COMMENTS OF STATES AND CITIES
IN SUPPORT OF EPA REVERSING ITS SAFE 1 ACTIONS

July 6, 2021

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INTRODUCTION

The State of California, by and through the California Air Resources Board (CARB) and California Attorney General Rob Bonta, along with the undersigned States and cities submit these comments in response to EPA's Notice of Reconsideration (86 Fed. Reg. 22,421 (Apr. 28, 2021)) concerning the actions EPA took in "SAFE 1" (84 Fed. Reg. 51,310 (Sept. 27, 2019)). We welcome EPA's reconsideration of its SAFE 1 actions and the opportunity to comment.

We urge EPA to reverse both actions it took in SAFE 1: 1) the withdrawal of the portions of the 2013 waiver covering California's greenhouse gas (GHG) and zero-emission-vehicle (ZEV) standards (Waiver Withdrawal) and 2) the conclusion that Section 177 of the Clean Air Act does not authorize other States to adopt California's GHG standards (Section 177 Determination). Both actions were unprecedented, unlawful, and ill-advised. Moreover, both actions were entirely unnecessary and upset long-settled reliance interests, including EPA-approved State Implementation Plans (SIPs) to meet National Ambient Air Quality Standards (NAAQS). In fact, many of the undersigned States are depending on emissions reductions from these standards to protect their residents and natural resources from multiple forms of harmful pollution, including smog, particulate matter, and the GHGs that are causing the growing climate change crisis. As discussed below, there are multiple grounds on which EPA can and should reverse its SAFE 1 actions.

1. EPA can and should reverse both its Waiver Withdrawal and its Section 177 Determination because those actions will increase harmful criteria pollution and have already, at a minimum, cast a cloud of uncertainty over approved SIPs. Nothing compelled EPA to take these actions, and EPA should not have taken discretionary actions that undermined public health protections and SIPs. Indeed, Congress has expressly prohibited federal agencies, including EPA, from taking actions that interfere with—or do not "conform" with—approved SIPs. EPA itself maintained throughout SAFE 1 that reducing criteria pollution and attaining and maintaining NAAQS is central to the Clean Air Act, generally, and Sections 209(b)(1) and 177, specifically. Yet, EPA nonetheless expressly opted to ignore its own prior findings concerning the criteria benefits of GHG and ZEV standards (including its approval of multiple SIPs containing those standards). EPA's disregard for the record was a clear violation of reasoned decision-making requirements, was inconsistent with its own assertions about the importance of reducing criteria pollution, and contravened the spirit (and letter) of the Clean Air Act's general conformity requirements. EPA can and should reverse its unnecessary SAFE 1 actions to correct those errors and restore the public health protections California's GHG and ZEV standards provide. And it may do so without regard to the conclusions it reaches on any of the other, alternative grounds discussed below.

2. EPA should reverse its Waiver Withdrawal because it was *ultra vires*. EPA's authority to withdraw a previously granted waiver is questionable, at best. But whatever withdrawal authority EPA might have in other circumstances, that authority does not extend to withdrawing a six-year-old waiver, on which multiple States have relied and on which multiple SIPs rest, simply because EPA adopts different policy views concerning the scope of the waiver provision or because another agency has decided to articulate its policy views concerning an entirely different statute. Congress did not intend EPA to have, and precedent does not provide EPA with, authority to withdraw a previously granted waiver in these circumstances or on these grounds.

3. EPA should also reverse its decision to rely on a rule promulgated by the National Highway Traffic Safety Administration (NHTSA) as a basis for EPA's Waiver Withdrawal. EPA's decision to withdraw a previously granted waiver based on a factor entirely outside the three exclusive statutory criteria Congress established was unjustified and unlawful. Indeed, EPA's explanation for why it would look beyond those three criteria in this *and only this* proceeding was woefully inadequate. Reversing EPA's reliance on NHTSA's rule would require reinstatement of the waiver for California's GHG and ZEV standards for model years (MYs) 2017-2020 because EPA's reliance on NHTSA's rule was the sole basis for that part of the Waiver Withdrawal. That reinstatement would also correct the clear legal error the agency committed when it extended the Waiver Withdrawal to MYs 2017-2020 without notice.

4. EPA should also reverse its Section 209(b)(1)(B) Determination—its conclusion that California does not "need" its GHG and ZEV standards within the meaning of this provision. This, combined with EPA's reversal of its decision to rely on NHTSA's Preemption Rule, would require EPA to restore the waiver for California's GHG and ZEV standards for MYs 2021-2025. There are three independent and alternative grounds for reversing the SAFE 1 Section 209(b)(1)(B) Determination.

a. EPA should revert back to its long-standing, traditional approach to this "need" inquiry—the one in which EPA considers California's need for its own mobile-source-emissions program as a whole, not whether California needs a particular standard for which it has requested a waiver. EPA can revert back to its traditional interpretation via one of two paths (or both, as alternatives). First, regardless of EPA's current views concerning its SAFE 1 approach, EPA can decide that it was unreasonable to apply that new approach to the long-settled 2013 waiver because doing so upended important reliance interests (including approved SIPs) and was particularly unnecessary given EPA's statement in SAFE 1 that its traditional approach remained a reasonable one. Second, EPA can readopt its traditional interpretation as its construction of Section 209(b)(1)(B) for the 2013 waiver and for waiver decisions going forward. Either way, EPA would have to reverse its Section 209(b)(1)(B) Determination and the portions of the Waiver Withdrawal resting on it because, even in SAFE 1, EPA did not and could not dispute that California still needs its own mobile-source emissions program.

b. EPA should reverse its Section 209(b)(1)(B) Determination on the grounds that, even under the SAFE 1 single-standard approach to this need inquiry, California needs its GHG and ZEV standards because they produce criteria pollution benefits upon which California (and other States) depend. EPA originally concluded in 2013 that the ZEV standard reduces criteria pollutant emissions. And the records in SAFE 1 and here, as well as EPA's own SIP approvals, confirm that both the ZEV and GHG standards reduce criteria pollution. Nonetheless, EPA disavowed the existence of any such reductions, while expressly declining to consider any evidence to the contrary. EPA should now correct those errors and find that California's need for

these standards to meet the undisputed and severe challenges it faces regarding criteria pollution suffices to reverse EPA's SAFE 1 Section 209(b)(1)(B) Determination.

c. EPA should also reinstate the Section 209(b)(1)(B) determination it made in 2013: that California needs standards that reduce its contributions to GHG emissions to address the extraordinary and compelling climate change conditions the State faces. EPA's reversal of that determination in SAFE 1 was based on new interpretations of Section 209(b)(1)(B) that should never have been applied both because it was unlawful to apply new policies to a long-settled waiver grant and because the new interpretations were unjustified and unreasonable. The records in SAFE 1 and here confirm EPA's prior position: that climate change conditions in California are "extraordinary" and the State needs to reduce its contributions to the emissions causing and exacerbating those conditions.

5. In addition, EPA should withdraw its Section 177 Determination for additional reasons beyond those referenced in point 1 above. EPA's Section 177 Determination can and should also be withdrawn because it was both *ultra vires* and an unreasonable interpretation of clear statutory text.

We also provide herein some additional information pertaining to the feasibility of automaker compliance with California's GHG and ZEV standards. To be clear, this information is *not* provided to support a determination under Section 209(b)(1)(C). As EPA made clear in SAFE 1 and in the Notice to which these comments respond, it did not finalize any changes to its 2013 analysis or decision under Section 209(b)(1) except as to Section 209(b)(1)(B). We agree with EPA that there are no issues before it concerning Section 209(b)(1)(C) or any other part of Section 209(b)(1). We are providing this additional information to underscore that automakers have been over-complying with California's GHG and ZEV standards and are expected to be able to continue to comply. Thus, there are no feasibility-related reasons not to reverse EPA's SAFE 1 actions.

We also explain below why neither CARB's 2018-2019 rulemaking to clarify its "deemed-to-comply" provision nor voluntary agreements between CARB and certain automakers are relevant to EPA's reconsideration of its SAFE 1 actions. Although these were mentioned in EPA's SAFE 1 decision, none of these CARB actions were a basis for EPA's SAFE 1 actions, none changed the GHG and ZEV standards for which EPA granted the waiver in 2013, and none have any bearing on California's need for those standards or any other issue raised by EPA's Notice.

In sum, we welcome EPA's decision to reconsider its SAFE 1 actions. We urge EPA to reverse those actions and observe that there are multiple, independent grounds on which it can do so.

BACKGROUND

A. The Original Waiver Provision

When Congress enacted the original waiver provision in 1967, it recognized that California was already leading the Nation in regulating vehicular emissions. In fact, the State's "interest in pollution control from motor vehicles dates to 1946," *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA* (*MEMA I*), 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979), and California's legislature mandated statewide motor vehicle emission standards beginning in the 1950s, *see* 1959 Cal. Stat. 2091. By contrast, "[n]o federal statute purported to regulate emissions from motor vehicles until 1965." *MEMA I*, 627 F.2d at 1108; *see also* Pub. L. No. 89-272, § 202, 79 Stat. 992 (1965).

When Congress did authorize federal regulation in this space, automakers urged Congress to preempt all state regulation, citing fears of "having to meet fifty-one separate sets of emissions control requirements." *MEMA I*, 627 F.2d at 1109. Congress, however, recognized that "the entire country" had benefitted from California's serving as "a kind of laboratory for innovation," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1080 (D.C. Cir. 1996). These "benefits for the Nation" included the "new control systems and design[s]," developed in response to California's technology-forcing standards. *MEMA I*, 627 F.2d at 1109–10 (quotation marks omitted); *see also* 38 Fed. Reg. 10,317, 10,318 (Apr. 26, 1973) (finding that waiver provision "has … made possible" "[i]nitial introduction of new emission control technology in California, followed by nationwide use in a later model year"). Congress also recognized the "harsh reality" of California's air pollution problems, the substantial contributions motor vehicles make to those problems, and the State's expertise in regulating vehicular emissions. H.R. Rep. No. 90-728, at 96-97 (1967); *see also* S. Rep. No. 90-403, at 33 (1967). For all these reasons, Congress chose to allow California to continue its technology-forcing leadership role—to continue "improv[ing] on 'its already excellent program' of emissions control," *MEMA I*, 627 F.2d at 1110 (quoting S. Rep. No. 90-403, at 33), over automaker objections that even two vehicular emission control regimes was too many, *see id.* at 1121 (citing H.R. Rep. No. 728, at 21-22).

Congress's careful compromise is reflected in Section 202, which requires EPA to regulate harmful emissions from new motor vehicles; Section 209(a), which preempts state regulation of new motor vehicle emissions; and Section 209(b)(1), which requires EPA to waive that preemption for California unless the agency makes one of three, narrow findings. That latter point—that EPA can only deny a waiver request on limited grounds—reflects the conclusion of a fierce debate in Congress. Specifically, Congress considered two versions of the original waiver provision at length. The Senate version provided that the waiver "shall" be granted (absent certain limited findings), while the House version provided that it "may" be granted. *See* 113 Cong. Rec. 30,956–57 (1967); *see also id.* at 30,950, 30,952. Advocates of the Senate's "shall" language described it as a "guarantee[]" that California could regulate, *id.* at 30,952, with the "burden … on the [agency] to show why California … should not be allowed to go beyond the Federal limitations," H.R. Rep. No. 90-728, at 96. By contrast, they viewed the "may" language of the House version as improperly placing California "at the mercy of the decision of one appointed head of a Federal department," forcing the State "to come with hat in hand to Washington." 113 Cong. Rec. at 30,941, 30,955; *see also* H.R. Rep. No. 90-728, at 96 ("Are we now to tell California that we don't quite trust her to run her own program, that big government should do it instead?"). Congress chose "shall," Pub. L. No. 90-148, § 208(b), 81 Stat. 501, and, by design, "the statute does not provide for any probing substantive review of the California standards by federal officials," *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1301 (D.C. Cir. 1979). *See also* 40 Fed. Reg. 23,102, 23,103 (May 28, 1975) (recounting this "unusually detailed and explicit legislative history").

As EPA and courts have long recognized, this legislative history and the text that resulted from it reflect Congress's decision "to grant California the broadest possible discretion in adopting and enforcing standards for the control of emissions from new motor vehicles." *MEMA I*, 627 F.2d at 1128. Accordingly, with judicial approval, EPA has long applied "deferential standards" when reviewing California's waiver requests, and particularly when that review implicates California's policy judgments such as which pollutants and which vehicles to regulate. *Ford Motor Co.*, 606 F.2d at 1302; *see also e.g.*, 41 Fed. Reg. 44,209 44,210 (Oct. 7., 1976) (describing and applying

"EPA practice of leaving the decision on … controversial matters of public policy to California's judgment"); *MEMA I*, 627 F.2d at 1121 ("[Congress] sharply restricted [EPA's] role in a waiver proceeding.").[1] Put simply, "Congress meant to ensure by the language it adopted that the Federal government would not second-guess the wisdom of state policy here." 40 Fed. Reg. at 23,103.

B. The 1977 Amendments to the Waiver Provision

The original waiver provision appeared to require that each California standard be more stringent than its federal counterpart (if any). In 1977, Congress "expand[ed] the waiver provision so that California could enforce emission control standards which it determined to be in its own best interest even if those standards were in some respects less stringent than comparable federal ones." *Ford Motor Co.*, 606 F.2d at 1301. Under Congress's deliberate "elect[ion] to expand California's flexibility to adopt a complete program of motor vehicle emissions control[,] … California need only determine that its standards will be in the aggregate, at least as protective of public health and welfare than applicable Federal standards, rather than the more stringent standard contained in the 1967 Act." *MEMA I*, 627 F.2d at 1110 (internal quotation marks omitted).

