofit California trade association representing the interests of over 1,000 members involved in a variety of business throughout California whose members own and operate on-road and non-road vehicles, engines, and equipment. WTA has no parent companies. No publicly traded corporation has 10% or greater ownership in WTA.

Delta Construction Company, Inc. is a California corporation engaged in the business of road construction, performing services such as road paving, reconstruction, shoulder widening, and fabric installation. Delta Construction Company, Inc., has no parent companies. No publicly held corporation has 10% or greater ownership in Delta Construction Company, Inc.

Southern California Contractors Association, Inc. ("SCCA") is a nonprofit California corporation representing the interests of construction contractors operating in Southern California. SCCA has no parent companies. No publicly held corporation has 10% or greater ownership in SCCA.

Ron Cinquini Farming ("Cinquini") is a farming business located in Central California. Cinquini has no parent companies. No publicly held corporation has 10% or greater ownership in Ron Cinquini Farming.

United Contractors is a trade association representing union-affiliated contractor businesses and associate firms throughout the western United States. United Contractors has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Federal Regulations

State Regulations

Miscellaneous

STATEMENT OF SUBJECT MATTER JURISIDICTION

Petitioners Dalton Trucking, Inc.; Loggers Association of Northern California, Inc.; Robinson Enterprises, Inc.; Nuckles Oil Company, Inc., dba Merit Oil Company; Construction Industry Air Quality Coalition; Western Trucking Association, Inc., formerly California Construction Trucking Association, Inc.; Delta Construction Company, Inc.; Southern California Contractors Association, Inc.; Ron Cinquini Farming; and United Contractors (the "California Petitioners" or the "Petitioners") seek review of the United States Environmental Protection Agency's ("EPA's") final agency action published at 78 Fed. Reg. 58,090 (Sept. 20, 2013) (the "California Nonroad Engine Waiver Decision") (ER—001-033), granting California's application under the Clean Air Act, 42 U.S.C. § 7401 et seq., for waiver from federal preemption of California's *Nonroad Engine Pollution Control Standards - Off-Road Compression Ignition Engines - In-Use Fleets,* 13 Cal. Code Regs. §§ 2449-2449.3 (the "Nonroad Engine Rules"). On November 19, 2013, the Petition for Review was filed within the requisite 60-day period under CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1), and this Court has jurisdiction under that provision, as well as under 5 U.S.C. §§ 702, 706.

STATEMENT OF ISSUES

1. Whether EPA applied the correct statutory standard to make the California Nonroad Engine Waiver Decision;

2. Whether section 209(e)(2)(a)(ii) of the Clean Air Act requires EPA to make California waiver decisions based on compelling and extraordinary conditions in California necessitating the particular air emission standards for which California files a waiver application or whether it is permissible for EPA to base a waiver decision on California's need to have its own motor vehicles emissions program "as a whole;"

3. If EPA's waiver decisions must be based upon California's need for the particular standards for which a waiver application is made, whether there is a rational connection between the facts found by EPA and EPA's decision to grant California's waiver application;

4. Whether EPA's decision to grant the waiver application was arbitrary and capricious or otherwise not in accordance with law.

FEDERAL STATUTES AND REGULATIONS

Pertinent statutes, regulations, and legislative history are in the Statutory Addendum.

STATEMENT OF THE CASE AND FACTS

This case is about whether EPA used impermissible criteria to grant California's application for a waiver from federal preemption for certain mobile source emissions regulations.

Background and Procedural History

To encourage travel and commerce throughout the nation, the Clean Air Act ("CAA" or "the 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. California is granted a special privilege to have its own motor vehicle emissions standards if it applies to EPA and seeks waivers from federal preemption when it wishes to promulgate mobile source emissions controls that differ from the federal ones. In making a waiver application, California must show that it needs the waiver to meet "compelling and extraordinary conditions" in the state. 42 U.S.C. § 7543(e)(2)(a)(ii). This case involves only nonroad vehicles. Specifically, the California Petitioners challenge EPA's California Nonroad Engine Waiver Decision made on September 20, 2013, on the ground that EPA used impermissible criteria when it granted the waiver application at issue in this case.

Petitioners take the position that the "need" set forth in the CAA refers to California's need for the specific standards for which a waiver application is made.

EPA contests that position, arguing that the "need" test applies not to California's specific need for the particular standards for which a waiver is sought but, rather, California's need to have its own motor vehicle air emissions program "as a whole." *See* 74 Fed. Reg. at 32,761 (July 8, 2009). ER—010 n.57.

The CAA mandates that EPA promulgate regulations implementing the waiver provision, *see* 42 U.S.C. § 7543(e). EPA promulgated the regulations in 1994. *See* 59 Fed. Reg. 36,969 (July 20, 1994) ("EPA's 1994 California Waiver Rule"). The preamble accompanying EPA's 1994 California Waiver Rule states that under CAA section 209(e)(2)(A) "California may adopt, but not enforce, nonroad standards prior to EPA authorization." 59 Fed. Reg. at 36,982. The rule, now codified at 40 C.F.R. § 1074.101(a) and (b), specifies that, in making a waiver application, California must "provide the record on which the state rulemaking was based" and that EPA "will provide notice and opportunity for a public hearing regarding such [waiver] requests." *See* 59 Fed. Reg. at 36,987 (promulgating original version of the rule at 40 C.F.R. § 85.1604(a) and (b) (1994)).

