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Emmett Institute on Climate Change and the Environment

SCHOOL OF LAW
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October 25, 2018

Submitted via regulations.gov

Secretary Elaine Chao
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590
Attn: Docket No. NHTSA-2018-0067/NHTSA-2017-0069
EPA-HQ-OA-2018-0259

Re: *Comment on Proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, Docket Nos. NHTSA-2018-0067/NHTSA-2017-0069; EPA-HQ-OAR-2018-0283 & FRL-9981-74-OAR; RIN 2127-AL76 & 2060-AU09 ("Proposed Rule")

Dear Secretary Chao:

The Emmett Institute on Climate Change and the Environment at UCLA School of Law submits the following comments on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2012-2026 Passenger Cars and Light Trucks ("Proposed Rule"). The Emmett Institute is a leading law school center focused on climate change and other critical environmental issues, and serves as a source of environmental legal scholarship, nonpartisan expertise, and policy analysis. We appreciate the opportunity to comment on this proposed rule.

As legal scholars and policy advocates with expertise in the Clean Air Act, we are deeply troubled by EPA and NHTSA's joint proposal to freeze federal fuel economy standards for passenger cars and light trucks at model year 2020 levels and to revoke the waiver for the California Advanced Clean Cars ("ACC") program and Zero-Emission Vehicle ("ZEV") requirements appropriately granted to California in 2013 pursuant to the Clean Air Act. We write here to attach comments we have submitted to EPA regarding the Proposed Rule, included as Attachment A to this letter.

While we object to many aspects of the Proposed Rule, we focus our attention in the attached comments on our conclusion that EPA's proposed revocation of California's ACC/ZEV waiver is inconsistent with its statutory authority and with Congress's intent in enacting the Clean Air Act. Revocation of the ACC/ZEV waiver would be both unlawful and inappropriate. First, the Clean Air Act does not provide authority to revoke a waiver. Second, even if there were authority to revoke a waiver, waiver revocation is time-barred here. The waiver was granted *over five years ago*, and states and the automobile and parts manufacturing industries have acted in reliance on the waiver grant. Finally, California's waiver continues to satisfy the requirements of Clean Air Act section 209. Revocation of California's waiver would ignore the "compelling and extraordinary" conditions that supported the correct 2013 decision to grant the waiver, conditions which, if they have changed at all, have only worsened.

We are submitting these comments to NHTSA as well in anticipation that your agency will find them instructive as it considers action on the Proposed Rule. We urge both EPA and NHTSA to withdraw the Proposed Rule and to leave California's waiver intact.

Respectfully submitted,

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Cara Horowitz
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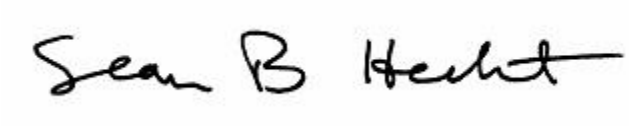

Sean B. Hecht
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ATTACHMENT A

UNIVERSITY OF CALIFORNIA, LOS ANGELES **UCLA**

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Emmett Institute on Climate Change and the Environment

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October 25, 2018

Submitted via regulations.gov

Acting Administrator Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Attn: Docket No. EPA-HQ-OA-2018-0283

Re: *Comment on Proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, Docket Nos. EPA-HQ-OAR-2018-0283 & FRL-9981-74-OAR; RIN 2127-AL76 & 2060-AU09; NHTSA-2018-0067/NHTSA-2017-0069 ("Proposed Rule")

Dear Acting Administrator Wheeler:

The Emmett Institute on Climate Change and the Environment at UCLA School of Law submits the following comments on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2012-2026 Passenger Cars and Light Trucks ("Proposed Rule"). The Emmett Institute is a leading law school center focused on climate change and other critical environmental issues, and serves as a source of environmental legal scholarship, nonpartisan expertise, and policy analysis. We appreciate the opportunity to comment on this proposed rule.

As legal scholars and policy advocates with expertise in the Clean Air Act, we are deeply troubled by EPA and NHTSA's joint proposal to freeze federal fuel economy standards for passenger cars and light trucks at model year 2020 levels and to revoke the waiver for the California Advanced Clean Cars ("ACC") program and Zero-Emission Vehicle ("ZEV") requirements appropriately granted to California in 2013 pursuant to the Clean Air Act. While we object to many aspects of the Proposed Rule, we focus our attention in this letter on our conclusion that EPA's proposed revocation of California's ACC/ZEV waiver is inconsistent with its statutory authority and with Congress's intent in enacting the Clean Air Act.