Thus, the waiver provision, as amended in 1977, requires EPA to grant California a waiver unless the Administrator finds:

- the State's determination that its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards" is arbitrary and capricious;
- California "does not need such State standards to meet compelling and extraordinary conditions"; or
- "such State standards and accompanying enforcement procedures are not consistent with" Section 202(a) (which involves questions of technological feasibility and lead time).

42 U.S.C. § 7543(b)(1).

When it enacted these 1977 amendments, "Congress expressed general approval of the Administrator's waiver decisions," *MEMA I*, 627 F.2d at 1122 (citing H.R. Rep. No. 95-294, at 301 (1977)), which, as noted above, were deferential, especially to California's policy judgments. It also described these amendments as "ratify[ing] and strengthen[ing] the California waiver provision." H.R. Rep. No. 95-294, at 301 (1977). As the D.C. Circuit summarized it shortly thereafter:

> The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation. Had

[1] Courts have also understood EPA's limited role in the broader legal context in which it sits, namely that challengers who "dislike the substance of the CARB's regulations, or … believe the procedures the CARB used to enact them were unsatisfactory, … are free to challenge the regulations in the state courts of California." *MEMA I*, 627 F.2d at 1105.

> Congress wanted to limit California's role to forbid its adoption of [certain program components], it could have easily done so. It did not. For a court to do so despite the absence of such an indication would only frustrate the congressional intent.

MEMA I, 627 F.2d at 1110–11.

Under both the original provision and the amended version, California has continued to lead the Nation in vehicle emission control, often regulating before, or more stringently, than EPA. *See* CARB SAFE Comments at 23–48 (EPA-HQ-OAR-2018-0283-5054).[2] As Congress anticipated, these pioneering efforts have led to the development of emission control technologies that have ultimately been deployed nationwide (and even internationally) to protect public health and welfare. *See id.*[3] And EPA's practice of deferring to California's policy judgments continued, as Congress intended. *E.g.*, 43 Fed. Reg. 25,729, 25,736 (June 14, 1978); 49 Fed. Reg. 18,887, 18,891 (May 3, 1984).

C. Section 177

In 1977, Congress also added a new, related provision to the Clean Air Act: Section 177. This section permits other States to adopt and enforce standards for which California receives a waiver, subject to three conditions:

- the State must have State Implementation Plan (SIP) provisions approved under Part D of Subchapter 1 of the Clean Air Act;
- the standards the State adopts and enforces must be identical to California's; and
- the State must provide auto manufacturers with at least two years of lead time.

42 U.S.C. § 7507. In enacting Section 177, Congress recognized, as it had in 1967, that California is not the only State that suffers from "automotive-related air pollution problems." H.R. Rep. No. 95-564, at 156 (1977) (Conf. Rep.); *see also* S. Rep. No. 90-403, at 33 (1967).

D. Section 209(e)(2)(A)

In 1990, after more than twenty years of waiver requests and decisions, Congress enacted a new but very similar provision to the Clean Air Act: Section 209(e)(2)(A). 42 U.S.C. § 7543(e)(2)(A). Like the waiver provision, Section 209(e)(2)(A) authorizes EPA to waive preemption for California emission standards regulating mobile sources. Section 209(e)(2)(A) applies to a different type of vehicles and engines: those that operate off road, such as bulldozers,

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[2] References to comments submitted in the SAFE proceeding are identified herein by the party or parties who submitted the comment (e.g., "CARB"). When these comments are first cited, the SAFE Docket ID is provided to clearly identify the document. Although we anticipate that the record from SAFE 1 is part of the record for this reconsideration proceedings, the cited comments are also being submitted into the docket for this proceeding along with these comments.

[3] *See also* Michael P. Walsh SAFE Comment at 1–3 (EPA-HQ-OAR-2018-0283-4029); M.J. Bradley & Associates, *California Transportation Policy Leadership: How California Led the World Toward Cleaner, Advanced Vehicles* (Oct. 2018) (EPA-HQ-OAR-2018-0283-4029).

graders, etc. To a significant extent, Section 209(e)(2)(A) mirrors Section 209(b)(1), requiring EPA to waive preemption unless EPA makes one of three findings. *Compare* 42 U.S.C. § 7543(b)(1), *with id.* § 7543(e)(2)(A). Most relevant here, the text of the "need" prong of Section 209(e)(2)(A) is identical to that of Section 209(b)(1) except that Congress replaced "State" with "California." Congress also adopted a provision similar to Section 177 that permits other States to adopt California's non-road standards, subject to similar conditions as those applicable under Section 177. *Id.* § 7543(e)(2)(B).

E. EPA's SAFE 1 Actions

In 2013, EPA granted California a preemption waiver under Section 209(b)(1) for the State's Advanced Clean Cars program. 78 Fed. Reg. 2,112 (Jan. 9, 2013) (Waiver Grant). That program combined multiple standards "into a single coordinated package of requirements for MY 2015 through 2025" light-duty vehicles. *Id.* It was designed to control a number of pollutants, including "smog and soot causing pollutants and GHG emissions." *Id*. Included in this coordinated package were Low Emission Vehicle (LEV) standards for criteria pollutants and for GHGs, as well as the State's Zero Emission Vehicle (ZEV) standard. *Id.* No one sought judicial review of EPA's decision to waive preemption for this program. Multiple States (Section 177 States) adopted California's standards, and EPA approved multiple State Implementation Plans containing some or all of these California standards.[4]

In 2018, EPA proposed to withdraw the portions of the 2013 waiver corresponding to California's GHG and ZEV standards (but not the criteria pollution standards that were part of the same program) for model years 2021-2025. 83 Fed. Reg. 42,986, 43,240 (Aug. 24, 2018). It proposed to do so on three grounds: 1) that NHTSA had proposed to promulgate a Preemption Rule stating that California's GHG and ZEV standards were preempted under the Energy Policy and Conservation Act (EPCA); 2) that, contrary to EPA's conclusion in 2013, California did not need these standards to meet compelling and extraordinary conditions under Section 209(b)(1)(B); and 3) that California's standards for these model years were technologically infeasible under Section 209(b)(1)(C)'s "consistency" requirement. *Id.* EPA also proposed to determine that Section 177 would not permit other States to adopt California's GHG standards, even if the State qualified to do so under Section 177 and California had a waiver for those standards. *Id.*

Most of the undersigned States and cities filed comments objecting to EPA's proposal and identifying numerous legal and other flaws therein. Nonetheless, in 2019, EPA finalized the Waiver Withdrawal on the first two grounds (including the Preemption Rule that NHTSA finalized at the same time). 84 Fed. Reg. 51,310, 51,328 (Sept. 27, 2019) (SAFE 1). EPA declined to make any feasibility findings under Section 209(b)(1)(C). *Id.* at 51,350. However, the agency appeared to expand the scope of the withdrawal beyond what it had proposed, seeming to assert that, based on EPA's reliance on NHTSA's Preemption Rule, the waiver for California's GHG and ZEV standards was "invalid, null, and void" for *all* model years (2017-2025), *id.* at

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[4] 82 Fed. Reg. 42,233 (Sept. 7, 2017) (Maine); 81 Fed. Reg. 39,424 (June 16, 2016) (California); 80 Fed. Reg. 61,752 (Oct. 14, 2015) (Delaware); 80 Fed. Reg. 50,203 (Aug. 19, 2015) (Rhode Island); 80 Fed. Reg. 40,917 (July 14, 2015) (Maryland); 80 Fed. Reg. 13,768 (Mar. 17, 2015) (Connecticut).

51,328, whereas the proposal had been limited to MY 2021-2025, *id.* at 51,329.[5] EPA also finalized the Section 177 Determination. *Id.* at 51,350-51.

Most of the undersigned States and cities sought judicial review and submitted a petition for reconsideration to EPA (in addition to a separate, limited petition for reconsideration submitted by California through its Attorney General and the California Air Resources Board). Those legal challenges are fully briefed before the D.C. Circuit but are in abeyance while EPA and NHTSA reconsider their respective SAFE 1 actions. EPA also granted both of the above mentioned reconsideration petitions by letters on April 23, 2021.[6]

The undersigned States and cities welcome EPA's reconsideration and urge EPA to reverse its SAFE 1 actions.

REASONS TO REVERSE EPA'S SAFE 1 ACTIONS

I. EPA SHOULD REVERSE ITS SAFE 1 ACTIONS BECAUSE OF THEIR SIGNIFICANT, ADVERSE CRITERIA POLLUTION CONSEQUENCES

Both of EPA's SAFE 1 actions—its Waiver Withdrawal and its Section 177 Determination—will increase criteria pollution that endangers public health and welfare. Both actions, at a minimum, cast a cloud of uncertainty over multiple already approved SIPs—state plans designed to reach or maintain the public-health-based standards EPA has set for criteria pollution levels. Yet, neither action was necessary. No statute compelled EPA to reconsider the 2013 waiver at all, let alone to apply new policies to that long-settled decision rather than to new waiver requests. EPA should not have taken discretionary actions that increase harmful criteria pollution and interfere with EPA-approved state plans to reduce that pollution. In so doing, EPA contravened the letter and the spirit of the Clean Air Act's general conformity requirements; created unexplained inconsistency with its own SAFE 1 position that reducing criteria pollution is of overriding importance; and, indeed, failed entirely to consider this important aspect of its actions. EPA should reverse both the Waiver Withdrawal and the Section 177 Determination to correct these errors, to protect public health and welfare, and to restore certainty to the affected SIPs. This reversal is, in fact, necessary to achieve consistency with the Clean Air Act's objectives and text concerning criteria pollution, as well as with the requirements of reasoned decision-making. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1064–65 (D.C. Cir. 2018) (vacating agency action that did "not demonstrate, or even acknowledge, that EPA considered … statutory objectives" and that, in fact, "undermine[d] these objectives without explaining why [doing so] was necessary"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Recognizing the well-documented, harmful criteria pollution consequences of EPA's unnecessary SAFE 1 actions also provides a more than sufficient "reasoned analysis for" reversing both of EPA's SAFE 1 actions, particularly since no reasonable reliance interests in those actions have developed. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

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[5] *See also* Petition for Clarification and Reconsideration submitted by CARB and the California Attorney General (October 9, 2019).

[6] These reconsideration petitions and EPA's letters granting them are included in the materials submitted with this comment.

A. As EPA Acknowledged in SAFE 1, Protecting Public Health and Welfare by Reducing Criteria Pollution Is a Core Objective of the Clean Air Act

The core objective of the Clean Air Act is to reduce harmful air pollution, and one of the central mechanisms by which it seeks to do that are the NAAQS for criteria pollution and the implementation plans designed to attain those standards and then maintain that level of air quality (or better). *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (describing "the NAAQS" as "the engine that drives nearly all of Title I of the CAA"). These plans (SIPs) are so central to the Act's objectives, Congress has forbidden federal agencies from engaging in activities that do not "conform" to approved SIPs. 42 U.S.C. § 7506(c).

In SAFE 1, EPA itself repeatedly recognized the importance of reducing criteria pollution as a core objective of the Clean Air Act and, specifically, of Section 209(b)(1). *E.g.*, 84 Fed. Reg. at 51,344, 51,349. Indeed, EPA crafted its new interpretation of Section 209(b)(1)(B) on the (mistaken) notion that it limits the availability of waivers to criteria pollution standards. *See infra* at 33 (Section IV.C.1). EPA went so far as to assert that, under a proper understanding of Section 209(b)(1), "California's need for a GHG/climate program" should be "subordinat[e]" "to California's need for a criteria pollutant program." 84 Fed. Reg. at 51,339. Consistent with EPA's own statements—and the text and intent of the Act—EPA should have considered the criteria-pollution and SIP consequences of its Waiver Withdrawal and Section 177 Determination. It did not, and those consequences are more than sufficient reason to reverse EPA's actions.

B. California's GHG and ZEV Standards Provide Criteria Pollution Benefits

As the records in SAFE 1 and here demonstrate, and as EPA itself has repeatedly found, California's GHG and ZEV standards reduce emissions that contribute to criteria pollution, including ozone and particulate matter.

1. The Zero-Emission Vehicle Standard

As EPA acknowledged in SAFE 1, California's ZEV standard initially targeted only criteria pollution. 84 Fed. Reg. at 51,329 ("Up until the ACC [Advanced Clean Cars] program waiver request, CARB had relied on the ZEV requirements as a compliance option for reducing criteria pollutants."); *see also* 78 Fed. Reg. at 2,118. In the 2013 Waiver Grant, EPA correctly recognized that, with its Advanced Clean Cars program, California had shifted to relying on the ZEV requirements to reduce *both* criteria and GHG pollution. 78 Fed. Reg. at 2,114 (recognizing that the ZEV amendments in ACC were "designed to address" "near and long term smog issues" as well as "GHG emission reduction goals"). EPA also accepted CARB's demonstration of "the magnitude of the technology and energy transformation needed from the transportation sector and associated energy production to meet federal standards *and* the goals set forth by California's climate change requirements" and found that the ZEV standards would help California achieve those "long term emission benefits as well as … some [short-term] reduction in criteria pollutant emissions." 78 Fed. Reg. at 2,131 (emphasis added); *see also* CARB Waiver Support Document (May 2012) at 15–16 ("Waiver Request") (EPA-HQ-OAR-2012-0562-0004); CARB Nov. 2012 Supp. Comments (Nov. 14, 2012) at 4 (EPA-HQ-OAR-2012-0562-0373).