On March 1, 2012, after a California administrative rulemaking process lasting several years, which included two amendments to the original rules submitted to EPA, the California Air Resources Board ("CARB") requested EPA to authorize CARB's current regulations, which require substantial reductions of small particulate matter ("PM 2.5") and oxides of nitrogen ("NOx") emissions from in-use

nonroad diesel fueled equipment (the "Nonroad Engine Waiver Request"). *See generally* 78 Fed. Reg. at 58,093. ER—002, 005.

EPA entertained comments on CARB's Nonroad Engine Waiver Request, 77 Fed. Reg. 50,500 (Aug. 21, 2012), ER—034-036, and held a public hearing on September 20, 2012. 78 Fed. Reg. at 58,093, ER—005. Comments were duly submitted by the California Petitioners and others. *See id*. at 58,094 n.29 (listing written comments) ER-006; *see also* EPA-HQ-OAR-2008-0691 (EPA's ORD Decision docket; Sept. 20, 2012 EPA public hearing) (hereafter, "ORD Decision docket 0691-xxxx").[1] ER – 037-160.

On September 20, 2013, EPA granted CARB's waiver request for California's Nonroad Engine Rules, finding that the grounds needed to grant the waiver under CAA section 209(e)(2)(A), 42 U.S.C. § 7543 (e)(2)(A), had been met. 78 Fed. Reg. at 58,091, 58,097, 58,111-19. ER—003, 009, 023-031.

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. ER-002-03. While specific elements of the Nonroad Engine Rules have changed since they were first presented to EPA for approval in 2008, a summary by CARB staff at that time still holds true:

[1] All "original" EPA administrative docket entries cited in this brief are available via the publicly - accessible federal website, www.regulations.gov, with "EPA-HQ-OAR-2008-0691" entered as the search term.

> The scope of the regulation is far-reaching: vehicles of dozens of types used in over 8,000 fleets, in industries as diverse as construction, air travel, manufacturing, landscaping, and ski resorts . . . . The regulation will affect, among others, the warehouse with one diesel forklift, the landscaper with a fleet of a dozen diesel mowers, the county that maintains rural roads, the landfill with a fleet of dozers, as well as the large construction firm or government fleet with hundreds of diesel loaders, graders, scrapers, and rollers.

ORD Decision docket 0691-0002 at 1. ER—010 n. 59. *See* ER 161-62.

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. *See* ER 163-269. ORD Decision docket 0691-0292, at 1 (CARB Final Regulation Order, promulgating Cal. Code Regs. tit. 13, § 2449(b)(1)). *See also*, ER—010.[2]

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,

[2] Specific categories of diesel fleets are excluded from the ORD Fleet Requirements, including, inter alia, recreational off-highway vehicles, husbandry implements, vehicles used solely for agriculture, and "off-road vehicles owned and operated by an individual for personal, non-commercial, non-governmental purposes." ORD Decision docket 0691-0292, at 2 (promulgating Cal. Code Regs. tit. 13, § 2449(b)(2)(G)).

§ 2449.1(a) & Tables 3-4). ER—191, 230-32, 239-40 (Tables 3 and 4 are on pgs. 49-50).

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)). ER—191, 196. 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 multi-state 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). ER—037, 158-59.

After EPA granted the waiver request on September 20, 2013. 78 Fed. Reg. 58,090, et seq., the Petitioners filed petitions to review on November 19, 2013, in this Court and in the United States Court of Appeals for the District of Columbia Circuit, because of the perceived ambiguity in the CAA as to which of the two courts

was the proper venue. The Federal Respondents filed a motion to dismiss in this Court, arguing that the D.C. Circuit was the proper venue. On March 11, 2014, this Court ruled that it would hold the motion to dismiss in abeyance pending a determination by the D.C. Circuit as to whether the petition for review was properly filed in that Court. Dkt. 19. On December 18, 2015, the D.C. Circuit ruled that venue was not proper in that court. *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875 (D.C. Cir. 2015). Accordingly, on April 18, 2016, the Federal Respondents filed a motion to withdraw their motion to dismiss. Dkt. 22. This Court granted the motion to withdraw and issued a briefing schedule by order dated June 10, 2016. Dkt. 24. On July 12, 2016, Petitioners made a streamlined request for a 30-day extension of the briefing schedule, Dkt. 26, which was granted by the Court on the same day. Dkt. 27.

Standing of the Petitioners

Declarations of the Petitioners are submitted herewith. Petitioner Delta Construction Company, Inc. ("Delta"), owns and operates a business that utilizes non-road vehicles powered by diesel engines subject to the CARB Nonroad Engine Rules. Norman Brown Decl. ¶¶ 3, 5. Delta is a member of the Western Trucking Association. *Id*. ¶ 2.