Revocation of the ACC/ZEV waiver would be both unlawful and inappropriate. First, the Clean Air Act does not provide EPA with the authority to revoke a waiver; EPA erroneously

applies the Clean Air Act section 209 standards for waiver grants or denials, but those standards do not apply in this context. Second, even if the agency possessed, as EPA argues, "inherent authority" to revoke California's waiver, the agency is barred from doing so now. EPA granted the waiver *over five years ago*, and states and the automobile and parts manufacturing industries have acted in reliance on the waiver grant. We believe that EPA is estopped from backtracking on its decision so long after its issuance. Finally, California's waiver continues to satisfy the requirements of Clean Air Act section 209. Revocation of California's waiver would ignore the "compelling and extraordinary" conditions that supported EPA's correct 2013 decision to grant the waiver, conditions which, if they have changed at all, have only worsened. Air districts in California, including the South Coast and San Joaquin Valley Air Basins, continue to have the worst air quality in the nation; California's need for its own motor vehicle emission program is just as compelling as it ever has been. And California is uniquely situated to suffer extraordinarily ill effects from climate change, effects that will reverberate nationally and even globally given California's importance for food security and economic stability.

We urge EPA to withdraw the Proposed Rule and leave California's waiver intact.

I. EPA Lacks Authority To Revoke The Waiver

During the long history of the California waiver to regulate motor vehicle emissions, EPA has never revoked a previously-granted waiver. Beyond the continuing necessity of California's waiver, the statute itself provides guidance: the Clean Air Act does not grant EPA the authority to withdraw a waiver that has already been approved.

California has, of course, had the authority to chart its own course on motor vehicle emission regulation for over fifty years, since the 1967 adoption of the precursor to the federal Clean Air Act, the Air Quality Act. Even before the federal government took action to limit motor vehicle emissions, California had already made strides, and "Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards." 74 Fed. Reg. 32744, 32745 (July 8, 2009).

The consequence of this recognition was the adoption of a waiver provision allowing California to set its own standards pursuant to its state law, a provision that became part of the Clean Air Act and was modified in 1977 to provide California with even broader flexibility in setting a motor vehicle emission program. H.R. Rep. No. 294, 95 Cong., 1st Sess. 301-02 (1977). In addition, Congress authorized other states to adopt California's program pursuant to Clean Air Act section 177, expanding the market for manufacturers complying with California's standards. See 42 U.S.C. § 7507. Today, California and the twelve other "Section 177 states" comprise 40 percent of the United States' automobile market.

The standards for grant or denial of California's waiver are codified in section 209 of the Clean Air Act. Section 209 provides that, as long as California finds its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards," EPA must grant the requested waiver unless it makes one of three determinations: (1) California's finding was arbitrary and capricious, (2) California does not need the standards to

meet compelling and extraordinary conditions; or (3) the standards and accompanying enforcement procedures are not consistent with Clean Air Act section 202. 42 U.S.C. § 7543(b). Standards are only inconsistent with section 202 if they are technologically infeasible or if California's test procedures impose requirements that are at odds with federal test procedures. *Motor and Equipment Mfrs. Ass'n, Inc. v. E.P.A.* ("*MEMA I*"), 627 F.2d 1095, 1126 (D.C. Cir. 1979).

But section 209 contains no suggestion that a waiver, once granted, can be revoked. The standards clearly apply when a waiver has been requested and is under consideration by EPA, not retroactively once the waiver has already been determined to satisfy section 209's criteria. In interpreting section 209, which expressly preempts states other than California from setting their own motor vehicle emission standards, "the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent," should be the primary consideration. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); see also *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (where a statute's plain language is not absurd, it should be enforced according to its terms).

Here, the plain language is clear: EPA may consider the factors enumerated in section 209 when determining whether or not to grant a waiver *in the first instance*, not after the waiver is granted. Indeed, Congress has not been reticent to expressly grant revocation authority in other sections of the Clean Air Act or in other federal environmental statutes. See 42 U.S.C. §7661a (granting EPA authority, under specific circumstances, to withdraw a state's delegated authority under Title V of the Clean Air Act to administer its own permitting program); 42 U.S.C. § 300h-1(b)(3) (explaining the circumstances under which EPA can withdraw a state's delegated primary enforcement authority for underground water sources under the Safe Drinking Water Act); 33 U.S.C. § 1342(b) (specifying the conditions under which EPA may withdraw a state's delegated authority to enforce NPDES requirements under the Clean Water Act). Given that Congress has been explicit in other Clean Air Act provisions in granting EPA the authority to revoke, EPA and courts cannot read such authority into a statutory provision from which Congress omitted it.

EPA has asserted that the legislative history of the Air Quality Act creates revocation authority, despite the fact that such authority is absent from section 209 itself. 83 Fed. Reg. 42986, 43242 (Aug. 24, 2018) ("The Administrator has 'the right…to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver.'") (quoting S. Rep. No. 50-403, 34 (1967)). This assertion is inapposite for two reasons.