Indeed, EPA found that CARB had "reasonably refute[d]" the contrary claim—that its ZEV standard would produce no criteria emission benefits. 78 Fed. Reg. at 2,125.[7]

EPA confirmed the ZEV standard's role in reducing criteria pollution yet again when it approved that standard into California's and other States' SIPs. 81 Fed. Reg. 39,424, 39,425 (June 16, 2016) (California).[8] EPA acknowledged this in SAFE 1: "EPA reviewed [and approved] California's SIP submission, including ZEV measures, *as a matter of NAAQS compliance strategy*." 84 Fed. Reg. at 51,337 (emphasis added). Similarly, EPA has approved CARB's EMission FACtor (EMFAC) emission inventory model as a tool to estimate emissions and develop implementation plans to attain the NAAQS. *See* 80 Fed. Reg. 77,337 (Dec. 14, 2015) (EMFAC2014 approval); 84 Fed. Reg. 41,717 (Aug. 15, 2019) (EMFAC2017 approval). Both EMFAC2014 and EMFAC2017 reflect the emission benefits of CARB's motor vehicle pollution control program, including its GHG and ZEV standards. EPA's approval of these models is further indication that EPA recognizes the emission reductions benefits of these programs.

In SAFE 1, EPA identified no record evidence that would support reversing its prior conclusions. And, in fact, CARB's comments in the SAFE 1 proceeding confirmed that EPA's prior findings were correct: that the ZEV standard reduces criteria pollution. For example, CARB modeled the consequences of the actions proposed in SAFE, which included withdrawing California's waiver for its GHG and ZEV standards and freezing the federal GHG standards at MY 2020 levels. CARB concluded those actions, which would eliminate California's ZEV and GHG standards and leave in place only federal GHG standards at MY 2020 levels, would increase NOx emissions in the South Coast air basin alone by 1.24 tons per day. CARB SAFE Comments at 288, 308. While that figure combined the effects of replacing both California standards with a weaker federal standard, it nonetheless demonstrated that invalidating the state standards would have adverse criteria pollution consequences—including in the area of the country with the worst ozone challenges.

CARB's additional analysis submitted in this docket provides still more confirmation and documentation of the criteria pollution benefits of the ZEV standard. *See* Appendix A at 2–5 (estimating criteria pollution benefits of replacing conventional vehicles with ZEVs); Appendix B at 11–15 (describing the importance of ZEVs for reducing pollution in overburdened communities).

2. The GHG Standard

EPA has also found that vehicular GHG emission standards reduce criteria pollutant emissions. For example, when it adopted its federal GHG standards for the same period at issue here (MY2017-2025), EPA found that those standards would reduce emissions of most criteria pollutants, including those, like VOCs and PM2.5, related to California's well-documented challenges with criteria pollution. 77 Fed. Reg. 62,624, 62,899 (Oct. 15, 2012). California's

[7] Congress, too, has recognized that ZEVs and California's ZEV standards reduce criteria pollution. 42 U.S.C. § 7586(f) (authorizing credits for zero-emission vehicles, defined "as closely as possible" as in "standards which are established by the State of California," as part of state plans to attain criteria-pollution standards).

[8] *See also* 82 Fed. Reg. 42,233, 42,235 (Sept. 7, 2017) (Maine); 80 Fed. Reg. 40,917, 40,920 (Jul. 14, 2015) (Maryland); 80 Fed. Reg. 13,768, 13,769 (Mar. 17, 2015) (Connecticut).

GHG standards are roughly equivalent to those EPA promulgated in 2012 and will, therefore, have similar criteria pollution benefits, albeit on a smaller (state) scale. If there were any doubt, EPA confirmed this connection again by approving California's GHG standards into multiple State SIPs,[9] and into California's EMFAC models, *see supra* at 33. And CARB likewise confirmed this connection in its SAFE comments. CARB SAFE Comments at 288, 308.

In addition, as EPA has previously recognized, reducing the GHGs that are causing climate change is important to mitigate increases in ozone formation. *E.g.*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016) ("[C]limate change is expected to increase ozone pollution over broad areas of the U.S., including in the largest metropolitan areas with the worst ozone problems, and thereby increase the risk of morbidity and mortality."); 74 Fed. Reg. 32,744, 32,763 (July 8, 2009) ("California has made a case that its greenhouse gas standards are linked to amelioration of California's smog problems."). The record in the SAFE proceeding confirmed these criteria pollution benefits of reducing GHGs. *E.g.*, Multi-State SAFE Comments at 24 (EPA-HQ-OAR-2018-0283-5481).[10]

The fact that CARB's 2012 waiver request did not specifically call out the criteria pollution benefits of its GHG standard does not undermine EPA's findings or the record evidence. CARB "performed a combined … emissions analysis" of all components of the Advanced Clean Cars program because that program was designed to work as an integrated whole and because EPA has always considered California's emissions reductions in the aggregate. ZEV Initial Statement of Reasons at 72 ("ZEV ISOR") (EPA-HQ-OAR-2012-0562-0008); CARB Nov. 2012 Supp. Comments at 3. As CARB noted at the time, even those objecting to the waiver "concede[d]" the Advanced Clean Cars standards were "interrelated." CARB Nov. 2012 Supp. Comments at 3. The GHG standards contribute to the combined benefits of the integrated program, as EPA's prior findings confirm.

Although no further evidence is required to establish that state GHG standards produce criteria pollution benefits, CARB nonetheless submits its latest analysis of the criteria pollution benefits of its GHG standards. Appendix C. CARB's analysis estimated those benefits for the calendar years by which the South Coast air basin must meet increasingly stringent NAAQS for ozone: 2023, 2031, 2037. The estimated statewide NOx emission benefits are as follows:

- 51-67 fewer tons per year, or 0.15-0.18 tons per day, in calendar year 2023;
- 297-358 fewer tons per year, or 0.86-1.03 tons per day, in calendar year 2031; and
- 404-483 fewer tons per year of NOx, or 1.16-1.39 tons per day, in calendar year 2037.

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[9] 82 Fed. Reg. 42,233 (Sept. 7, 2017) (Maine); 80 Fed. Reg. 61,752 (Oct. 14, 2015) (Delaware); 80 Fed. Reg. 50,203 (Aug. 19, 2015) (Rhode Island); 80 Fed. Reg. 40,917 (July 14, 2015) (Maryland).

[10] *See also* U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, at 514, 518 (2018) (EPA-HQ-OAR-2018-0283-7447); Union of Concerned Scientists, *Climate Change and Your Health: Rising Temperatures, Worsening Ozone Pollution* at 2–3 (June 2011) (EPA-HQ-OAR-2018-0283-5683).

Id. at 2–3. To place these figures in context, mobile-source NOx emissions in the South Coast air basin—which is in extreme non-attainment for ozone—must be reduced by more than half of 2021 levels by 2023, with further, deep reductions required for later years. *Id.* at 8. Every ton, and every fraction of a ton, of emission reductions is absolutely necessary in that region and in the multiple other regions of California in which ozone levels threaten public health and welfare. For these reasons, CARB has included its GHG standards in a recent SIP submittal, as multiple States have already done (and EPA has approved).

C. EPA's Refusal to Consider the Criteria Pollution Consequences of Its SAFE 1 Actions Contravened the Clean Air Act and Reasoned Decision-Making Requirements

Despite acknowledging California's criteria pollution challenges and the importance of addressing those challenges under the Act, EPA expressly declined to consider the criteria emission consequences of 1) withdrawing the waiver for California's GHG and ZEV standards and 2) determining that other States may not adopt California's GHG standards under Section 177. EPA claimed that California had asserted no criteria benefits from these standards in its 2012 waiver application and that considering those benefits in SAFE 1 would, therefore, contravene EPA's practice "not to scrutinize California's criteria pollutant emissions reductions projections or air emissions benefits." 84 Fed. Reg. at 51,349 n.284. Thus, EPA chose to ignore the record and its own prior findings and to treat "elevated atmospheric concentrations of greenhouse gases" as the only "air pollution problem at issue" in SAFE 1. 84 Fed. Reg. at 51,346. Agencies cannot disregard the relevant evidence before them, *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018), and this general principle applies to waiver proceedings, *MEMA I*, 627 F.2d at 1122. EPA's purported rationale does not support its deliberate decision to ignore the criteria pollution consequences of its SAFE 1 actions or otherwise cure EPA's multiple legal errors.

First, the premise of EPA's claim is false: California *did* assert criteria benefits from its standards in the 2012 waiver proceeding. In fact, EPA accepted those assertions. 78 Fed. Reg. at 2,125. CARB established that the ZEV standard would address criteria pollution in two ways: 1) by reducing emissions associated with the production, transportation, and distribution of gasoline; and 2) by driving the commercialization of zero-emission-vehicle technologies necessary to reduce future emissions and achieve California's long-term air quality goals. Waiver Request at 16 (quantifying criteria benefits from resulting from ZEV standards by 2030); *id.* at 22 (describing "ZEV technology commercialization and long-term GHG and *criteria emission goals*" as "one of the [ZEV] program's primary objectives") (emphasis added). The California rulemaking material CARB submitted made these same two points, stating that "[t]he ZEV regulation … remains critically important to California's efforts to meet health based air quality goals." ZEV ISOR at ES -1; *see also id.* at 72 ("ZEVs are needed as a critical part of the future California fleet to achieve … critical criteria pollutant emission reductions"); CARB Nov. 2012 Supp. Comments at 3–4 ("[W]e need these technologies to be commercialized by 2025 to reach smog forming … reduction targets long term."). As the record made clear, the ZEV standard was always intended to drive the commercialization of zero-emission technologies to reduce criteria pollution and achieve California's long-term air quality goals. The fact that CARB decided the ZEV standard could *also* advance the State's long-term GHG emission reduction goals did not change that. *See* Waiver Request at 2 (describing "shifting the focus of the ZEV regulation to

both GHG and criteria pollutant emission reductions") (emphasis added). CARB did not "present[] its ZEV program to EPA solely as a GHG compliance strategy." *See* 84 Fed. Reg. at 51,337.

Second, all federal agencies, including EPA, are required to "conform" their actions to approved SIPs, meaning agencies are prohibited from taking actions—like EPA's SAFE 1 actions—that undermine approved plans. 42 U.S.C. § 7506(c). EPA acknowledged in SAFE 1 that it had approved multiple SIPs containing one or both of the California standards it effectively invalidated in SAFE 1. 84 Fed. Reg. at 51,388 n.256. EPA also acknowledged, perhaps inadvertently, CARB's comments in SAFE 1 that called attention to the SIP risks EPA's actions would create. 84 Fed. Reg. at 51,337 n.251 (quoting CARB's SAFE 1 Comments at 373: ''This increasing ZEV deployment is critical to achieving the statewide 2030 and 2045 GHG requirements *and 2031 South Coast SIP commitments* (the 2016 State SIP Strategy identified the need for light-duty vehicles to reduce NOX emissions by over 85 percent by 2031 to meet federal standards)" (emphasis added)).

EPA's deliberate decision to ignore any and all evidence of the criteria pollution consequences of its actions—including consequences for the approved SIPs—plainly contravened its conformity obligations. *See* CARB SAFE Comments at 288 ("The federal proposal to rollback vehicle standards and withdraw Clean Air Act preemption waivers granted to California for its GHG standards and Zero Emissions Vehicle (ZEV) mandate will not allow California to achieve the 2031 South Coast SIP commitments or statewide 2030 and 2045 GHG requirements."); *id.* at 308 ("California's ZEV regulation is a practical necessity to meeting the National Ambient Air Quality Standards for ozone."). Indeed, EPA did not even conduct the initial step of a conformity analysis, despite a comment demanding that it do so. South Coast Air Quality Management District SAFE Comments at 2–3 (EPA-HQ-OAR-2018-0283-4124).

In its SAFE 1 brief, EPA tried to justify this failure, asserting exceptions to conformity and purporting to adopt NHTSA's inadequate conformity analysis. Respondents' Final Br. (Respondents' Br.) at 104–105 (*UCS v. NHTSA*, D.C. Cir. No. 19-1230 and consolidated). None of those justifications withstands scrutiny (and, notably, EPA asserted none of them in SAFE 1 itself). *See* Final Reply Br. of State & Local Gov't Petitioners and Public Interest Petitioners at 17. But even if the general conformity requirements somehow did not apply, EPA's discretionary actions in SAFE 1—and its refusal to even consider the criteria pollution consequences of those actions—plainly contravened the spirit of those requirements. EPA's statement that it might address the consequences of SAFE 1 for those SIPs at a later date, 84 Fed. Reg. at 51,833 n.256, only underscores the point: there were such consequences and EPA failed to even begin to grapple with them. The serious tension with—if not violation of—EPA's conformity obligations is more than sufficient reason to reverse its SAFE 1 actions.