Before EPA made its California Nonroad Engine Waiver Decision, CARB could not enforce the rule. *Id*. at ¶ 6. Because of EPA's California Nonroad Engine

Waiver Decision, CARB can enforce the rule. *Id*.; 59 Fed. Reg. at 36,982. Delta is concretely injured by the rule because the rule requires Delta to purchase expensive retrofit equipment in order to comply with the emissions standards set forth in the rule. Norman Brown Decl. ¶ 6. If Delta had the capital or credit necessary to purchase the new retrofit equipment for all of its vehicles subject to the rule, it would do so. *Id*. at ¶ 8. But Delta does not have the capital or the credit required to purchase for all of its vehicles the expensive new equipment mandated by the CARB Nonroad Engine Rules. *Id*. At the same time, Delta is prohibited from operating its off-road diesel vehicles without retrofitting them in compliance with the rules. *Id*.

Because the cost of retrofitting is prohibitive, Delta was forced to take out of service a number of nonroad vehicles, in order to get below the current applicability threshold of 5,000 horsepower, resulting in the instant destruction of the value of the equipment, a decrease in Delta's ability to maintain its former workload, and a consequent loss of profit reflected on its balance sheet. *Id*. at 9. As a result, Delta's ability to borrow money to support even the reduced current operations has been severely damaged. *Id*. Because of the reduction in horsepower capacity, Delta has also been forced to refrain from bidding on new jobs that require the additional capacity, resulting in layoffs of experienced and valuable employees. *Id*.

Even with the decrease in total horsepower capacity and consequent loss of profits, employees, and business opportunities stemming from the rules, Delta will

be subject to the full retrofit requirements in 2019, when the phase-in period terminates and all of Delta's nonroad equipment will be covered by the rules. *Id*. at ¶ 10. Because its business prospects have been severely damaged by the rules, Delta will not be able to afford the retrofits required in 2019. As a result, Delta will be forced either to go out of business or find ways of cutting costs in other areas by further changing or reducing its business activities. *Id*. In either event, this will likely mean layoffs of employees, and a negation or reduction of profitability. *Id*.

These adverse impacts have injured and will continue to injure Delta, as long as EPA's California Nonroad Engine Waiver Decision (sometimes referred to as "EPA's Waiver Grant") remains effective and in place. *Id*. ¶ 11. If EPA's Waiver Grant were to be vacated, Delta would no longer be injured by the cost increases attributable to the CARB Nonroad Engine Rules because CARB would no longer be authorized to enforce them. Accordingly, Delta would no longer suffer the economic losses caused by EPA's Waiver Grant. *Id*. ¶ 12.

Petitioner Dalton Trucking, Inc. ("Dalton") is also concretely injured by EPA's waiver grant for the Nonroad Engine Rule because the rule requires Dalton to purchase expensive retrofit equipment, if it is to stay in business, in order to comply with the rule's emissions standards. Klenske Decl. ¶ 5-6. Dalton is a member of the Western Trucking Association. *Id*. ¶ 2.

Dalton is injured by the rule and the waiver grant because Dalton will incur additional costs to purchase the retrofit equipment for its existing vehicles or will be required to take then out of service. *Id*. at ¶ 7. As a result, Dalton will lose operating funds and borrowing ability, resulting in reduction in profitability, cash flow problems affecting business operations, and possible layoffs of employees, all of which will adversely impact Dalton's Business. *Id*. These adverse impacts have injured and will continue to injure Dalton as long as EPA's Waiver Grant remains effective and in place. *Id*. ¶ 8. If EPA's Waiver Grant were to be vacated, Dalton would no longer be injured by the cost increases attributable to the CARB Nonroad Engine Rules because CARB would no longer be authorized to enforce them. *Id*. ¶ 9. *See* 59 Fed. Reg. at 36,982. Accordingly, Dalton would no longer suffer the economic losses caused by EPA's Waiver Grant. *Id*.

Petitioner Western Trucking Association, Inc., ("WTA") is a trade association representing businesses and individuals concretely injured by the rule and the waiver grant in that they utilize nonroad vehicles in their businesses. The vehicles are subject to the rule's emissions standards and WTA's members are now required to purchase expensive retrofit equipment in order to comply with the emissions standards set forth in the rule. Lee Brown Decl. ¶¶ 3, 5. WTA members are injured by the rule because they either incur additional costs to purchase the expensive new

retrofits for the equipment they use in their businesses or are required to take the equipment out of service. *Id*. at ¶ 7.

For WTA members that have the cash or credit to purchase the expensive retrofits, they are injured because they lose operating funds and borrowing ability, resulting in reduction of profitability, severe cash flow problems affecting business operations, and layoffs of employees. *Id*. Other members cannot afford to install the expensive retrofits mandated by the rules and have been forced to take out of service a number of nonroad vehicles, in order to get below the current applicability threshold of 5,000 horsepower, resulting in the instant destruction of the value of the equipment, a decrease in their ability to maintain their former workload, and a consequent loss of profit reflected on their balance sheets. *Id*. ¶ 8. As a result, they will either go out of business or find ways of cutting costs in other areas by further changing or reducing their business activities. *Id*. In either event, this will mean further layoffs of employees, a negation or further reduction of profitability, and, in some cases, business shutdowns. *Id*. These adverse impacts have injured and will continue to injure the members of WTA, as long as the waiver grant remains effective and in place. *Id*. ¶ 9. If EPA's Waiver Grant were to be vacated, the members of WTA would no longer be injured by the cost increases attributable to the CARB rules because CARB would no longer be authorized to enforce them. *Id*.

¶ 10. *See* 59 Fed. Reg. at 36,982. Accordingly, WTA members would no longer suffer the economic losses caused by EPA's Waiver Grant. Lee Brown Decl. ¶ 10.