First, the legislative history upon which EPA relies dates from the waiver's original adoption as part of the Air Quality Act in 1967. But the waiver provision was amended—and strengthened—as part of the 1977 Clean Air Act amendments. H.R. Rep. No. 294 at 23. The original 1967 waiver provision had authorized the federal Secretary of Health, Education, and Welfare to make the initial determination regarding the necessity of California's waiver. Pub. L. 90-148 § 208(b), 81 Stat. 501 (1967) (providing that the Secretary shall waive the application of the Air Quality Act's standards to California "unless he finds that [California] 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."). In 1977, Congress changed the decision-making structure, placing the necessity determination in the hands of California officials at the outset, and curtailing EPA's authority to deny a waiver to the three limited circumstances enumerated in section 209. The change in structure came with a temporal limitation on EPA's consideration of the section 209 factors: the amended statutory text now specified that the factors were to be considered after California officials determined a state program was necessary but before EPA had granted a waiver to California for that program. 42 U.S.C. § 7543(b) ("No such waiver shall be granted" if EPA makes any of the findings outlined in section 209.). Any discussion of revocation authority is absent from the legislative history for the 1977 amendments. Given the constraints imposed by the amended statutory text, if any revocation authority existed under the original language of the Air Quality Act (and the lack of explicit authority makes this argument doubtful, as explained below), it has since been eliminated by the broader California authority granted in 1977.

Second, the presence of one line in the legislative history for a provision that is no longer intact cannot be the basis for reading revocation authority into Section 209. See *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) ("[R]esort to legislative history is not appropriate in construing plain statutory language."); *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) (courts should "not resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-809 fn. 3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). EPA cannot read "a standardless and open-ended revocation authority" into "a silent statute." *American Methyl Corp. v. E.P.A.*, 749 F.2d 826, 836-837 (D.C. Cir. 1984). The Supreme Court has been clear: "[w]e should prefer the plain meaning [of a statute] since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Where, as here, the plain language of the statute and a comparison with similar federal laws shows that Congress did not intend to include revocation authority as part of section 209, EPA cannot read that authority into the statute based on "a sentence in a legislative committee report untethered to any statutory language." *Abrego v. Dow Chemical Co*., 443 F.3d 676, 686 (9th Cir. 2006); see also *International Broth. of Elec. Workers, Local Union No. 474, AFL-CIO v. N.L.R.B.*, 814 F.2d 697, 699-700 (D.C. Cir. 1987) ("…courts have no authority to enforce alleged principles gleaned solely from legislative history that has no statutory reference point.").

In sum, EPA lacks the authority under CAA section 209 to revoke an already-granted waiver. While EPA is entitled to consider the necessity of California's separate motor vehicle emission program, its ability to do so is temporally limited by the terms of section 209: it does not get to second-guess the waiver determination after it has already been made. Neither the plain language of the statute nor the legislative history offers any support for EPA's assertion of revocation authority here; EPA accordingly lacks the power to withdraw California's 2013 ACC/ZEV waiver.

II. EPA Is Time-Barred From Revoking The Waiver

Even if, as EPA argues, the agency possesses "inherent authority" to revoke California's waiver, the time for EPA to act would be long past. The ACC/ZEV waiver was granted five years ago, in 2013, and since that time, the automobile and parts manufacturing industries and a number of states have acted in reliance on EPA's waiver grant. Indeed, an about-face when the agency's action has been settled for years, not days, weeks, or even months, would set a dangerous precedent and subject regulated entities to significant and unnecessary uncertainty in the future.

As permitted by Clean Air Act section 177, about a dozen states, representing about one-third of the United States auto market, have already adopted California's standards—standards they are reliant upon to meet federal criteria pollutant standards, as EPA acknowledges in the Proposed Rule. 83 Fed. Reg. at 43244 ("EPA may subsequently consider whether to employ the appropriate provisions of the CAA to identify provisions in Section 177 states' SIPs that may require amendment and to require submission of such amendments."). The attorneys general of those states and the mayors of over fifty cities within them have stressed that "these standards are both necessary and feasible" and are "particularly appropriate given the serious public health impacts of air pollution in our cities and states…" Local Leaders' Clean Car Declaration (Apr. 3, 2018). And even automakers have spoken out in "support [of] increasing clean car standards through 2025"; practically speaking, the industry has already invested in compliance with California's program for years. See Ford Motor Company, Statement of Bill Ford, Executive Chairman, and Jim Hackett, President and CEO, "A Measure of Progress" (Mar. 27, 2018). In fact, the California Air Resources Board's ("CARB") 2017 midterm review of the ACC program found that "manufacturers are over complying with the [greenhouse gas ("GHG")] requirements and are offering various vehicles on the road today that are already able to comply with the GHG standards for later model years." CARB, California's Advanced Clean Cars Midterm Review: Summary Report for the Technical Analysis of the Light Duty Vehicle Standards ("ACC Midterm Report") (Jan. 18, 2017), ES-2.