Third, having claimed that criteria pollution reduction is the primary, if not sole, purpose of Section 209(b)(1), EPA could not lawfully ignore the comments and record evidence indicating that its SAFE 1 actions would increase that very pollution. 84 Fed. Reg. at 51,350 n.285 (asserting "section's original purpose [was] addressing smog-related air quality problems"); *id.* at 51,350 (claiming Section 177 was enacted solely to facilitate the struggle to attain NAAQS); *State Farm*, 463 U.S. at 43. EPA's SAFE 1 actions purported to put criteria pollution "at the center of its reasoning." *See Delaware Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 15

(D.C. Cir. 2015). EPA's "refus[al] to engage" the record on that pollution rendered EPA's actions internally inconsistent and unlawful. *Id. See also MEMA I*, 627 F.2d at 1122 ("[The Administrator] must consider all evidence that passes the threshold test of materiality.").

Fourth, and finally, EPA did not even consistently apply the principle it articulated as its rationale for ignoring criteria pollution consequences. While EPA (correctly) does not "scrutinize" California's projections of emission reductions it anticipates from the State's standards, 84 Fed. Reg. at 51,349 n.284, if EPA had truly applied that principle in SAFE 1, it would have *accepted California's demonstration* of criteria benefits, not declined to consider it. Moreover, application of that principle precludes EPA from quibbling with California's *quantification* of projected emission benefits. It does not permit EPA to disregard all evidence that pollution reduction benefits will occur. *See Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action."); *Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 178 (D.C. Cir. 2005) ("[Agency's] decision does not withstand review because the agency decisionmaker *entirely ignored* relevant evidence.").

D. EPA Should Reverse Its Unnecessary SAFE 1 Actions to Correct Its Errors and Restore Public Health Protections

As the Clean Air Act's general conformity provision makes clear, EPA should not take discretionary, unnecessary actions that undermine approved SIPs. Likewise, EPA should not take discretionary, unnecessary actions that increase criteria pollution and the risks it poses to public health and welfare. Yet that is what EPA did in SAFE 1. EPA can and should reverse its SAFE 1 actions to protect public health and welfare and return certainty to approved SIPs designed to do just that.

EPA can reverse its actions on this ground, regardless of its position on any of the alternative grounds described below. Nothing *required* EPA to reconsider its 2013 decision, to adopt new policy positions, or to apply those new positions to a long-settled waiver grant. EPA never claimed otherwise; nor could it have. At a minimum, then, EPA has discretion to reverse these decisions, so long as it acknowledges it is doing so and provides an explanation for changing course. And, because no reasonable reliance interests have attached to EPA's SAFE 1 actions and EPA's reversal would comport with precedents governing reconsideration of adjudications, the agency need only provide "good reasons" for changing course, *Fox Television*, 556 U.S. at 515. Protecting public health, complying with the spirit (and letter) of the law, advancing the statute's objectives, and correcting violations of reasoned decision-making principles are all "good reasons" here, again regardless of what decisions EPA makes on the other strong bases for reversal discussed below.

EPA's reversal and reinstatement of the waiver on this ground would not contravene the principles governing reconsideration of adjudications as its SAFE 1 actions did. First, unlike SAFE 1, this reversal would not be unreasonably delayed. Although EPA did not open this proceeding within the period for initiating judicial review, many petitioners, including CARB, did initiate judicial review within the statutorily prescribed period, and those consolidated cases have not yet been resolved. Thus, unlike in SAFE 1, EPA would not be reconsidering a settled decision for which the period of judicial review had long ago run without a single challenge

being filed. *See Nat'l Ass'n of Trailer Owners, Inc. v. Day*, 299 F.2d 137, 138 (D.C. Cir. 1962) (holding reconsideration period reasonable where permanency of adjudication was not "assumed by either of the parties" involved). Second, EPA's reversal would be based on 1) honoring the policies long extant in the Clean Air Act regarding the importance of reducing criteria pollution, 2) factual findings (which the agency should re-confirm here) concerning the criteria pollution benefits of these standards, and 3) the need to correct plain legal errors. The reversal would not be impermissibly based on changes in agency policy as SAFE 1 was.

In addition, no reasonable reliance interests can have attached to EPA's SAFE 1 actions. Those actions were challenged immediately, and that litigation is unresolved. Where, as here, "[t]he state of the law has never been clear, and the issue has been disputed since it first arose," reliance is generally unreasonable. *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996). Automakers and others who may claim to have relied on EPA's SAFE 1 actions did so unreasonably, "in the face of considerable uncertainty." *Id.* The automakers who intervened to defend EPA's SAFE 1 actions confirmed as much in their filings in the D.C. Circuit. They asked the Court to expedite the SAFE 1 litigation, asserting that they *could not rely* on EPA's actions, and, until the litigation was resolved, they would have to prepare to comply with California's standards as well as EPA's. Intervenors' Motion for Expedited Consideration at 11 (*UCS v. NHTSA*, D.C. Cir. No. 19-1230) ("[W]hile Petitioners' challenge is pending, Movants' members will continue to face multiple, overlapping, and inconsistent regulations, and will be required to expend unrecoverable resources developing production plans preparing for this possibility—even if California's separate standards are later deemed to be illegal."); *see also id.* at 14 ("Prompt resolution of this case is thus necessary to provide Movants' members with a clear answer regarding California's authority to regulate."). Put simply, these automakers—the only ones who sought to defend EPA's SAFE 1 actions—told the Court that those actions did "not serve as a guide to lawful behavior." *See Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2179 (2019) (internal quotation marks omitted). Thus, the automakers (and those affected by their decisions) had "no reliance interests" in those actions. *See id.*

Consistent with the Clean Air Act and the agency's own statements in SAFE 1, EPA should reverse both of its SAFE 1 actions to eliminate uncertainty it created regarding already approved SIPs and to restore the public health protections California's GHG and ZEV standards provide.

II. EPA Should Reverse Its SAFE 1 Waiver Withdrawal Because That Action Was Outside EPA's Authority

EPA is "a creature of statute" with "only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Thus, EPA may act "only if some provision or provisions of the [Clean Air] Act explicitly or implicitly grant it power to do so." *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016). Neither Section 209(b)(1) nor any other section of the Clean Air Act explicitly authorizes EPA to withdraw a previously granted waiver in whole or in part. Section 209(b)(1) refers only to EPA's action to "grant[ ]" or not grant a waiver requested by California. *See* 42 U.S.C. § 7543(b)(1). It makes no mention of, let alone explicitly authorizes, withdrawals of previously granted waivers. Section 209(b)(1) likewise does not implicitly authorize waiver withdrawals, and, even if it did so under some circumstances, EPA's SAFE 1 Waiver Withdrawal was far outside those bounds. EPA should reverse that withdrawal on the grounds that it was *ultra vires*.

In SAFE 1, EPA asserted that the authority to withdraw a waiver is implicit in Section 209(b)(1). 84 Fed. Reg. at 51,332 (quoting S. Rep. No. 90–403, at 34 (1967)). That position suffers from multiple flaws. It fails to recognize the difference between a decision to grant or deny a waiver in the first instance—the decision explicitly authorized by the provision—and a decision to withdraw a previously granted waiver. The former prevents States from beginning to enforce and otherwise implement a regulation or program; the latter derails a state program already in effect and underway (possibly in multiple States). The sovereign and reliance interests at stake in the latter would be far stronger, as Congress was well aware, having invited some of those interests to develop. Specifically, in Section 177, Congress invited other States to rely on EPA's waivers by adopting California's standards as their own—an act that would obviously become the basis for state planning and other exercises of sovereign police powers. Congress also invited States to rely on EPA's waivers by including California standards in their SIPs to attain or maintain NAAQS. Congress believed so strongly in the importance of those plans that it expressly forbade federal agencies from interfering with them after EPA approval. It would be quite surprising, then, for EPA to have *implicit* authority to upend this multi-actor, multi-step scheme by pulling the rug out from under it after the fact. *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 840 (D.C. Cir. 1984) (rejecting "implied power" as "contrary to the intention of Congress and the design of" the Act).[11]

But EPA need not reach the general question of withdrawal authority and its particular bounds here because EPA's SAFE 1 action was plainly *ultra vires* under any view of EPA's withdrawal authority. As a threshold point, EPA's sole source of support for its authority was a single sentence from 1967 legislative history that does not establish any withdrawal authority and, in any event, does not establish authority for the SAFE 1 withdrawal. EPA's selected snippet predated both the creation of the NAAQS program and Congress's invitations to the development of numerous state reliance interests in waiver grants. Moreover, EPA's legislative history stated a view that the Administrator had an "implicit … right … to withdraw" *if* he or she found "that the State of California *no longer complies with the conditions of the waiver*.'' S. Rep. No. 90–403, at 34 (1967) (emphasis added). But EPA made no such finding in SAFE 1. Indeed, EPA's SAFE 1 withdrawal was not predicated on any finding that California was conducting its program differently than anticipated at the time the waiver was granted or on any factual finding at all. Quite the contrary: EPA's action was based entirely on its own changed policy positions, namely its reinterpretation of Section 209(b)(1) to create a categorical bar against state regulation of vehicular GHG emissions and its decision to rely on another agency's newly articulated views of a different statute. None of those bases involved California's compliance with "conditions of the waiver." EPA's action was, thus, outside even the authority to which EPA attempted to lay claim.

In addition, Section 209(b)(1) cannot provide implicit authority to revoke on grounds—including NHTSA's Preemption Rule—that are entirely outside its scope. The waiver provision provides three, and only three, criteria upon which EPA can deny a waiver. If EPA must grant a waiver

[11] The importance and complexity of the structure Congress chose to allow States and EPA to build on top of granted waivers indicates, at a minimum, that any withdrawal authority EPA has is constrained and is plainly not capacious enough to include changes in policy views of the kind that underlay SAFE 1.

absent satisfaction of one of those three criteria (and it must), it cannot have *broader, implicit* authority to revoke such a grant on entirely different grounds.

Finally, any withdrawal authority EPA might have must be exercised consistent with the principles and precedents governing agency actions, generally, and reversals of informal adjudications, specifically.[12] As the constraints of Section 209(b)(1) itself indicate, Congress has not "countenance[d]" the "ill-conceived revisory power" EPA claimed in SAFE 1—where "[w]aivers granted after the statutorily-prescribed determination … would be open to revocation at any time, based on any evidence, subject to no substantive or procedural safeguards." *Am. Methyl Corp.*, 749 F.2d at 835. At a minimum, precedent requires 1) that reversals of informal adjudications occur within a reasonable time after the original decision (*id.*); 2) that the agency consider reliance interests that have attached to its original decision (*Chapman v. El Paso Nat. Gas Co.,* 204 F.2d 46, 53–54 (D.C. Cir. 1953); *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914 (2020)); and 3) that the reversal is not for "the sole purpose of applying some … change in administrative policy" (*Chapman*, 204 F.2d at 53–54.; *see also United States v. Seatrain Lines Inc.*, 329 U.S. 424, 429 (1947)).[13] EPA's Waiver Withdrawal violated each and every one of these principles.

1. By any measure, six years was too long a delay for EPA's reconsideration to be lawful. That period was well beyond the "weeks, not years" sometimes referenced as guidance for reasonableness. *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977). Likewise, the period for seeking judicial review had long ago run, *Am. Methyl Corp.*, 749 F.2d at 835, and, in fact, no one had sought that review.

2. EPA refused to consider the reliance interests that had attached to its 2013 Waiver Grant. At the time EPA proposed SAFE 1, twelve other States had relied on EPA's 2013 Waiver Grant and adopted one or both of the California standards as their own. Multi-State SAFE Comments at 130. California and those Section 177 States further relied on the 2013 Waiver Grant in developing their long-term plans to control various forms of air pollution—including plans to reach state GHG and air quality targets as well as SIPs to attain or maintain compliance with NAAQS. *Id.* at 131.

These reliance interests are weighty. *See Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 595 (D.C. Cir. 2015) (describing as "important" state and local governments' reliance interests in "long-term plans" based on federal agency actions). The Clean Air Act and long-standing Executive branch policy both place substantial importance on States' interests in implementing

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[12] EPA has long maintained (including in in SAFE 1) that its waiver actions are informal adjudications. *E.g.*, 84 Fed. Reg. at 51,337 (SAFE 1); 74 Fed. Reg. at 32,781 ("EPA believes that its waiver proceedings and actions therein should be considered an informal adjudication…. EPA has been conducting its waiver proceedings in this manner for decades, and while Congress has amended provisions in section 209 on two separate occasions, Congress has not chosen to alter EPA's administrative requirements. Instead, Congress has expressed support for EPA's practice in applying and interpreting section 209(b).").

[13] Some statutes may also grant agencies the authority to correct ministerial errors in their original adjudications. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958). EPA's SAFE 1 action was not a correction of a ministerial error, nor did EPA claim that it was.

the plans and laws they have determined best meet the needs of their States. *E.g.*, 42 U.S.C. §§ 7401(a)(3), (a)(4), (b)(3), 7416; 64 Fed. Reg. 43,255 (Aug. 10, 1999) (E.O. 13132). And, at bottom, the States' interests here are in protecting their residents and natural resources from harm, precisely as the Clean Air Act intends. *E.g.*, 42 U.S.C. §§ 7401(c), 7506. Moreover, because achievement of the NAAQS and many other air pollution goals requires long-term plans that often cannot change easily or quickly, upending those plans causes serious disruptions that could require years of additional state planning (and attendant expenditures of state resources) and could result in the imposition of unexpected regulatory burdens on various parties to ensure the achievement of public health and welfare objectives. And, as EPA well knows, States face serious consequences for not achieving NAAQS goals, only enhancing the significance of reliance interests here for States relying on California's GHG and ZEV standards as part of their plans to achieve those goals. Other parties, including industry groups, also identified significant reliance interests, including sizable investments and their own long-range planning, in California's standards. Yet, EPA gave these reasonable, explained, and serious reliance interests no weight at all.