One of the missions of WTA is to preserve and foster regulatory programs that encourage the use of business equipment for the duration of its useful life without the need for stringent retrofits or replacements. To that end, WTA has been forced to expend its resources on challenging EPA's Waiver Grant. *Id*. ¶ 11. These are resources that WTA could have devoted to accomplish its other missions, such as representing the interests of its members in a variety of other contexts, including legislative and regulatory reforms to benefit its members in a variety of ways, such as encouraging, among other things, highway and infrastructure repair for the safety of WTA members. *Id*. The channeling of resources away from accomplishing those important goals of WTA has directly injured WTA as an organization. *Id*. That injury will be redressed if EPA's Waiver Grant is vacated because WTA will no longer be required to devote any resources to challenging or encouraging amendment or repeal of the CARB rules. *Id*.

These adverse impacts have injured and will continue to injure the members of WTA, as long as EPA's Waiver Grant remains effective and in place. *Id*. ¶ 8. If EPA's Waiver Grant were to be vacated, the members of WTA would no longer be injured by the cost increases attributable to the CARB Off-Road Diesel Rules because CARB would no longer be authorized to enforce them. Accordingly, the

members of WTA would no longer suffer the economic losses caused by EPA's Waiver Grant. *Id*. ¶ 9. *See* 59 Fed. Reg. at 36,982.

If any one of the Petitioners has standing, the case may proceed. *City of Las Vegas, Nev. v. F.A.A.,* 570 F.3d 1109, 1114 (9th Cir. 2009). Accordingly, this challenge to the waiver grant presents a "case or controversy" under Article III of the United States Constitution.

STANDARD OF REVIEW

The Court sets aside agency action or inaction when (1) the agency fails to comply with a nondiscretionary statutory duty, *Bennett v. Spear*, 520 U.S. 154, 172 (1997); (2) the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law," 5 U.S.C. § 706, 42 U.S.C. § 7607(d)(9); (3) the action contradicts congressional intent, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843 n.9 (1984); or (4) there is no rational connection between the facts found and the choice made by the agency. *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm*, 463 U.S. 29, 43 (1983); *see* 5 U.S.C. § 706.

Further, when analyzing an agency's interpretation of a statute, "courts often apply the two-step framework announced in *Chevron*. *See King v. Burwell*, 135 S.Ct. 2480, 2488 (2015). Under that framework, the court asks, "whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable." *Id.*

Chevron's interpretation is not proper, however, when the interpretation of a statutory provision raises a "question of deep economic and political significance that is central to the statutory scheme." *Id.* at 2489 (internal quotation marks omitted.) In such circumstances, it is the court's task to determine the correct reading of the statute. *Id.*

SUMMARY OF ARGUMENT

The Court should vacate EPA's California Nonroad Engine Waiver Decision and remand it to the Agency. Section 209(e)(2)(A)(ii) of the CAA 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.

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

EPA takes 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. at 32,761, ER—037, 079. Such an interpretation is impermissible under the CAA, 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." Here, 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.

In response to comments submitted by the California Petitioners, 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. ER—010. But California has 14 air quality control regions, a fact EPA conveniently ignored in it waiver decision. EPA has not justified the application of *statewide* standards to solve two localized concerns.

Indeed, as both CARB and EPA have admitted, 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) (ER—010). 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.

Finally, the public was never given the opportunity to make meaningful comment on EPA's application of the "alternative" test. The Federal Register notice setting forth the opportunity for comment on the waiver application was silent regarding the possibility that any such "alternative" test would be either applied or even contemplated. *See* ER – 034-35. Accordingly, both remand and vacatur are appropriate.

ARGUMENT

I.

EPA APPLIED AN INCORRECT STANDARD IN GRANTING THE CARB WAIVER APPLICATION

By singling out California for special treatment, the wavier provision departs from the fundamental constitutional principle of equal sovereignty among states, requiring that the waiver provision be interpreted so as to minimize the disparate treatment. With an understanding of the Congressional policy decisions underlying the statutory text, a close reading of the provision's language reveals that EPA's interpretation violates both the rule against surplusage and the doctrine of last antecedent, while at the same time impermissibly conflating two distinct decision making criteria that Congress intended to function independently of each other.

A. The Clean Air Act Strikes A Delicate Balance Between Mobile Source Emissions Controls and Interstate Commerce, Limiting EPA's Authority to Grant Waivers to California

The CAA 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. Environmental Protection Agency*, 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, ER-010. 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. United States 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.")

Here, as in *N.W. Austin,* the waiver provisions at issue create a constitutional anomaly, whereby one state, California, is treated differently than the others under the CAA's mobile source provisions. California's special position harms other states in two ways: (1) it gives California an outsize 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 United States, 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.

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. E.P.A.*, 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 (U.S. 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. Louisiana,* 363 U.S. 1, 16 (1960) (referring to the historic tradition that states enjoy "equal sovereignty").

EPA takes the position 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 *Util. Air Reg. Group* and *Brown & Williamson*. It is also contrary to the actual language and plain meaning of the statute and its amendment history.

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.[3] *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.