California, of course, has relied on the waiver as well. As the ACC Midterm Report explains, the ZEV requirements have led to "significant advances in PM control" and to improvements in criteria pollutant emission control technology as well. ACC Midterm Report at ES-2. California continues to exceed federal ambient air quality standards; for example, in order to come into attainment with the 8-hour ozone standard by its compliance date of 2023, the Los Angeles region must reduce its NOx emissions "by an additional two thirds beyond reductions from all of the control measures in place today." ACC Midterm Report at ES-11. Attainment of ozone standards "are expected to have to rely heavily on significant and on-going progress towards zero and near-zero mobile source emissions in California," making the ACC program key. *Id*. In fact, the primary purpose of the ZEV mandate was to meet state and federal ambient air quality standards for conventional pollutants, not to achieve GHG reductions. See Proposed Regulations for Low-Emission Vehicles and Clean Fuels: Staff Report (EPA Legacy Docket A-91-71-II-A-3) at 3-4, CARB (Aug. 13, 1990); see also Proposed Regulations for Low-Emission Vehicles and Clean Fuels: Final Statement of Reason (EPA Legacy Docket A-91-71-II-A-7),

CARB (July 1991) at 47-48 ("The primary objective of the adopted regulations is to achieve substantial emission reductions in an attempt to attain the state and federal ambient air quality standards. . . . [W]e believe that the significant penetration of ZEVs is crucial to long-term attainment of the ambient standards in the South Coast, and there is no assurance that ZEVs will be developed without the limited, measured ZEV sales requirements in the regulations.").

Both the South Coast Air Quality Management District ("SCAQMD") and the San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD") rely on the ACC program, and in particular, the ZEV mandate, as a means to implement an approvable state implementation plan ("SIP") to achieve federal ambient air quality standards. SCAQMD's 2016 air quality management plan ("AQMP") points out that the AQMP's "control strategy strongly relies on a transition to zero and near-zero technologies in the mobile source sector…" SCAQMD, 2016 Air Quality Management Plan (Mar. 2017) at ES-5. And SJVUAPCD has explained that "[a]ttainment of the latest [federal] standards will require transformative changes and development of innovative control strategies to reduce emissions from mobile sources, which now make up over 85% of the Valley's NOx emissions…mobile sources, particularly in the goods movement sector, must transition to near zero emission levels…" SJVUAPCD, 2016 Plan for the 2008 8-Hour Ozone Standard (Jun. 16, 2016) at ES-5. Indeed, "…substantial reductions from both mobile and stationary sources are necessary to reach attainment…Such actions to control mobile sources are possible because of California's unique authority to regulate emissions from certain source categories more stringently than the federal government under the Act's §209(b) waiver provision." SJVUAPCD, Draft San Joaquin Valley Supplement to the Revised 2016 State Strategy for the State Implementation Plan (Aug. 27, 2018) at 2. Without the ACC program, neither air district—both of which suffer from degraded air quality unparalleled elsewhere in the nation—will be able to meet *federal* air quality standards for *conventional* pollutants pursuant to its SIP. As discussed above, EPA has recognized this problem in the context of the Section 177 states; it is just as real for California itself. In fact, as discussed further below, the waiver denial will only exacerbate the conventional pollutant problem in California, as climate change worsens the health impacts from ozone and PM pollution.

And the ACC program is also necessary to meet California's 2030 climate change targets, codified in 2016 with the adoption of SB 32. CARB explained that "[m]odeling to meet the 2030 GHG targets established by SB 32…indicates approximately three million additional ZEVs and PHEVs will be needed in 2026 through 2030." ACC Midterm Report at ES-6. In other words, California depends on the waiver—and has relied upon it in planning for the future—to meet both federal and state statutory mandates. While it might have been possible for California to have adopted a different approach to compliance had EPA reassessed the waiver shortly after its grant, if the waiver is revoked now, five years after its issuance, California will lack the requisite time necessary to recover by implementing alternative compliance strategies to meet state mandates.

This sort of reliance—on the part of California, other states, and the automobile and parts industries—is precisely the kind that courts respect when evaluating an agency's reconsideration of a past decision. See *American Methyl Corp.*, 749 F.2d 826. In *American Methyl Corp*., EPA

had granted a waiver to allow marketing of a fuel blend under Clean Air Act section 211(f), which provides no revocation authority, and sought to reconsider that determination two and a half years after the fact. *Id*. at 833. The D.C. Circuit declined to infer "a standardless and open-ended revocation authority from a silent statute." *Id*. at 836-837. In so doing, said the court, "we ensure that entities subject to regulation under section 211 know what is expected of them." *Id*. at 839. "Protecting the legitimate expectations" of those reliant on the EPA's waiver grant avoids an "ever-present threat" to the adoption of new technology and prevents the "extraordinary risk" involved in starting down a compliance pathway, only to have the rug pulled out from underneath. *Id*. at 839-840. Here, reliance is not limited to California and the Section 177 states; like in *American Methyl Corp.*, manufacturers have also relied on the waiver for the past several years as they make investments to design their fleets. The states and regulated entities need to be able to trust that a five-year-old waiver is settled: as *American Methyl Corp.* explains, allowing reconsideration so far after the decision point is economically disruptive and deprives everyone of regulatory certainty. And courts have never permitted agencies to wait a span of years before reevaluating a decision pursuant to "inherent authority"; instead, they have confirmed that reconsideration must take place within a "reasonable period of time"—often defined as "within the period for taking an appeal," and typically, a matter of weeks. See *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (any reconsideration must occur "in a timely fashion"); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977); *Albertson v. F.C.C.*, 182 F.2d 397, 399 (D.C. Cir. 1950). "That period has long expired here." *American Methyl Corp*., 749 F.2d at 835.