Instead, EPA asserted that no reliance interests could reasonably attach to the 2013 Waiver Grant because EPA had agreed, in 2012, to conduct a Mid-Term Evaluation of its own *federal* GHG standards. 84 Fed. Reg. at 51,335. The mere fact that an agency *might* change its standards in the future is insufficient to undercut reliance interests in already promulgated standards. To conclude otherwise would suggest that no reliance interests in regulations are reasonable given that, as EPA itself forcefully asserted in SAFE 1, agencies can generally reconsider their own regulations for prospective application. *See* 84 Fed. Reg. at 51,333. Indeed, the requirement that agencies "provide a more detailed justification" when replacing a "prior policy [that] has engendered serious reliance interests" demonstrates that substantial and reasonable reliance interests can attach to policies that are subject to change. *See Fox Television*, 556 U.S. at 515. But, even accepting *arguendo* that EPA's Mid-Term Evaluation commitment could undercut the reasonableness of reliance on the *federal* standards adopted in 2012, that commitment would remain immaterial to reliance on *California's* separate standards.

Notably, EPA pointed to no "express limitations," *Regents of the Univ. of California*, 140 S. Ct. at 1914, or anything else that would have provided "explicit notice" that EPA might reconsider that waiver decision as part of EPA's Mid-Term Evaluation or otherwise, *Solenex LLC v. Bernhardt*, 962 F.3d 520, 528 (D.C. Cir. 2020). EPA's Mid-Term Evaluation regulation speaks only of the *federal* standards and nowhere mentions *California's*. 40 C.F.R. § 86.1818–12(h). Given that EPA had never before withdrawn a waiver in more than fifty years of waiver practice, the absence of any indication from EPA that this particular waiver was unsettled speaks volumes.[14] Moreover, EPA entirely failed to consider the self-evident state (and state resident)

[14] CARB's inclusion of a "deemed-to-comply" provision, under which CARB would accept compliance with EPA's GHG standards as compliance with California's GHG standards, does not aid EPA's contention. *See* 84 Fed. Reg. at 51,335. As California made clear at the time it adopted that provision, acceptance of federal compliance was conditioned on the federal standards "provid[ing] equivalent or better overall greenhouse gas reductions in the state compared to California's program." CARB Initial Statement of Reasons to Consider Proposed Amendments to the LEV III GHG Emission Regulation at 6 ("DTC Clarification ISOR"); *see also infra* at 57 (Section VI.A.1). The "deemed-to-comply" provision did not, then, undercut

reliance interests in EPA-approved State Implementation Plans containing one or both of these California standards, going so far as to indefinitely postpone this consideration. 84 Fed. Reg. at 51,338 n.256. This failure is particularly noteworthy given Congress's clear indication that it shares the interests of these States in the ongoing validity and effectiveness of their approved SIPs, such that federal agencies are prohibited from undercutting those plans. 42 U.S.C. § 7506(c)(1). EPA's rejection of the substantial reliance interests in the 2013 Waiver was unjustified. And EPA's failure to adequately consider those interests—including its failure to determine that they were outweighed by some (unidentified) need to take this action—renders its action unlawful. *Chapman*, 204 F.2d at 54; *Regents of the Univ. of California*, 140 S. Ct. at 1914.

3. EPA chose to *sua sponte* reconsider its 2013 Waiver Grant for the sole purpose of applying new policy determinations, as reflected in the two bases for the Waiver Withdrawal. EPA chose, for the first time, to rely on NHTSA's views of EPCA preemption and its Preemption Rule. EPA also chose to depart from its long-standing interpretations of Section 209(b)(1)(B), to adopt new interpretations that served only to categorically bar state standards that reduce vehicular GHG emissions, and to apply those new interpretations to a six-year-old, settled decision. EPA thus acted for "the sole purpose of applying some … change in administrative policy," *Chapman,* 204 F.2d at 53–54, and neither precedent nor some implicit power in Section 209(b)(1) authorized it to do so.

EPA lacked authority for its Waiver Withdrawal, even if it has some withdrawal authority, because this action flouted every constraint on an agency's authority to reconsider a settled adjudication. EPA should reverse its *ultra vires* action.

III. EPA Should Reverse Its Decision to Rely on NHTSA's Preemption Rule and Reinstate the Waiver for Model Years 2017-2020

EPA should reverse its decision to rely on NHTSA's Preemption Rule as a basis for a Waiver Withdrawal. We note that NHTSA has proposed to repeal its unlawful and unwarranted Preemption Rule. But, regardless of whether NHTSA finalizes that repeal, EPA should reverse its decision to rely on NHTSA's Rule.

In its Notice, EPA asked whether "EPA has the authority to withdraw an existing waiver based on a new action that is beyond the scope of section 209 of the CAA." 86 Fed. Reg. at 22,429. As discussed above, the answer is no. Whatever reconsideration authority EPA may have (*but see supra* at 16), EPA may not reconsider a settled waiver grant simply because the agency has changed its mind on policy matters, *supra* at 19, and particularly cannot do so when the result upends weighty reliance interests and EPA-approved SIPs, *supra* at 17. EPA's decision to look outside the three Section 209(b)(1) criteria—for the first time—was precisely the kind of policy

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California's reliance interests in the emissions benefits of its own standards because, as EPA noted in 2013, California always intended its standards would "remain an important backstop in the event the national program is weakened or terminated." 78 Fed. Reg. at 2,128. Moreover, that provision only applies to the GHG standard, and EPA never attempted to explain how its Mid-Term Evaluation commitment or the "deemed-to-comply" provision undercut reliance interests in the ZEV standard.

change that may not be applied to a settled waiver grant, as was NHTSA's decision to promulgate a Preemption Rule and EPA's decision to rely on another agency's action.

But, even if EPA had the authority to rely on NHTSA's Preemption Rule, it had no need to do so; and it never justified doing so, particularly since its action upended consequential reliance interests and, at a minimum, cast a cloud over approved SIPs. EPA can reverse this reliance on the alternative (or additional) ground that a reversal will correct those errors without infringing on any reasonable reliance interests in SAFE 1. *See supra* at 15.

Over decades and across administrations, EPA's consistent position has been that the only bases on which it could deny California a waiver were those factors Congress enumerated in Section 209(b)(1): "waiver request[s] cannot be denied unless the specific findings designated in the statute can properly be made." 41 Fed. Reg. at 44,210; *see also e.g.*, 49 Fed. Reg. at 18,889; 36 Fed. Reg. 17,458, 17,458 (Aug. 31, 1971). EPA's traditional understanding of its limited role is entirely consistent with the text of Section 209(b)(1) and precedent interpreting it. *See Motor & Equip. Mfrs. Ass'n v. Nichols* (*MEMA II*), 142 F.3d 449, 462–63 (D.C. Cir. 1998) (absent an adverse finding under one of those enumerated factors, EPA is "obligated to approve California's waiver application"); *MEMA I*, 627 F.2d at 1115–20 (similar). It is likewise entirely consistent with precedent respecting separation of powers and federalism principles and holding that "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). EPA has always reasonably understood that scope to be limited to the three waiver criteria—the only bases on which EPA may deny a waiver request.

In SAFE 1, EPA changed course, for one time only, relying on NHTSA's Preemption Rule to make a waiver decision although no one argued (or could argue) that that Rule was within the scope of Section 209(b)(1). But EPA failed to provide the reasoned explanation required for such an abrupt reversal—especially given the substantial reliance interests engendered by EPA's 2013 Waiver Grant.

EPA asserted only that the "context here is different" because it had chosen to "undertak[e] a joint action with NHTSA." 84 Fed. Reg. at 51,338. But what Congress directed EPA to consider when it wrote Section 209(b)(1) does not change depending on whether EPA acts alone or with another agency. This was not an adequate justification for EPA's change of course, particularly when EPA has no particular expertise on the relevant question and the position NHTSA took is contrary to that of the only courts to have addressed the issues. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1153–54 (E.D. Cal. 2007), *as corrected* Mar. 26, 2008; *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 300–01 (D. Vt. 2007). The inadequacy of EPA's justification was only magnified by EPA's remarkable admission that it did not "intend in *future* waiver proceedings … to consider factors outside the statutory criteria in section 209(b)(1)(A)–(C)." 84 Fed. Reg. at 51,338 (emphasis added); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (observing that "[u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (internal quotation marks omitted).

EPA should reverse its reliance on NHTSA's Preemption Rule. EPA "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

problem," *and* "offered an explanation for its decision that … is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. This reversal requires restoration of the withdrawn portions of the 2013 waiver for model years 2017-2020, if, as the agency asserted in the D.C. Circuit, it withdrew the waiver for those years. EPA's reliance on NHTSA's Preemption Rule was the sole basis of any withdrawal for those model years. 84 Fed. Reg. at 51,328 (withdrawing only for MY2021–2025 on Section 209(b)(1)(B) grounds). Confirming that the waiver is in effect for those model years would have the added advantage of correcting the legal error EPA made when it purported to expand the scope of the Waiver Withdrawal to include those model years without any notice.[15] We appreciate EPA granting California's petition for reconsideration or clarification on that issue, and encourage EPA to reverse course.

Finally, there are no reasonable reliance interests that could outweigh the stability and clarity that would result from a return to EPA's consistent long-standing approach of limiting review to the Section 209(b)(1) criteria or the correction of EPA's error in failing to justify its one-time change in course. As discussed above, there are no reasonable reliance interests in any parts of the Waiver Withdrawal. *See supra* at 15. In addition, no automaker (or party affected by automaker compliance) could have reasonable reliance interests in the withdrawal of a preemption waiver for standards governing periods that were already past or well underway when the withdrawal occurred. And, in any event, the automakers have complied with, and often over-complied with, model years 2017-2020 already and are projected to be able to comply easily with the remaining model years. Appendix D at 2 ("[T]he industry will enter the 2021 model year in compliance with California's [GHG] standards and, given the progression of technologies, are on a trajectory to continue to comply at or below previous cost projections."); Appendix E at 2 ("Since 2005, all auto manufacturers have complied with California's Zero Emission Vehicle (ZEV) Regulation, and all have collectively exceeded its requirements - and by increasing margins."), 4 (Figure 1) (showing significant over-compliance through MY 2019, the latest year for which data was available).

Moreover, restoration of the waiver for already-completed model years of the ZEV standard would actually serve the reliance interests of automakers. All of them hold credit balances now under California's ZEV program, Appendix E at 18 (Table 6, 2019); *see also id.* at 7 (Table 2), and those existing balances reflect credits issued for model years 2017 and later. If the waiver is not restored for those model years, the status of credits issued for those model years (and the automakers' credit balances) could become questionable.

Whatever force NHTSA's Preemption Rule had, and whatever NHTSA decides to do about that Rule, EPA should abandon its reliance on it and reverse the Waiver Withdrawal for model years 2017-2020.

[15] *See* Petition for Clarification and Reconsideration submitted by CARB and the California Attorney General (October 9, 2019).

IV. EPA SHOULD ALSO REVERSE ITS SAFE 1 SECTION 209(B)(1)(B) DETERMINATION AND THE WAIVER WITHDRAWAL FOR MODEL YEARS 2021-2025 THAT WAS BASED ON THAT DETERMINATION

In SAFE 1, EPA determined that California did not need its own standards to reduce vehicular GHG emissions and withdrew the 2013 waiver for California's GHG and ZEV standards for MYs 2021-2025 on that ground. 84 Fed. Reg. at 51,328. That determination was ill-founded and unlawful, and should be reversed, for multiple, independent reasons, as discussed below.

A. EPA Should Reverse Its SAFE 1 Section 209(b)(1)(B) Determination by Reverting to EPA's Long-Standing Program-Level Approach to This "Need" Inquiry

As EPA acknowledged in SAFE 1, it has, for many decades, consistently understood Section 209(b)(1)(B) to ask whether the State needs its own regulatory program, separate from that of the federal government, not whether the State needs each individual standard or package of standards for which it seeks a waiver. 84 Fed. Reg. at 51,330.[16] In SAFE 1, EPA also acknowledged that this program-level interpretation of the phrase "such State standards" remains a reasonable one. 84 Fed. Reg. at 51,341 ("[T]hat phrase could reasonably be considered as referring either to the standards in the entire California program, the program for similar vehicles, or the particular standards for which California is requesting a waiver under the pending request."). Yet, EPA chose to adopt a new interpretation and apply it to the six-year-old 2013 Waiver Grant. Under that interpretation, EPA considered California's need for its GHG and ZEV standards, individually, and concluded that, although California still needs its own program to address its compelling and extraordinary criteria pollution conditions, the State does not need standards that reduce GHG emissions. 84 Fed. Reg. at 51,340.

EPA can and should reverse its decision to apply this new interpretation of "such State standards" in Section 209(b)(1)(B). Indeed, irrespective of whether EPA's SAFE 1 interpretation is a reasonable one (it is not), EPA should revert back to the traditional approach it applied in 2013. Nothing compelled EPA to apply a new interpretation to a well-settled adjudicatory decision reached six years earlier, and reversing that decision would correct multiple legal errors, reduce confusion, respect federalism principles and the weighty reliance interests of States, and fulfill the purposes of the Clean Air Act (including its conformity provision). In addition, EPA should revert back to its traditional interpretation because, as EPA has correctly stated, it is "the most straightforward reading of the text and legislative history of section 209(b)." 78 Fed. Reg. at 2,127. At a minimum, EPA's traditional interpretation is a better choice than the interpretation adopted in SAFE 1.