B. The Amendment History of Section 209(e)(2)(A)(ii) Inexorably Drives the Conclusion That the "Needs" Test Must Be Applied on a Standard-By-Standard Basis

An understanding of the policy choices Congress made in enacting the current version of the waiver provision is essential to understanding the statutory language.

1. The Air Quality Act of 1967

The original Clean Air Act did not contain a preemption provision for motor vehicles. *See* Pub. L. No. 89-272, 79 Stat. 992 (Oct. 20, 1965). In 1967, Congress enacted the "Air Quality Act of 1967," which amended the Clean Air Act so as to include: (1) a provision explicitly preempting state emission standards for new motor vehicles, (2) a recognition that California had certain "compelling and extraordinary" conditions that could require the state to promulgate new motor vehicle emissions standards that differed from the federal ones, and (3) a provision

[3] The Supreme Court has construed the term "standards" as used in Section 209 to "denote . . . numerical emissions levels with which vehicles or engines must comply." *Engine Mfrs.*, 541 U.S. at 254. *See Adamo Wrecking Co. v. United States*, 434 U.S. at 286 ("standard" means a quantifiable level of emissions to be attained by the use of techniques, controls, and technology).

authorizing California to request waivers from federal preemption on a case-by-case basis when California could make a showing that it needed a particular emission standard to meet its "compelling and extraordinary conditions." In relevant part, the text of then-Section 208 reads:

> (a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this title. . . .
>
> (b) The Secretary shall, after notice and opportunity for public hearing, waive application of this section *to any State which has adopted standards* (other than crankcase emission standards), *for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966,* unless he finds that such State does not require standards *more stringent than applicable Federal standards* to meet *compelling and extraordinary conditions*, or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title.

Pub. L. No. 90-148, 81 Stat. 485 (Nov. 21, 1967). (Emphasis added). The only state that had new motor vehicle standards in place prior to March 30, 1966, was California.

Thus, from its beginning, the waiver provision applied solely to specific "standards" that California may require based on compelling and extraordinary conditions in the state. Congress authorized EPA's predecessor to grant waivers from federal preemption but only when EPA found that California required "standards more stringent than applicable Federal standards." Had Congress wanted

to apply the waiver provision to California's need for a separate motor vehicles emissions program as a whole, it could have used the term "program" rather than the term "standards" in the amendments, but it did not. Rather, Congress made the policy determination that, because of California's "extraordinary and compelling conditions," California could have the option of promulgating its own motor vehicle emissions standards on a case-by-case basis. Having made that overarching policy decision, Congress delegated to EPA's predecessor the authority to determine whether California requires or, more precisely, "does not require" the particular emissions standards for which waiver from federal preemption is sought.

In the 1967 amendments, Congress recognized that California's conditions 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) (emphasis added). Thus, Congress intended that "from time to time" California could submit waiver applications based on "compelling and extraordinary circumstances" that "may . . . need to be more stringent than national standards" and that EPA would deny such periodic waiver applications if it found that California "does not require" any particular standards for which a waiver application is made.

2. The Clean Air Act Amendments of 1977

Ten years after the 1967 preemption provision was enacted, the "more stringent" requirement proved unworkable, because the same technologies that would reduce some emissions would also increase others. To deal with this technological anomaly, in 1977 Congress replaced the requirement that *each* standard be more stringent with the more flexible "Protectiveness Test," and at the same time counterbalanced that test by adding a separate "Needs Test" that addresses the national interest in the free flow of interstate commerce. *MEMA I,* 627 F.2d 1095, 1110 (D.C. Cir. 1979).

In relevant part, the 1977 Amendments to the waiver provision set forth in Section 209(b) reads:

> (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, *in the aggregate, at least as protective of public health and welfare* as applicable Federal standards. *No such waiver shall be granted* if the Administrator finds that:
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does *not need* such State standards to meet *compelling and extraordinary conditions*, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.

Clean Air Act Amendments of 1977, § 207, Pub. L. No. 95-95, 91 Stat. 685 (Aug.

7, 1977) (emphasis added). Thus, the 1977 Amendments did away with the 1967 requirement that each California standard be "more stringent" than the corresponding federal standard and created *two* separate tests with differing purposes: (a) the Protectiveness Test,[6] which is designed to ensure California has the ability to adequately protect its residents' health; and (b) the Needs Test, which is designed to ensure that California's mobile source emission regime does not unnecessarily burden interstate commerce.

To meet the Protectiveness Test under the 1977 amendments, the waiver application need only show that California has made a determination that its mobile source emissions standards "in the aggregate" will as protective of health and welfare as applicable federal standards. Once EPA satisfies itself that California has in fact made such a determination, EPA's inquiry stops under the Protectiveness Test. On the other hand, under the Needs Test EPA is prohibited from approving the waiver application if California "does not need" such standards. Accordingly, California is required to affirmatively demonstrate to EPA that it needs the preferred state-specific standards to meet "compelling and extraordinary conditions." Thus, Congress provided California substantial latitude with respect to guarding its own citizens' health while limiting its ability to adopt standards that would burden

[6] Petitioners do not challenge Defendants' determinations under the Protectiveness Test.

interstate commerce without an explicit showing of "compelling and extraordinary conditions" necessitating the standards for which a waiver is sought. Significantly, in describing the change made in the waiver provision in 1977, the House Report observes that California may need to have specific "quantitative" standards that differ from the federal ones. H.R. Rep. No. 294, 95th Cong. 1st Sess. 302 (1977). As set forth in more detail in Sections II, *infra,* there is no indication that, by using the term "standards," Congress intended to delegate to EPA the authority to determine whether California needed its own "program," as Congress itself had already made that policy decision.