EPA possesses no authority, "inherent" or otherwise, to reassess its 2013 waiver determination. But even if it did, the time for that reassessment is long gone. Revocation of the waiver at this juncture, when both state governments and regulated entities have acted in reliance upon it, is both impermissible and unwise.

III. The Waiver Remains Necessary And Appropriate

Beyond EPA's lack of authority to revoke the ACC/ZEV waiver, the waiver should remain in place for another key reason: it continues to comply with all federal standards for a waiver grant. "EPA has consistently interpreted the waiver provision as placing the burden on the opponents of a waiver to demonstrate that one of the criteria for a denial has been met." 74 Fed. Reg. at 32745. It is well-settled that California's findings with respect to its motor vehicle emission program are entitled to significant deference; California has consistently determined, based upon substantial evidence, that the ACC/ZEV program is at least as protective as any federal program, is necessary to meet "compelling and extraordinary conditions," and is consistent with Clean Air Act section 202. Even if the section 209 factors were to apply to a revocation determination—which they do not—EPA has not met its burden to show that the waiver should be withdrawn.

A. California's Findings Are Entitled To Significant Deference

Both EPA and federal courts have long acknowledged that when California makes findings to support a waiver request, EPA must afford those determinations substantial deference. California has consistently presented strong evidence—at the time of the initial waiver request, at the time of EPA's waiver grant, and again during California's 2017 midterm review of the ACC program—to support the necessity and protectiveness of the waiver. As EPA has historically agreed, even if EPA's own analysis differs from California's, that is not a sufficient basis to second-guess the state's determination. 74 Fed. Reg. at 32749. California's findings must stand.

Since 1970, "EPA has recognized its limited discretion in reviewing California waiver requests." 74 Fed. Reg. at 32745. As discussed above, the 1977 amendments further strengthened and clarified California's role in the waiver process, leaving in the state's hands the preliminary determination that California's program is, in the aggregate, at least as protective as applicable federal standards. "The language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them." *MEMA I*, 627 F.2d at 1121.

Indeed, EPA has acknowledged that its job is not to rethink California's considered analysis:

> The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe ***I am required to give very substantial deference to California's judgments on this score***. 40 Fed. Reg. 23102, 23103-23104 (1975) (emphasis added).

California has persuasively demonstrated that its ACC program is at least as—indeed, more—protective than applicable federal standards; that it is necessary to meet "compelling and extraordinary conditions" the state continues to face, both in the aggregate and with respect to climate change and GHG emissions specifically; and that it is technologically feasible in compliance with the requirements of Clean Air Act section 202. While the Proposed Rule offers different interpretations and analysis of available data, EPA has presented no "clear and compelling evidence" to show that California's assessment was "arbitrary and capricious." *MEMA I*, 627 F.2d at 1122. Under these circumstances, EPA is required to defer to California's findings, all of which support the continued endurance of the waiver.

B. The Waiver Satisfies The Requirements Of Clean Air Act Section 209

As discussed above, EPA retains only very limited discretion to review California's waiver requests: unless EPA makes one of the three findings set forth in Clean Air Act section 209, it must grant the requested waiver. EPA assessed California's ACC/ZEV waiver request five years ago and determined that it could not make any of those findings. Although EPA now claims that its new analysis has led it to revise its assessment, EPA has presented no "clear and compelling evidence" sufficient to override California's findings or its own prior determination.

1. The Waiver Is At Least As Protective As Federal Standards

It is indisputable that the ACC program is at least as protective as any applicable federal standards—EPA determined over a decade ago that California's pre-existing standards for light-duty vehicles and trucks are at least as protective as the federal Tier II standards, and there are no applicable federal GHG emission standards. Accordingly, "[c]omparing an absence of EPA greenhouse gas emission standards to the enacted set of California greenhouse gas emission standards provides a clearly rational basis for California's determination that the California greenhouse gas emission program will be more protective of human health and welfare than non-existent applicable federal standards." 74 Fed. Reg. at 32754.

Indeed, EPA does not argue that California acted arbitrarily and capriciously in making its determination. 83 Fed. Reg. at 43240. California's finding stands, and the absence of federal standards with which to compare the ACC program's GHG standards underscores the importance of the waiver and its consistency with section 209's longstanding recognition of California as "a pioneer and a laboratory for the nation in setting new motor vehicle standards." 74 Fed. Reg. at 32745.