If EPA reverses application of its new approach to the need inquiry, it must also revert to its 2013 determination that California needs its own new motor vehicle emissions program,

[16] As EPA stated, it had always approached the "need" inquiry as a program-level one "up until the 2008 GHG waiver denial," which it reversed in 2009 in part by returning "the traditional interpretation of CAA section 209(b)(1)(B), under which it would only consider whether California had a need for its new motor vehicle emissions program as a whole." 84 Fed. Reg. at 51,330–31 (internal quotation marks omitted). Since that 2009 reversal, EPA has continued to consistently apply its traditional, program-level approach. *E.g.*, 79 Fed. Reg. at 46,261.

including its GHG and ZEV standards, and restore the withdrawn portions of the 2013 waiver. Even in SAFE 1 (and in unrelated litigation that followed it), EPA maintained that California still needs its own new motor vehicle program under the traditional approach it employed in 2013. And there is certainly no reason to conclude otherwise here.

1. EPA should reverse its application of a new Section 209(b)(1)(B) approach to the 2013 waiver, irrespective of whether it might apply that new approach going forward

EPA's decision to apply a new approach to its 2013 Section 209(b)(1)(B) determination was both unnecessary and unjustified. Given that, the multitude of interests upended by EPA's action, and the absence of any reasonable reliance interests in the SAFE 1 action, EPA can and should reverse its new approach and, thus, its SAFE 1 Section 209(b)(1)(B) Determination, regardless of EPA's views of the reasonableness of applying its SAFE 1 approach to *future* waiver requests.

It was plainly unnecessary for EPA to reconsider the Section 209(b)(1)(B) determination it reached in the 2013 Waiver Grant. No one had sought judicial review or agency reconsideration of that determination.[17] EPA made no factual findings that suggest, let alone establish, any need to reconsider, opting not to finalize any feasibility findings.[18]And even if EPA has some authority to reconsider previously granted waivers and that authority could extend to the application of new polices to prior waiver grants (*but see supra* at 19), EPA was not *compelled* to do so.

These facts alone support reversal in light of the longstanding Executive Branch federal policy against unnecessarily preempting state law. 64 Fed. Reg. 43,255 (Aug. 10, 1999) (Executive Order 13132). That policy—which has stood through administrations of both parties—recognizes the value of state experimentation of precisely the kind Congress wanted California to continue pursuant to Section 209(b)(1)(B), *id.* § 1(f), and expressly states that federal agencies should "carefully assess the necessity" of "any action that would limit the policymaking discretion of the States," *id.* § 3(a). *See also id.* § 3(c) ("Intrusive Federal oversight of State administration is neither necessary nor desirable" with respect to "Federal statutes and regulations administered by the States").

Reversal is also supported by the fact that EPA's unnecessary Section 209(b)(1)(B) Determination upended reliance interests, including those of States striving to improve air quality for their residents through EPA-approved SIPs. As discussed above, EPA unjustifiably disregarded the substantial and reasonable reliance interests of multiple States (California and the Section 177 States), among others. *See supra* at 17. In and of itself, EPA's failure to consider those reliance interests is a sufficient reason to reverse its Section 209(b)(1)(B) Determination.

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[17] Two automaker associations sought EPA's reconsideration of the 2013 waiver, but they did so only on "consistency" grounds under Section 209(b)(1)(C) (and only as to the ZEV standard). 84 Fed. Reg. at 51,330 n.215. Not surprisingly, then, that reconsideration petition played no role in EPA's SAFE 1 actions. *Id.*

[18] In arguing that it need conduct no analysis under the Endangered Species Act, EPA did claim that its reconsideration was "necessitate[ed]" by NHTSA's decision to promulgate its Preemption Rule. 84 Fed. Reg. at 51,356. That claim is simply wrong, *see supra* at 19 (Section III), but, in any event, it does not constitute a factual finding.

Regents of the Univ. of California, 140 S. Ct. at 1913 (confirming it is arbitrary and capricious to ignore serious reliance interests when reversing course).

But the fact that those state reliance interests included EPA-approved SIPs establishes an independent, but related, additional reason for reversal. As discussed above, federal agencies are prohibited from "engag[ing] in" or "support[ing] in any way... any activity which does not conform to an implementation plan after it has been approved." 42 U.S.C. § 7506(c). There can be no question that EPA's SAFE 1 actions effectively preempting California's GHG and ZEV standards failed to "conform" to the multiple EPA-approved plans containing those very standards. At best, EPA's actions flew in the face of the intent behind the general conformity requirement; at worst, they violated that requirement. Either way, eliminating the cloud now hanging over those approved SIPs is sufficient reason to reverse the unnecessary Section 209(b)(1)(B) Determination.

It is abundantly reasonable to return, *in this proceeding*, to the agency's traditional approach to Section 209(b)(1)(B)—the one it applied in 2013. That approach has worked for decades, went unchallenged in 2013, and EPA has acknowledged, in SAFE 1, that it remains reasonable. Reversing EPA's unnecessary Section 209(b)(1)(B) Determination would not upend any reasonable or substantial reliance interests, *see supra* at 15, but it would correct multiple errors: EPA's application of a new policy judgment to a long-settled adjudication, EPA's failure to weigh substantial reliance interests, and EPA's failure to consider the consequences of its actions for SIPs and public health. EPA can reverse its application of its new approach to the settled 2013 Waiver Grant on this ground, without determining whether to apply its SAFE 1 approach to Section 209(b)(1)(B)'s inquiry as to new waiver requests.

2. EPA's should return to the traditional, program-level approach it applied in 2013

In the alternative (or in addition), EPA can and should reverse its Section 209(b)(1)(B) Determination by rejecting the approach to that inquiry adopted, for GHG-reducing standards only, in SAFE 1. EPA should return to its prior, decades-old program-level approach instead. Because no reliance interests reasonably attached to SAFE 1's Waiver Withdrawal, *see supra* at 15, and EPA made no factual findings in SAFE 1 that would contravene a return to the traditional interpretation, EPA need not conclude here that its traditional approach is *more* reasonable. *Fox Television*, 556 U.S. at 515 ("reasons for the new policy" need not be "*better* than the reasons for the old one" absent reliance interests or contrary factual findings). But EPA could easily reach that conclusion for multiple reasons discussed below.

First, to answer one of the questions EPA posed in its Notice, 86 Fed. Reg. at 22,429, it was *not* "permissible for EPA to construe section 209(b)(1)(B) as calling for consideration of California's need for a separate motor vehicle program where criteria pollutants are at issue and consideration of California's specific standards where GHG standards are at issue." The Supreme Court has rejected this "novel interpretive approach" of assigning different meanings to the same statutory text in the same provision, depending on the application, because it "would render every statute a chameleon." *Clark v. Martinez*, 543 U.S. 371, 382 (2005); *see also United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality opinion) ("forcefully" rejecting this "interpretive contortion"); *U.S. Dep't of the Treasury v. FLRA*, 739 F.3d 13, 21 (D.C. Cir. 2014) (rejecting "two inconsistent interpretations" of the same statutory provision).

In its SAFE 1 brief, EPA claimed that its new approach to Section 209(b)(1)(B) would apply "for all types of pollutants." Respondents' Br. at 85 (emphasis omitted). But EPA could point to nowhere in SAFE 1 where EPA so indicated. *See id.* Moreover, only two sentences later, EPA's brief demonstrated that this was simply not true: that EPA's approach would "change the 'compelling and extraordinary conditions' against which EPA reviews California's" need, depending on which "air quality concerns" were implicated. *Id.* That is just another way of saying EPA would not apply a program-level approach to GHG-reducing standards but would do so for standards reducing other emissions (such as criteria pollution emissions). As EPA has acknowledged in this Notice, it adopted a pollutant-specific approach to Section 209(b)(1)(B)'s inquiry. *E.g.*, 83 Fed. Reg. at 43,247 (explicitly proposing different interpretations for different pollutants); 84 Fed. Reg. at 51,339 (finalizing proposal); 84 Fed. Reg. at 51342 n.263 (affirming new interpretation "relates to the review of GHG standards" but not "criteria pollutant" standards). That was impermissible. *See also* 78 Fed. Reg. at 2,125 ("[S]ection 209(b)(1)(B) should be applied in the same manner for all air pollutants.").

Second, EPA's SAFE 1 interpretation conflicts with the plain text of Section 209(b)(1)(B). EPA erroneously read the plural "standards" as singular. *See generally Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 741–42 (2017) (assigning interpretive meaning to Congress's use of plural and singular). Even more improperly, EPA read the word "such" out of the phrase "such State standards." "Prima facie, the use of the iterative adjective 'such' indicates that this language is understandable only by reference to" a prior reference to "State standards"—namely the reference in in Section 209(b)(1), "which immediately precedes section [209(b)(1)(B)] and which, it is undisputed," is an aggregate inquiry. *See Middle S. Energy, Inc. v. FERC*, 747 F.2d 763, 768 (D.C. Cir. 1984). The word "such" can play either a "particularizing" or "non-particularizing" role, meaning it can refer either to the "object[s] as already particularized" in the antecedent use or to those kind of objects more broadly. *N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 95 (D.C. Cir. 1999). Thus, for example, when it followed the phrase "single-family house sold or rented by an owner," the phrase "such single-family houses" could refer either to single family houses sold or rented by an owner (particularizing) or to all single family houses (non-particularizing). *Id.* (discussing *Hogar Agua y Vida en el Desierto, Inc. v. Suarez–Medina,* 36 F.3d 177 (1st Cir. 1994), in which the court adopted the non-particularizing meaning); *see also SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713, 716 (D.C. Cir. 2017). Thus, "such State standards" in Section 209(b)(1)(B) can only be understood as referring to the set of California standards considered for protectiveness—the "aggregate" set described in the antecedent reference in Section 209(b)(1)—or to all California standards of that kind (i.e., all California vehicular emission standards).[19] *See Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019) (quoting 1964 dictionary defining "such" as "[o]f the kind or degree already described or implied"). This reading—that the set of standards considered for "need" is either the same or larger than the set of standards considered for "protectiveness"—also reflects the logical tie between these two inquiries. *MEMA I*, 627 F.2d at 1113.

[19] Notably, in both the 2013 Waiver Grant and SAFE 1, EPA understood "State standards, … in the aggregate" in Section 209(b)(1) to refer to California's whole motor vehicle emissions program. 78 Fed. Reg. at 2,121; 84 Fed. Reg. at 51,342; Respondents Br. at 85. The "particularizing" reading and the generalizing one produce the same result in that event, and "such State standards" must refer to California's whole program.

In fact, reading the "need" inquiry as *narrower* than the protectiveness inquiry, as EPA did in SAFE 1, would produce absurd results. The protectiveness inquiry is expressly an "aggregate" one so that California can design the program it believes best serves the State's needs. Congress explicitly permitted California to "promulgate individual standards that are not as stringent as comparable federal standards" as part of a larger program that, on the whole, is equally or more protective. 74 Fed. Reg. at 32,761. Thus, by congressional design, California may "promulgate individual standards that, in and of themselves, might not be considered needed to meet compelling and extraordinary circumstances." *Id.* Section 209(b)(1)(B) cannot logically be understood as permitting EPA to deny a waiver for those individual standards. Congress did not provide California with flexibility under one prong and then render that flexibility "meaningless" by eviscerating it in a different prong. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20, (1995) ("It is an elementary rule of construction that the act cannot be held to destroy itself.") (internal quotation marks omitted). There is no reasonable interpretation of "such State standards" in Section 209(b)(1) that produces EPA's narrower, single-standard approach, as underscored by EPA's failure to provide a meaning for "such." *See* Respondents' Br. 81-88.

Third, EPA failed to justify, and in some instances failed even to acknowledge, its departures from multiple prior positions it had taken that support its traditional, program-level interpretation. Specifically, EPA had previously found that the program-level approach was supported by "the legislative history of section 209, particularly the fact that in creating an exception to Federal preemption for California, Congress expressed particular concern with the potential problems to the automotive industry arising from the administration of two programs." 49 Fed. Reg. at 18,990. EPA had also previously recognized the logical tie between the need and protectiveness inquiries created by the word "such" and the nature of the two inquiries. 74 Fed. Reg. at 32,761. At most, EPA offered only circular logic to explain the departure from its decades-old interpretation, arguing that it had to reinterpret the provision to allow single-standard review so that it could engage in single-standard review. 84 Fed. Reg. at 51,341. Such "conclusory statements," including statements that EPA simply believed its new interpretation to be reasonable, "do not suffice to explain its decision," particularly "[i]n light of the reliance interests at stake." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). "[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.* at 2126 (internal quotation marks and modifications omitted).

Fourth, Congress resolved the scope of Section 209(b)(1)(B)'s "need" inquiry by ratifying the agency's long-standing program-level approach in 1977 and again in 1990. EPA did not dispute (and could not have disputed) that it has been employing its program-level approach from the beginning. *See, e.g.*, 38 Fed. Reg. 30,316 (Nov. 1, 1973); 40 Fed. Reg. 23,102, 23,104 (May 28, 1975). Indeed, in 1976, EPA rejected an approach by which it would determine "whether *these particular standards* are actually required by California." 41 Fed. Reg. at 44,210, 44,213 (emphasis added). The legislative history from 1977, when Congress enacted what is now Section 209(b)(1)(B)—including its "such State standards" phrase—reflects Congress's approval of EPA's practice of "liberally constru[ing] the waiver provision." H.R. Rep. No. 95-294, at 301 (1977). Congress's "awareness of and familiarity with" EPA's program-level approach to the need inquiry "is particularly strong evidence" of congressional affirmation. *See Jackson v. Modly*, 949 F.3d 763, 773 (D.C. Cir. 2020).