Thus, the Protectiveness Test applies to the issue of whether the California standards "in the aggregate" are at least as protective of human health and the environment as the federal standards are in the aggregate. The separate Needs Test focuses on whether California needs the *particular* standards for which waiver is sought, based upon "compelling and extraordinary conditions" in the state.

3. Clean Air Act Amendments of 1990

By its own terms, Section 209(b) is limited to new motor vehicles and engines used on roads. It was only in 1990 that the Clean Air Act was amended to cover nonroad vehicles and engines, both new and existing, in a new Subsection 209(e):

> (e) NONROAD ENGINES OR VEHICLES.
>
> (1) PROHIBITION ON CERTAIN STATE STANDARDS. No State or any political subdivision thereof shall adopt or attempt to enforce any

> standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this Act.
>
> (A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.
>
> (B) New locomotives or new engines used in locomotives.
>
> . . .
>
> (2) OTHER NONROAD ENGINES OR VEHICLES. (A) In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that:
>
> (i) the determination of California is arbitrary and capricious,
>
> (ii) California does not need such California standards to meet compelling and extraordinary conditions, or
>
> (iii) California standards and accompanying enforcement procedures are not consistent with this section.

Clean Air Act Amendments of 1990, § 222(b), 1990 S. 1630 (Nov. 9, 1990). While Section 209(e)(1) is not at issue in this case, Section 209(e)(2) is the operative language for nonroad engines and vehicles at issue here, and the language in that subsection is substantially similar to the language for on-road vehicles and engines in Section 209(b) added by the 1977 Amendments. Accordingly, the analysis set

forth in Section I.B.2., supra, applies with equal weight to the relevant language in the 1990 Amendments governing nonroad engines and vehicles.

"Under the new act, as under current law, States with nonattainment areas may adopt California vehicle *emissions performance standards* if a waiver has been granted under section 209 *for those standards*." Extended Remarks of Mr. Symms on Passage of S. 1630, Nov. 2, 1990, 6 Environment and Natural Resources Policy Division, Library of Congress, A Legislative History of the Clean Air Act Amendments of 1990, 10726 (1998) (Emphasis added). Again, waiver grants apply to "those standards" for which a waiver application is made.

In sum, the amendment history of the Clean Air Act's California waiver provisions shows that Congress intended the Needs Test set forth in Sections 209(b)(1)(B) (for on-road vehicles) and 209(e)(2)(A)(ii) (for nonroad vehicles) to apply to whether there was a need for the particular quantitative emissions standards for which a waiver application is made. On the other hand, the Protectiveness Test focuses on whether California's standards are as stringent as EPA's standards "in the aggregate." While EPA tries to conflate the two tests, in fact each test addresses a different issue and sets forth different criteria.

C. The Plain Meaning of the Text Requires EPA to Consider Each Standard Individually Under the Needs Test

With an understanding of the policy decisions Congress made in amending the waiver provision in 1977, it is evident that EPA's 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 cannons of statutory construction. Reading "standards" to mean "standards, in the aggregate" renders the "in the aggregate" language of the 1977 amendments redundant. It also contradicts Supreme Court precedent applying the "rule of the last antecedent" which holds that a limiting phrase should only be read as modifying the noun or phrase it directly follows. Correctly applying the rule of last antecedent results in the term "in the aggregate" modifying "standards" only in the Protectiveness Test and not in the more remote Needs Test. The relevant inquiry under the Needs Test is whether the specific standards for which a waiver application is made are needed to address compelling and extraordinary circumstances unique to California.

1. EPA's Interpretation of the Term "Standards" As Used in Section 209(e)(2)(A)(ii) Is Contrary to the Plain Meaning of the Statutory Text

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.

(Emphasis added). 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.

(Emphasis added).

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) ("[w]here 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 broaden the likelihood of granting a waiver, while the Needs Test is drafted to narrow 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 CAA 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. 1995)). Referring to similar differences in the language Congress chose to include or exclude from the Clean Air Act, the D.C. Circuit observed, "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." *Motor & Equipment Mfrs.*, 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. Courts 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 CAA).

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.)[4] Prior to its amendment in 1977, the CAA 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) (emphasis added). 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.

[4] *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.")

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. Envtl. Protec. Agency*, 606 F.2d 1293, 1306 n. 38 (D.C. Cir. 1979) (emphasis added). 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 Federal Defendants' definition 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.*, 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) (The 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) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

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, the EPA's 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 "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. US*, 136 S. Ct. 958, 963 (2015) ("[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.").

2. 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 interprets the Needs Test as an inquiry into whether California needs its emissions program as a whole. 78 Fed. Reg. at 58099. ER-011. 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.

Further, EPA's interpretation is inconsistent with the last part of the subsection, Section 209(e)(2)(B), which allows other states to adopt "standards" identical to those approved for California. *See* 42 U.S.C. § 7543(e)(2)(B). As acknowledged by EPA's counsel during oral argument before the D.C. Circuit, EPA interprets this provision to allow states to adopt only a subset of California's

standards.[5] In other words, other states need not adopt California's program "as a whole" but may pick-and-choose which EPA-approved standards to adopt. Petitioners' interpretation 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) (A court must interpret the statute "as a symmetrical and coherent regulatory scheme,"); *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 389 (1959) (The 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."