2. The Waiver Is Necessary To Meet "Compelling And Extraordinary Conditions"

EPA asserts that California no longer needs the ACC/ZEV waiver to meet "compelling and extraordinary conditions." This assessment is based upon two arguments: (1) that the effects of global climate change are not unique to California, and that standards which address, among other things, climate change are therefore not needed to meet "compelling and extraordinary conditions"; and (2) that even if California does have "compelling and extraordinary conditions" in the climate change context, the waiver is not necessary because it will not solve the problem of global climate change.

These arguments are both specious. First, they ignore the well-established practice of EPA in assessing "compelling and extraordinary conditions," which is to review California's motor vehicle emission program as a whole, not as separate component parts. EPA's attempt to pick off the GHG standards and ZEV requirements as though they do not fit within a larger regulatory program is inconsistent with the law and with the agency's prior practice. Second, they disregard California's substantial evidence—entitled to significant deference—that it will uniquely suffer from the effects of climate change and that implementation of the ACC program

will mitigate those ill effects. EPA has not presented "clear and compelling evidence" to suggest the waiver is no longer needed. *MEMA I*, 627 F.2d at 1122.

a. An evaluation of "compelling and extraordinary conditions" properly considers California's motor vehicle emission program as a whole, not individual component parts.

When assessing whether a waiver request should be granted, EPA has traditionally "consider[ed] whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions." 74 Fed. Reg. at 32759. EPA—even during the Bush Administration—has agreed that it should "look at the program as a whole in determining compliance with section 209(b)(1)(B)" because "in the legislative history of section 209, the phrase 'compelling and extraordinary circumstances' refers to 'certain general circumstances, unique to California, primarily responsible for causing its air pollution problem'" rather than "'the levels of pollution directly.'" 73 Fed. Reg. 12156, 12159-60 (Mar. 6, 2008). In other words, the question should be whether the "fundamental conditions" that cause air pollution in California continue to exist, not whether specific pollution levels are "compelling and extraordinary" or whether specific standards will address the air pollution problem. 74 Fed. Reg. at 32759.

Section 209's legislative history supports this interpretation as well. The 1977 amendments to section 209 clarified that the protectiveness of California's program should be considered "in the aggregate"; the protectiveness of individual component parts of a motor vehicle emission program do not each need to be as stringent as federal standards if the program, as a whole, is at least as protective. 42 U.S.C. § 7453(b)(1). In so amending section 209, "Congress quite intentionally restricted and limited EPA's review of California's standards, and its express legislative intent was to 'provide the broadest possible discretion [to California] in selecting the best means to protect the health of its citizens and the public welfare.'" 74 Fed. Reg. at 32761 (quoting H.R. Rep. No. 294, at 301-302).

In the Proposed Rule, EPA asserts that although the traditional approach of the agency has been to assess California's motor vehicle emission program as a whole, that approach applies only when the program in question "is designed to address local or regional air pollution problems." 83 Fed. Reg. at 43247. But there is no support in the Clean Air Act, its legislative history, or prior agency practice for drawing such a distinction. Indeed, such a distinction would not make much sense; even local or regional air pollution problems are not isolated unto themselves, and there is significant evidence, including that presented by CARB in support of the waiver, demonstrating that supposedly "global" GHG pollution problems can impact local ozone levels.

Simply put, the text and the legislative history of section 209—and the practical realities of air pollution—demonstrate that EPA's traditional approach to "compelling and extraordinary conditions" is the correct one. The only question should be whether general conditions persist in California that necessitate a separate motor vehicle emission program. The answer to that

question is an unequivocal "yes": all of the distinguishing characteristics that led Congress to recognize California's need for a waiver in the first place remain in spades. For example, the South Coast Air Basin exceeded federal ozone standards on 139 days in 2017—over one-third of the year—and ozone conditions are worsening due to climate change's unique effects on California's weather patterns. SCAQMD, Mobile Source Committee, 2017 Ozone Season Summary and Trend Analysis (Oct. 20, 2017). The San Joaquin Valley Air Basin "has the most burdensome $PM_{2.5}$ challenge in the country…[t]he Valley is also one of only two areas in the country classified as an Extreme ozone nonattainment area." SJVUAPCD, Draft San Joaquin Valley Supplement to the Revised 2016 State Strategy for the State Implementation Plan at 1. The other extreme nonattainment area is the South Coast Air Basin. California's need for its own motor vehicle emission program is as strong as ever.

b. Even considered separately, California's GHG standards and ZEV mandates are necessary to meet "compelling and extraordinary conditions."

Even if the GHG standards and ZEV requirements of the ACC program are broken out and considered separately from the components of the program that are specifically targeted to address what EPA has termed "local or regional air pollution problems," they are still necessary to meet "compelling and extraordinary conditions" unique to California. First, California has demonstrated that "its greenhouse gas standards are linked to amelioration of California's smog problems," and EPA has presented no "clear and compelling evidence" to show that this is not the case. 74 Fed. Reg. at 32763. Second, California's unique geography and weather patterns—qualities EPA has acknowledged, in this rulemaking, are among those constituting "compelling and extraordinary conditions"—mean that California will suffer more extreme impacts as a result of climate change. Finally, California has shown that the ACC program will mitigate the negative effects of climate change on the state, and EPA has once again failed to contradict that finding with clear and compelling evidence.