And, if there were any doubt, Congress confirmed the point in 1990. It enacted a new subsection of the Act that, *inter alia*, permits California to obtain EPA's authorization to regulate emissions from non-road vehicles in engines. That new subsection—Section 209(e)(2)(A)—largely mirrors Section 209(b)(1)'s waiver provision, and the text of the "need" prong—Section 209(e)(2)(A)(ii)—is a word-for-word copy of Section 209(b)(1)(B) except that Congress changed "State" to "California." By the time of that 1990 re-enactment, EPA had not only been consistently interpreting Section 209(b)(1)(B) as a program-level inquiry for decades, it had also explicitly defended that interpretation for the second time. 49 Fed. Reg. at 18,889–90. When Congress "re-enacts a statute without change," as it did here, it is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran* (*Curran*), 456 U.S. 353, 382 n.66 (1982).

Finally, EPA claimed its new SAFE 1 interpretation was an improvement because it would allow the agency to read the phrase "such State standards" as having the same meaning in Sections 209(b)(1)(B) and 209(b)(1)(C). 84 Fed. Reg. at 51,345. But this is simply not true. EPA has never defined the scope of its inquiry under Section 209(b)(1)(C) based on the pollution problem(s) the standards are purportedly designed to solve, which is the approach to Section 209(b)(1)(B) EPA adopted in SAFE 1. 84 Fed. Reg. at 51,341 ("standards which address pollution problems that lack that type of particularized nexus to California are particularly appropriate candidates for an individualized consideration"); Respondents' Br. at 85 ("EPA must further particularize its [Section 209(b)(1)(B)] review when different 'subsets' of standards address different air-quality concerns (as happened here).").

Further, when EPA asserted "it is appropriate for EPA to read the term ["such State standards"] consistently between prongs (B) and (C)," it claimed that the scope of its review under (C) was the "standards California has submitted to EPA" in its waiver request. 84 Fed. Reg. at 51,345. But that approach is not the one EPA employed in SAFE 1 for its (B) inquiry *or* the one EPA employs for its (C) inquiry. In SAFE 1, EPA did not consider whether California needs the "standards California ... submitted to EPA" in 2013—the entire Advanced Clean Cars (ACC) program. *See* 78 Fed. Reg. at 2,112 (describing the ACC as "combin[ing] the control of smog and soot causing pollutants and GHG emissions into a single coordinated package of requirements"); 84 Fed. Reg. at 51,329 (describing the 2013 ACC waiver package as containing a suite of "interrelate[ed] … regulatory provisions," including criteria pollutant standards). Instead, EPA pulled out two standards from that package and analyzed California's need for *those standards on their own*. 84 Fed. Reg. at 51,343 ("In this action, EPA is reviewing a waiver for motor vehicle standards designed to address a global air pollution problem and its effects.").[20]

Moreover, EPA does not conduct its (C) inquiry by looking solely at the "standards California has submitted to EPA" in a particular package because one standard (including an existing standard) can affect the feasibility of another. Congress understood these interactions—that standards for different pollutants can be technologically interrelated—when it made the

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[20] Because EPA did not apply a waiver-package-approach in SAFE 1, it need not reject a package-level approach in order to reverse the Waiver Withdrawal. The question here is simply whether EPA should stand behind its SAFE 1 single-standard approach as applied to the 2013 Waiver Grant or reverse that and revert to the traditional, program-level approach it originally applied in 2013.

protectiveness inquiry an "aggregate one." *MEMA I*, 627 F.2d at 1110 n.32 (describing Congress's intent to address the problem that "technological developments posed the possibility that emission control devices could not be constructed to meet both the high California oxides of nitrogen standard and the high federal carbon monoxide standard"). And EPA has likewise found that to be true. *E.g.*, 38 Fed. Reg. at 30,136 (considering whether certain standards are "achievable … in conjunction with" others); 49 Fed. Reg. at 18,893–94 (granting waiver for amendments to particulate matter standards after considering automaker arguments "that it will be difficult or impossible for them to meet the 1985 particulate standard in conjunction with the [existing] more stringent NO[x] standards"). In sum, EPA never made a credible argument that its SAFE 1 interpretation of (B) was more consistent with the interpretation it applies in (C) because it misstated both interpretations. These fatal flaws in EPA's claim of greater consistency are reasons enough to abandon that justification for EPA's SAFE 1 interpretation of (B).

And EPA need not go further here. It need not, for example, conclude that it would be better to interpret prongs (B) and (C) as having the same or different scopes. Indeed, any such conclusion has no bearing on this proceeding where the only question is whether EPA should stand behind its SAFE 1, single-standard approach to (B) and its decision to apply that new approach to a previously decided waiver *or* should revert to the decades-old, program-level approach EPA applied, without legal challenge, in 2013.[21] Specifically, if EPA were to conclude that (B) and (C) should have the same scope (as it stated in SAFE 1), that would not support retaining EPA's SAFE 1, single-standard approach because EPA does not, and cannot, limit its consideration of feasibility under (C) to individual standards standing alone and because the word "such" indicates that the (B) inquiry is at least as broad as the multiple-standards, "aggregate" protectiveness inquiry, as shown above. Similarly, if EPA were to conclude that (B) and (C) may have different scopes, or even different applications of the same scope, that would not support retaining the SAFE 1 approach to (B) because it would entirely undercut one of the (erroneous) justifications offered for that approach. Moreover, because neither SAFE 1 nor this proceeding involves a determination under Section 209(b)(1)(C), EPA need not, and should not, opine about the scope or meaning of that section. To the extent EPA (or commenters) wish to address the relative scope of the three prongs, it (and they) may do so when EPA considers a new waiver request and all three inquiries will result in determinations. There is simply no reason to do so here.

B. EPA Should Reverse Its SAFE 1 Section 209(b)(1)(B) Determination Because California (and Other States) Need These Standards for Criteria Pollution Reductions Now and in the Future

As it did throughout its SAFE 1 actions, EPA failed to consider criteria pollution emissions in making its Section 209(b)(1)(B) Determination. EPA expressly and improperly limited its Determination to consideration of the "application of CAA section 209(b)(1)(B) to California's need *for a GHG/climate program*." 84 Fed. Reg. at 51,339 (emphasis added); *see also id.* (limiting Section 209(b)(1)(B) consideration to "the case of GHG emissions"). As noted above, EPA's refusal to consider the criteria pollution consequences of its actions is a sufficient basis to

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[21] EPA should certainly not adopt a new, *third* approach in this reconsideration of a reconsideration proceeding. *See supra* at 19 (discussing impermissibility of applying new policies to previously decided adjudications).

reverse the agency's reconsideration of the 2013 waiver and its Section 177 Determination. *See supra* at 8 (Section I).

That refusal also introduced independent legal error specifically into EPA's Section 209(b)(1)(B) Determination that California does not need its GHG and ZEV standards. Criteria pollution is particularly relevant to Section 209(b)(1)(B) because EPA has never questioned that California's criteria pollution "conditions" are "extraordinary and compelling" or that California needs, essentially, every fraction of a metric ton of criteria emission reductions it can produce. The record demonstrates that California's GHG and ZEV standards reduce criteria emissions in California, and that suffices for EPA to reverse its SAFE 1 Section 209(b)(1)(B) Determination, and the portion of the Waiver Withdrawal that rests on it, regardless of whether EPA reverts to its traditional, program-level approach to this section's inquiry.

As a threshold point, EPA has repeatedly found—including in SAFE 1 itself—that California's criteria pollution conditions remain "compelling and extraordinary," 84 Fed. Reg. at 51,344, and that California "needs" standards to produce any and all reductions in criteria pollution emission, 84 Fed. Reg. at 51,346. *See also*, *e.g.*, 41 Fed. Reg. at 44,210 (rejecting claims of only "marginal improvements in air quality" as grounds to deny waiver). Given that, EPA could not properly determine whether California still needs its GHG and ZEV standards while explicitly (and unlawfully) declining to consider the criteria pollution evidence in the record.[22] But that is precisely what EPA did in SAFE 1. 84 Fed. Reg. at 51,349 n.284. EPA never considered whether California needed those criteria emission reductions, because it refused to consider those reductions at all. Even under the SAFE 1 single-standard approach to the Section 209(b)(1)(B) inquiry, EPA's consideration of California's need for these two standards was inadequate and cannot stand.

As shown above, EPA attempted to justify disregarding record evidence and its own prior findings concerning the criteria emission benefits of these California standards by mischaracterizing CARB's 2012 waiver request. That attempt fails. *See supra* at 12 (Section I.C). EPA also claimed California's GHG and ZEV standards—collectively—were "designed to address … [only] climate change problems." 84 Fed. Reg. at 51,344. But, having chosen to *sua sponte* reopen the question whether California continues to need standards that it has been implementing for six years, pursuant to an EPA preemption waiver, EPA could not limit its consideration to what the standards were intended to achieve when they were originally designed or presented to EPA. At a minimum, EPA had to consider evidence of the need for these standards that may have developed after EPA's initial waiver grant. CARB (and others) asserted clearly in SAFE 1 comments that both the GHG and ZEV standards produce criteria pollution benefits upon which California and other States rely to improve air quality. *See supra* at 9. EPA unlawfully ignored those new submissions from CARB, all the while purporting to rely on CARB's characterizations of its standards.

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[22] In 2013, no one challenged California's need for its GHG standards on the grounds that they produced no criteria benefits; the objections were limited to whether California could "need" its own standards when it had agreed to accept compliance with the 2012 federal GHG standards as compliance with California's. 78 Fed. Reg. at 2,128.

As shown above, a review of the records in SAFE 1 and here demonstrates that California's GHG and ZEV standards reduce criteria pollution emissions, as well as GHG emissions. *See supra* at 9 (Section I.B). EPA can and should find that California continues to have compelling and extraordinary conditions with respect to criteria pollution (which was undisputed in SAFE 1) and that it needs these standards to address those long-standing and immensely challenging conditions. *See* Waiver Request at 18; CARB SAFE Comments at 285–88, 290–92, 294–302, 365–66.

1. Other commenters may claim that California cannot "need" these standards within the meaning of Section 209(b)(1)(B) because some of the criteria emission reductions demonstrated in the record are not vehicular emission reductions, in the strictest sense of that phrase.[23] However, in this unusual and unprecedented context where EPA *sua sponte* reopened selected portions of a long-settled waiver grant, that distinction need not be relevant. "[T]he baseline for measuring the impact of *a change or rescission*" to a previous, final action "is the requirements of [the action] itself, not the world as it would have been" had the action never been taken. *Air All. Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018). Having granted California a waiver for its GHG and ZEV standards, EPA cannot ignore the impact of that grant, or the impact that reversing it would have, on California's need to reduce criteria pollution. "At the very least this alternative way of achieving the objectives of the Act"—the continuation of California's standards, including in States with EPA-approved SIPs containing them—"should have been addressed and adequate reasons given for its abandonment." *See State Farm*, 463 U.S. at 48. But EPA "did not even consider the possibility" in SAFE 1. *Id.*

This is particularly problematic, here, where the record indicated that at least some of the emissions reductions will occur in the parts of California that need them the most. For example, "NOx emissions in the greater Los Angeles region must be reduced by two thirds to meet the current ozone attainment goal, even after considering all of the regulations in place today." ZEV ISOR at 72; *see also* Waiver Request at 16 ("Refinery emission reductions will occur primarily in the east Bay Area *and South Coast region…*"); *id.* (anticipating reductions from reduced truck and ship activity around, *inter alia*, the port of Los Angeles); CARB SAFE Comments at 308.

2. In any event, the records in 2013, in SAFE 1, and here establish that the ZEV standards do reduce vehicular emissions. At a minimum, then, EPA should reverse its SAFE 1 Section 209(b)(1)(B) Determination on this ground for the ZEV standard. EPA previously acknowledged that California needs the ZEV standard now to ensure the development and commercialization of technology required for the future, deeper vehicular emission reductions California will have to make to attain the NAAQS and achieve other long-term emission goals. *See supra* at 9; *see also* 78 Fed. Reg. at 2,131 ("The ZEV standards are a reasonable pathway to reach the LEV III goals, in the context of California's longer term goals [for GHG *and* criteria pollution].") (emphasis added). As CARB has made clear, the ZEV standard—and the technologies it requires automakers to develop and deploy—are essential to attaining the NAAQS in critical regions and

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[23] We note, as we did in our SAFE 1 briefing, that EPA did not rely on the distinction between "vehicular" and "other" emissions for its SAFE 1 actions. *See* Final Reply Br. at 15 n.9. We take no position here on whether, or how, such a distinction should affect EPA's decisions in other contexts, such as when it considers a waiver request in the first instance, and encourage EPA to do the same.

to improving air quality for Californians, generally, and vulnerable populations living near roadways, specifically.[24]

The records also establish that the ZEV standards play an important role in reducing shorter-term vehicular criteria emissions as well. Contrary to EPA's claim in SAFE 1, CARB's attribution of vehicular criteria emissions to its LEV III criteria standards does not establish otherwise. As EPA has always recognized, and CARB clearly stated during its own rulemakings and EPA's proceedings, the Advanced Clean Cars program was designed as an integrated regulatory regime harnessing multiple regulations to drive in the same direction: reducing criteria and GHG emissions. Accordingly, CARB's emissions analysis under the California Environmental Quality Act looked at the "combined" effects of the LEV and ZEV standards (and others). ZEV ISOR at 72. So, too, did its summary of emission benefits submitted to EPA with its 2012 waiver request. Waiver Request at 15; *see also* CARB Nov. 2012 Supp. Comments at 3 ("EPA must review CARB's determination of compared California and federal *aggregate* emissions from what NADA concedes are "interrelated" regulations.").