3. "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*

[5] Oral Argument at 19:30, *Dalton Trucking V. EPA*, (D.C. Cir 2016) (No. 13-1283), available at https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/A3CEE9BCE3E12F9885257EF8005EC55C/$file/13-1283.mp3 (last visited Aug. 11, 2016) ("[S]tates need not adopt the entire program promulgated by California").

importing the plural include the singular"). (Emphasis added). Accordingly, there is no particular magic in Congress's use of the plural "standards" in the Needs Test.

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 set forth in more detail in Section I.B., *supra,* 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 tim*e, need to be more stringent than national standards." S. Rep. No. 90-403 at 33 (1967) (emphasis added). 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 CAA. For example, the CAA commands the Administrator 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 CAA'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"). Here, California seeks waiver for emissions "standards" governing two air pollutants—particulate matter and NOx—from a wide range of nonroad vehicles.

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. As set forth in Section I.C.1.d, even the Federal Defendants acknowledged during oral argument in the D.C. Circuit that "states need not adopt the entire program promulgated by California." *See* Footnote 8, *supra*.

Given the clarity resulting from the traditional cannon of construction regarding the doctrine of last antecedent and the rule against surplusage, coupled with the fact that traditional usage under the CAA recognizes that the term "standards" includes requirements set forth in a single regulation, this Court 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. *See* 42 U.S.C. § 7543(e)(2)(B). Accordingly, any reliance by the Federal Defendants on the use of the plural form "standards" in Section 209 of the Act should be rejected.

II.

EPA'S INTERPRETATION LEADS TO ABSURD RESULTS

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 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.

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 CAA in the manner suggested by the EPA in its waiver grant would lead to the untenable conclusion that EPA may act as a legislative, policy-making 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, ER-011; *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. Mortgage 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 Trust Corp*., 43 F.3d at 1236 (9th Cir 1995); *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 468-69 (D.C. Cir. 1996). Accordingly, because EPA's interpretation of the needs test leads to absurd results, while the Petitioners' conflicting interpretation does not, EPA's interpretation must be abandoned.

III.

CHEVRON CANNOT SAVE EPA'S INTERPRETATION

Defendants will likely argue that, even if their interpretation is not the best available one, it should nevertheless receive deference under *Chevron*. However, *Chevron* deference is not appropriate in politically or economically significant cases. *See King v. Burwell*, 135 S. Ct. at 2489 (refusing *Chevron* deference where tax credits involving billions of dollars and health insurance for millions of people were at issue). The interpretation of Section 209(e) presents one of those cases.

When it enacted the waiver provision, Congress made the judgment that California's unique topography and geography required a degree of autonomy not afforded to other states. But given (1) the Supreme Court's refusal to defer to agency interpretations when constitutional issues arise because a statute treats states disparately; (2) the relative rarity of such statutes; (3) the high stakes for interstate commerce; (4) the "cornerstone" role played by the waiver provision in Title II of the CAA; and (5) the serious economic and political significance inherent in Section 209, *Chevron* deference is inapplicable in this case. In short, the special rights accorded to California under Section 209 are not the sort of "details" Congress delegates to agencies, with or without statutory ambiguity.

A. *Chevron* Deference is Not Applicable Because the Waiver Provision Involves a Question of Deep Economic and Political Significance.

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 *Utility Air Regulatory Group v. EPA*, 134 S.Ct. at 2444 (2014). 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 – 11.

As described in more detail in Section I.A., *supra,* 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 Util. Air Reg. Group*, 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 signifies its significance. *See Motor Vehicles,* 17 F.3d at 526. Accordingly, *Chevron* deference in connection with the issues presented in this case would be inappropriate.

B. *Chevron* is Not Applicable Because EPA's Interpretation Contradicts the Ordinary Meaning and Clear Intent of the Waiver Provision.

In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Supreme Court rejected EPA's interpretation of the term "appropriate and necessary" because, in the absence of a statutory definition or legislative history to the contrary, the ordinary meaning of that ambiguous term must prevail. The Court found that EPA did not offer a sufficient rationale for interpreting its duty to ensure regulations are "appropriate and necessary" in a manner that would allow it to ignore costs when promulgating those regulations. Nor can EPA justify an interpretation here that renders "in the aggregate" redundant, contradicts the rule of last antecedent, and is at odds with the structure and amendment history of the CAA. *See UARG v. EPA*, 134 S. Ct. 2427,

2442 (2014) ("an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.").

When an agency adopts an interpretation at odds with congressional action, *Chevron* is inapplicable. *City of Arlington, TX v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013) ("[F]or Chevron deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."). As described in more detail in Section I.B.2, *supra,* Congress considered it necessary to amend the CAA in 1977 to make the Protectiveness Test holistic by adding the term "in the aggregate." Congress did not include that term in the Needs Test. By attempting to read an aggregation standard into the Needs Test, EPA is seeking to accomplish through agency interpretation that which Congress rejected in 1977 by excluding the term "in the aggregate" from the Needs Test while at the same time including it in the Protectiveness Test. *See State of California Dept. of Soc. Services v. Thompson*, 321 F.3d 835, 853 (9th Cir. 2003) (To depart from the plain language of the statute there must be evidence "that Congress meant something other than what it said."). EPA does not have discretion to rewrite the Clean Air Act. *Id*. *See also*, *Brown & Williamson,* 120 S. Ct. at 1315. Therefore, *Chevron* cannot save EPA's interpretation.