Multiple regions in California fail to meet federal ozone and $PM_{2.5}$ standards; nearly a third of California counties are out of attainment for ozone, and both the San Joaquin Valley and the South Coast Air Basins suffer from "extreme" ozone pollution (South Coast experiences "serious" $PM_{2.5}$ pollution, while San Joaquin's "extreme" $PM_{2.5}$ pollution is the worst in the country). Environmental Protection Agency, *8-Hour Ozone (2015) Designated Area/State Information with Design Values*; Environmental Protection Agency, *PM-2.5 (2012) Designated Area/State Information*. As discussed above, the ACC program, and in particular, the ZEV mandate, is critical to California's ability to meet federal ambient air quality standards for these conventional pollutants. Further, studies have shown that climate change, and the warmer temperatures California will experience because of it, will increase the air stagnation that leads to elevated $PM_{2.5}$ and ground-level ozone concentrations, further worsening this already "compelling and extraordinary" problem. Daniel E. Horton et al., *Occurrence and Persistence of Future Atmospheric Stagnation Events*, 4 NATURE CLIMATE CHANGE 698, 700 (2014); D.J. Jacob and D.A. Winner, *Effect of climate change on air quality*, 43 ATMOSPHERIC ENVIRONMENT 51, 52-53 (2009). Scientists have also found that reductions in GHG emissions can bring with them

co-benefits of improved air quality with respect to conventional pollutants like ozone and $PM_{2.5}$. Y. Zhang, S.J. Smith, J.H. Bowden, Z. Adelman, and J.J. West, *Co-benefits of global, domestic, and sectoral greenhouse gas mitigation for U.S. air quality and human health in 2050*, ENVIRON. RES. LETT. 12, 114033 (Nov. 14, 2017). California is projected to experience the worst health impacts of any state as a result of increased ozone pollution, with costs of over $700 million projected in 2020 alone. Union of Concerned Scientists, *Rising Temperatures, Worsening Ozone Pollution*, at 19 (2011). Science shows that increased GHG emissions, which EPA admits will occur if the waiver is denied, will worsen these impacts, and reductions in GHG emissions, which the ACC program is designed to promote, could mitigate them. EPA offers no evidence to the contrary, even though it recognizes that "clear and compelling evidence" is the burden of proof to demonstrate that "compelling and extraordinary conditions" do not exist. 83 Fed. Reg. at 43244, fn. 567.

The exacerbation of $PM_{2.5}$ and ozone pollution alone is sufficient to demonstrate the continued existence of "compelling and extraordinary conditions," but climate change will have still more severe—and unique—impacts on California. CARB has already "identified a wide variety of impacts and potential impacts within California, which include exacerbation of tropospheric ozone, heat waves, sea level rise and salt water intrusion, an intensification of wildfires, disruption of water resources by, among other things, decreased snowpack levels, harm to high value agricultural production, and additional stresses to sensitive and endangered species and ecosystems." 74 Fed. Reg. at 32765. EPA's only response to this litany of enumerated California-specific harms is to argue that because other states will also suffer climate change-related impacts, California's conditions are not "compelling and extraordinary." 83 Fed. Reg. at 43249.

First, the harms suffered by California will, in many cases, be worse than those experienced in other states due to its individual geography, topography, weather patterns, and other distinguishing characteristics. But more importantly, California does not need to suffer the worst effects to have need for a waiver—that is simply not how "compelling and extraordinary conditions" are assessed. Other states suffer severe "local and regional air pollution problems," including ozone and $PM_{2.5}$ non-attainment, but that has never impacted California's ability to receive a waiver for those standards. Indeed, EPA has recognized that "there is no indication in the language of section 209 or the legislative history that California's pollution problem must be the worst in the country for a waiver to be granted." 49 Fed. Reg. 18887 (May 3, 1984). California has demonstrated that it will suffer numerous serious impacts as a result of climate change. EPA, far from contradicting that evidence, has admitted that those impacts are likely to occur and should be cause for "concern." They certainly constitute "compelling and extraordinary conditions" necessitating the ACC/ZEV waiver.

Finally, EPA's argument that the waiver is not necessary because the ACC program will not solve the issue of global climate change is inapposite. EPA is suggesting that if one program cannot provide the ultimate resolution for a pollution problem, then there is no reason to enact it in the first place. This logic undercuts the technology-forcing purpose of section 209 and is irrelevant to a waiver determination by the agency. As EPA recognized over four decades ago,

"[t]he issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to [EPA's] decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California." 36 Fed. Reg. 17458 (Aug. 31, 1971). But beyond that, California did support its initial waiver request with evidence demonstrating that its program would lead to improvements in climate change and ozone problems in the state. California Air Resources Board, EPA-HQ-OAR-2006-0173-0004. Its policy judgment is entitled to significant deference, and EPA has not presented "clear and compelling" evidence that such improvements will not occur. Absent that proof, a difference of opinion about the efficacy of the regulatory program California has selected is not enough to reassess the waiver.