IV.

EPA'S WAIVER DECISION SHOULD BE VACATED AND REMANDED

Invalid agency actions are ordinarily vacated and remanded. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). An agency's failure to comply with statutory requirements usually results in vacating a rule. *See* 5 U.S.C. § 706(2) ("The reviewing court shall…hold unlawful and set aside agency action…found to be…not in accordance with law."); *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) ("[W]e have only ordered remand without vacatur in limited circumstances."). Here, EPA not only failed to apply the statutorily mandated standard to make the waiver decision, but it never provided the public, including the California Petitioners, with an opportunity to make meaningful comments on EPA's application of the so-called "alternative" test for granting a waiver. *See Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982) (failure to provide comment opportunity invalidated rule); *see also, Sprint Corp. v. Fed. Commc'n Comm'n*, 315 F.3d 369 (D.C. Cir. 2003) (noting that vacatur as a complement to remand is granted with regularity when notice-and-comment is absent). Such a failure is not only a violation of the Administrative Procedure Act and the CAA but also violates EPA's own regulations requiring notice and comment opportunity. *See* 40 C.F.R. §§ 1074.101(a), (b).

A. If EPA Had Applied the Correct Standard, the Waiver Would Not Have Been Granted.

The notice published by EPA asking for comments on California's waiver application provided no indication that EPA would use any criteria other than whether California needed the program "as a whole." ER-034-36. During the comment period, California Petitioners commented that the correct formulation of the Needs Test was whether California needed the specific standards for which the waiver application was made and not whether California needed its own mobile source emissions program. ER-006, 011-12, 022-23, 076-083. In its waiver grant, EPA rejected the test proffered by the California Petitioners but then went on to apply that test in a wholly inadequate manner by justifying its issuance of the waiver based on elevated emission levels in two air quality control regions in California, namely, the San Joaquin Valley and the South Coast regions. *See* 78 Fed. Reg. at 58102-03, 58098. ER-014-015, ER-010. Specifically, EPA noted that the waiver grant would help bring those two regions, and those two regions only, into attainment with the federal standards for PM2.5 and 8-hour ozone. *Id*. But there are 14 federal air quality control regions in California. *See* 40 C.F.R. § 81, Subpart B (designating 14 federal air quality control regions in California under the Clean Air Act).

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. U.S. 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 cites 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 CAA 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) (ER—010). 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. *See* ER-034-36. 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*, 676 F.2d at 358.

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.

Federal Defendants may choose to argue 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).

B. EPA Cannot Now Rely on New Justifications for the Waiver.

EPA cannot now rely on justifications for the waiver other than those set forth in the document granting the waiver application, as the only argument it relied on during the rulemaking in connection with the so-called "alternative" test was the presence of the two nonattainment areas. *See Michigan v. EPA,* 135 S. Ct. 2699 (2015) (noting that it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action.") (citing *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943)).

EPA's utter failure to apply the correct standard, its irrational effort to justify the "alternative" standard, and its failure to provide notice and comment that it would use or even consider the "alternative" test in any way to make a waiver decision, evidences the seriousness of the deficiency in this case, while potential disruptive consequences of vacatur here are minimal. EPA would simply be required to revisit the issue of whether to grant the waiver, using the correct standard. *See Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015) ("When determining whether to leave an agency action in place on remand, we weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed.") (citations and quotations omitted).

Vacatur here would only cause a reversion to the *status quo ante* for nonroad emissions, which account for only 4% of NOx emissions in California and only 7%

of PM emissions. 78 Fed. Reg. at 58099. ER-011. Given that the new California regulations require retrofit of only 8% of fleets per year, their temporary suspension could at most increase emissions by 0.32% of NOx emissions (8% of 4%) or 0.56% of PM emissions (8% of 7%). *See* 78 Fed. Reg. No 183 at 58091. ER-003. Thus, the minor environmental effects from temporary reversion to the prior regulator scheme cannot justify overlooking EPA's "fundamentally flawed" application of the waiver standard. *See North Carolina v. EPA*, 531 F.3d 896, 929 (9th Cir. 2008).

Accordingly, EPA's California Nonroad Engine Waiver Decision should be vacated and remanded to EPA with instructions to undergo notice and comment, applying the correct standard. Because "EPA must redo its analysis from the ground up" its "fundamentally flawed" waiver must be vacated. *See North Carolina v. EPA*, 531 F.3d 896, 929 (9th Cir. 2008).

CONCLUSION

For the foregoing reasons, this Court should vacate and remand EPA's California Nonroad Engine Waiver Decision, with instructions to EPA to apply the correct standard in making its waiver decision.

DATED: August 30, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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DATED: August 29, 2016.

s/THEODORE HADZI-ANTICH
Attorney for Petitioners

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I hereby certify that on August 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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STATEMENT OF RELATED CASES

There are no related cases.