In sum, even when assessed independently of the ACC program as a whole, the GHG standards and ZEV requirements are necessitated by "compelling and extraordinary conditions" in California. EPA has offered no evidence sufficient to override the substantial deference owed to California's determination that these components of the program are needed, and they must remain in place.

C. The Waiver Is Consistent With Clean Air Act Section 202

Under section 209, EPA's review of a waiver's consistency with Clean Air Act section 202(a) is constrained: those opposed to the waiver must meet their burden of showing either that California's standards are technologically infeasible or that California's test procedures impose requirements that are at odds with the federal test procedure. *MEMA I*, 627 F.2d at 1126. Here, the Proposed Rule suggests that the ACC/ZEV waiver is inconsistent with section 202(a) because California has not provided "adequate lead time for the development and application of necessary technology prior to the effective date of applicable standards." 83 Fed. Reg. at 43251. But California has provided ample support for the feasibility of its standards, which have already been in place for five years, and EPA has not presented clear, compelling evidence that the standards are technologically infeasible.

EPA acknowledges that under applicable D.C. Circuit precedent, the test of infeasibility is whether technology control costs are "excessive"—whether they would cause a doubling or tripling of vehicle cost—but the agency suggests that the agency should instead "holistically consider whether technology control costs are infeasible by considering the availability of the technology, the reasonableness of costs associated with adopting it within the required lead time, and consumer acceptance." 83 Fed. Reg. at 43251; see *MEMA I*, 627 F.2d at 1118. That is simply not the case; Congress' intent was to allow California broad discretion to impose technology-forcing standards. 40 Fed. Reg. 23102, 23103 ("The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed…"). But regardless, California has already demonstrated that the ACC program standards are technologically feasible.

At the time it adopted the ACC program, CARB assessed vehicle technology and the feasibility of the program's standards. CARB relied on a comprehensive vehicle simulation modeling effort and cost analysis, as well as a separate analysis of the GHG benefits of alternative fuel technologies, and "concluded that it had identified the necessary technology in existence at that time that could enable vehicles to meet the GHG standards…" 74 Fed. Reg. at 32769. Those findings are supported by more recent data. As part of its midterm review, CARB assessed manufacturer compliance with the ACC program, which had already been in place for four years. At the time of the review in early 2017, automobile manufacturers had "successfully employed a variety of technologies that reduce GHG emissions and increase fuel efficiency, many at a faster rate of deployment than was originally projected" and manufacturers were "over complying with the GHG requirements and [were] offering various vehicles on the road today that are already able to comply with the GHG standards for later model years." ACC Midterm Report at ES-2. Manufacturers had already "been marketing passenger cars and SUVs meeting the 2025 LEV III criteria pollutant fleet average of super ultra-low emissions vehicles (SULEV30) for over a decade" in response to California's ZEV regulation. *Id*. In other words, not only was the technology in existence and feasible, it was being—and continues to be—successfully employed. This only makes sense: manufacturers have now had over ten years to adjust to the standards, including five years of implementation.

EPA says that its own predictions "for future and timely availability of emerging technologies," including BEV and PHEV technologies, cast doubt on CARB's assessment of technological feasibility. 83 Fed. Reg. at 43251-52. Even if EPA's predictions were to be correct, which market data suggests they are not, there must be more than mere "doubt" to overturn California's finding of technological feasibility: there must be clear and compelling evidence. EPA has not offered any. In the absence of such evidence, California's finding, and the waiver, must stand.

IV. Conclusion

California—Southern California and the San Joaquin Valley in particular—has long had some of the worst air pollution in the country. Congress recognized California's special circumstances, and the wisdom of allowing California regulatory flexibility to address them, over a half-century ago. Since then, EPA has consistently acknowledged California's continued need for its own motor vehicle emission program, granting waiver after waiver to programs combatting persistent air pollution problems. There is no reason to depart from that historical trend now; nor is there any authority for EPA to do so.

Even if EPA could revoke California's waiver, California's findings are entitled to significant deference, and EPA has not met the high burden required to revisit and upend California's analysis. California faces pervasive and persistent air pollution problems and unique climate change impacts. The technologically-feasible ACC program works to address these "compelling and extraordinary conditions." There is no basis for EPA to revoke the ACC/ZEV waiver, and we urge EPA to withdraw its proposal to do so.

Respectfully submitted,

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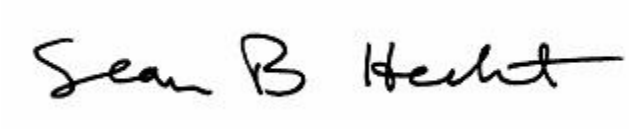

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