In its 2012 initial submission to EPA, CARB did attribute most or all of the immediate vehicular criteria emission benefits of the Advanced Clean Cars program to the LEV criteria standard, choosing to focus on the primary objective of the ZEV standard: enabling long-term reductions in vehicular criteria and GHG emissions. Waiver Request at 2 (describing CARB's "commitment to meeting California's long term air quality and climate change reduction goals through commercialization of ZEV technologies"), 15-16 (attributing emissions benefits). EPA accepted that showing. 78 Fed. Reg. at 2,131 ("Whether or not the ZEV standards achieve additional reductions by themselves above and beyond the LEV III GHG and criteria pollutant standards, the LEV III program overall does achieve such reductions, and EPA defers to California's policy choice of the appropriate technology path to pursue to achieve these emissions reductions.").

But the attribution CARB made as part of its waiver request was never intended to, and did not, establish the absence of any vehicular emission benefits from the ZEV standard. Instead, it reflected a simplification that distinguished the standards based on the *primary* objectives of the two, complementary standards. Further, CARB's attribution of short-term emissions benefits does not undercut the long-term vehicular benefits of the ZEV standards which were well-established in the 2013 and 2019 records.

In contexts like this, where emissions or emission reductions have multiple causes, attribution of those emissions or reductions among those causes is part science and part policy, and agencies are entitled to discretion to adopt reasonable approaches. *See Nat. Res. Def. Council v. EPA*, 896 F.3d 459, 464 (D.C. Cir. 2018) (considering EPA's attempt to delineate "natural" and "human" causes for emission-increasing events and noting "many events are caused by a combination of the two"). Accordingly, CARB has re-examined the short-term criteria benefits of its ZEV standard and now estimates that, for this calendar year (2021), the cumulative effect of California's requirement that automakers sell certain numbers of ZEVs has reduced emissions of NOx, total organic gases (TOG) (from both exhaust and evaporative emissions), and PM2.5.

[24] *E.g.*, ZEV ISOR at 72 ("[T]he most significant share of needed emission reductions" in the greater Los Angeles region would come "from long-term advanced clean air technologies."); CARB SAFE Comments at 286–88, 290–29, 297–302; Appendix B.

Appendix A at 3–4. Specifically, had those ZEVs not been sold, and similar conventional vehicles sold instead, vehicular emissions of those pollutants in 2021 would have increased by approximately:

- 326 tons of NOx exhaust emissions,
- 366 tons of total organic gas (TOG) exhaust and evaporative emissions, and
- 16 tons of PM2.5 exhaust emissions.

Id. at 3. By calendar year 2023—a critical year for ozone NAAQS compliance—the emissions avoided due to ZEV sales are estimated to be even higher:

- 516 tons of NOx exhaust emissions,
- 538 tons of TOG exhaust and evaporative emissions, and
- 20 tons of PM2.5 exhaust emissions.

Id. These emission benefits from ZEV sales are only projected to grow over time, with increasing sales percentages required by the standards. *Id.* These emission benefits—from the small to the large—are necessary to protect public health (especially for vulnerable populations living near roadways) and to attain and maintain NAAQS. 81 Fed. Reg. at 39,425 (EPA approval of California SIP containing ZEV standards); CARB SAFE Comments at 285–88; Appendix B. To be clear, CARB recognizes that these emission benefits from ZEVs *could be* attributed to the Advanced Clean Cars program, generally, or to the LEV III criteria standard as CARB had previously done. But that does not change the fact there are emission benefits—both short- and long-term—from the requirement that automakers sell ZEVs instead of conventional vehicles. And those benefits can be attributed to the ZEV standards themselves.

3. As EPA previously found, "California has made a case that its greenhouse gas standards are linked to amelioration of California's smog problems." 74 Fed. Reg. at 32,763; *see also* Multi-State SAFE Comments at 24. Put simply, the reduction in vehicular GHG emissions—reductions that were undisputed as to both the GHG and ZEV standards in SAFE 1—also reduce the formation of ozone (or smog). EPA failed to justify its departure from this prior conclusion. EPA merely asserted:

> the fact that GHG emissions may affect criteria pollutant concentrations (*e.g.,* increases in ambient temperature are conducive to ground-level ozone formation) does not satisfy this requirement for a particularized nexus, because to allow such attenuated effects to fill in the gaps would eliminate the function of requiring such a nexus in the first place and would elide the distinction between national and local pollution problems which EPA discerns as underlying the text, structure, and purpose of the waiver provision.

84 Fed. Reg. at 51,340. EPA did not explain what makes these recognized effects "attenuated" or how EPA was distinguishing "attenuated" effects from others it would consider under Section 209(b)(1)(B). It likewise identified no evidence that supports EPA's attempt to distance itself from its prior finding of a relevant link.

Moreover, where a well-established scientific phenomenon—the relationship between increased GHG pollution and exacerbated ozone problems (*see supra* at 11)—"would elide" a purported distinction between types of pollution, that is not a basis for declining to consider the well-established phenomenon. Rather, it is a reason to reject the distinction as artificial. Put simply, the fact that EPA could not reconcile its manufactured distinction with the scientific evidence provides no support for maintaining that distinction, let alone for departing from its 2013 finding recognizing the relationship between GHG and ozone pollution and its conclusion that this relationship supported California's waiver.

EPA should correct its failure to consider the record before it and reverse its Section 209(b)(1)(B) Determination on the grounds that California needs these standards to address its undisputed compelling and extraordinary criteria pollution conditions.

C. EPA Should Reverse Its SAFE 1 Section 209(b)(1)(B) Determination Because Its Conclusion that California Does Not Need these Standards to Address Its Climate Change Conditions Was Unjustified and Unlawful

Even if it were proper for EPA to reconsider California's need for the GHG-reducing effects of its GHG and ZEV standards on their own, EPA should still reverse its SAFE 1 Section 209(b)(1)(B) Determination. EPA was correct, in 2009 and 2013, when it concluded "California does have compelling and extraordinary conditions directly related to regulations of GHGs." 86 Fed. Reg. at 22,424 (citing 78 Fed. Reg. at 2,129–30); *see also* 74 Fed. Reg. 32,744. California needs its GHG and ZEV standards to address its contribution to the emissions causing extraordinary climate change conditions. EPA's contrary conclusion in SAFE 1, 84 Fed. Reg. at 51,328-33, was unlawful not only because it applied new interpretations to an already granted waiver, *see supra* at 19, but also because those interpretations were unlawful and unreasonable, and because EPA's conclusion was, and is, contradicted by the record.

1. In SAFE 1, EPA read atextual and unreasonable limitations into Section 209(b)(1)(B)

In SAFE 1, EPA articulated a new, atextual interpretation of Section 209(b)(1)(B) that required a particularized, local nexus between emissions from California's vehicles, air pollution, and the resulting impacts on health and welfare. 86 Fed. Reg. at 22,425 (citing 84 Fed. Reg. at 51,339, 51,347). EPA also narrowly interpreted "extraordinary" in Section 209(b)(1)(B) to require state-specific conditions and created a heightened standard for "need" that required the GHG and ZEV standards to "meaningfully address" climate change on their own. All of these new interpretations led EPA to one conclusion (which was also EPA's starting point): that state regulation of vehicular GHG emissions is categorically barred by the Clean Air Act. All of these new interpretations—and the categorical bar they produce—are unjustified and unreasonable. EPA's traditional interpretations—which reflect Congress's intent that California "continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program," *MEMA I*, 627 F.2d at 1110—should be restored. And EPA's SAFE 1 Section 209(b)(1)(B) Determination should be reversed.

a. SAFE 1's particularized, local nexus test is divorced from the statute and contravened by the legislative history on which EPA purported to rely

EPA did not explain in SAFE 1 how its particularized nexus test was connected to the text of Section 209(b)(1)(B). Nor could it. Section 209(b)(1)(B) does not contain the word "nexus" or any word or phrase EPA claimed to read as having that meaning. It likewise includes none of the other words EPA used in articulating its "nexus" requirement, including "particularized," "peculiar," and "local." *See* 84 Fed. Reg. at 51,339. As with "nexus," EPA failed to identify which of the words in Section 209(b)(1)(B) it was interpreting as having those meanings. Instead, EPA pointed to the text of a different section of the Clean Air Act—Section 202(a)(1)—that provides *EPA's* authority to regulate vehicle emissions. In addition, EPA pointed to Congress's consideration of California's smog problem when it adopted the waiver provision. Neither of these alleged sources provides supports for EPA's novel "nexus" requirement.

Section 202(a)(1) does not itself contain a particularized, local nexus requirement (or the words EPA used to articulate that requirement), let alone establish that such a requirement applies under Section 209(b)(1)(B) which contains entirely different text. *See* 84 Fed. Reg. at 51,339–40 (claiming the "nexus" requirement flows from Section 202(a)). Section 202(a) requires EPA to set vehicle emission standards for "any air pollutant … which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). Far from creating a complex, particularized nexus requirement, Section 202(a)(1) "requires EPA to answer only two questions: whether particular 'air pollution'—here, greenhouse gases—'may reasonably be anticipated to endanger public health or welfare,' and whether motor-vehicle emissions 'cause, or contribute to' that endangerment." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 117 (D.C. Cir. 2012), *aff'd in part, rev'd in unrelated part sub nom. UARG v. EPA*, 573 U.S. 302 (2014). In fact, rather than creating a barrier to regulation,"[t]his language requires a precautionary, forward-looking scientific judgment about the risks of a particular air pollutant, consistent with the CAA's precautionary and preventive orientation." *Id.* at 122 (internal quotation marks omitted).[25] And, of course, the Supreme Court held that Section 202(a) provides EPA with "the statutory authority to regulate the emission of [GHGs] from new motor vehicles," even though "regulating motor-vehicle emissions will not by itself *reverse* global warming." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). Section 202(a) does not require SAFE 1's "particularized, local nexus." But even if it did, EPA identified no textual similarities between that provision and Section 209(b)(1)(B) that would permit importing such a limitation across the sections; and, indeed, there are none. *See also* 79 Fed. Reg. 46,256, 46,262 (Aug. 7, 2014) ("[California's] Regulations are promulgated under the authority of California state law, and are neither contingent on nor dependent upon EPA's endangerment finding.").

Nor does the 1967 Congress's interest in California's smog problem justify SAFE 1's particularized, local nexus test. *See* 84 Fed. Reg. at 51,339 (claiming Congress's "original

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[25] Similar language has likewise been interpreted to support broad authority to regulate, including by adopting rules that do not directly reduce emissions but, rather "facilitate[] the reduction of emissions by other[s]." *Env't Def. Fund, Inc. v. EPA*, 82 F.3d 451, 460 (D.C. Cir.), *amended sub nom. Env't Def. Fund v. EPA*, 92 F.3d 1209 (D.C. Cir. 1996)).

motivation … informs the proper understanding of what CAA section 209(b)(1)(B) requires"). EPA's references to congressional discussions do not identify the *statutory text* EPA purported to interpret or otherwise tether EPA's "nexus" requirement to that text. In addition, the legislative history establishes the opposite intent: Congress drafted Section 209(b)(1), including Section 209(b)(1)(B), broadly to enable California's continued exercise of leadership and technical expertise to respond to emerging threats "from various pollutants." H.R. Rep. No. 95-294, at 23; S. Rep. 90-403 at 81 (California leads the nation as a "laboratory of innovation"); *see also MEMA I*, 627 F.2d at 1122 (finding "congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare"). Indeed, allowing California to regulate pollutants *before*, or more stringently than, the federal government so was at the heart of Congress's intent. *MEMA I*, 627 F.2d at 1111 ("Congress intended the State *to continue and expand* its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program.") (emphasis added). The legislative history of the waiver provision is not a source of *limitations* on the pollutants California could regulate or the pollution problems it could address.

In fact, as EPA previously observed, Congress "easily could have limited" Section 209(b)(1)(B) to particular pollutants. 49 Fed. Reg. at 18,890; *see also MEMA I*, 627 F.2d at 1111. It did so elsewhere in the Clean Air Act, including in Sections 202(b)(1)(A) and (B) where Congress singled out particular vehicular emissions for specialized treatment by EPA. 42 U.S.C. § 7521(b)(1)(A), (B); *see also*, *e.g.*, 42 U.S.C. § 7412(b)(1). The absence of similar language in Section 209(b)(1)(B) underscores that Congress "took a broader approach" toward California's regulatory program—an approach "consistent with [Congress's] goal of allowing California to operate its own comprehensive program." 49 Fed. Reg. at 18,890. The phrase "compelling and extraordinary conditions" is broad for this reason—to provide "regulatory flexibility" to respond to "changing circumstances and scientific developments" and "forestall . . . obsolescence." *Id.*; *see also Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 627 (2010) (describing phrase "compelling and extraordinary conditions" "expansive statutory language" in virtually identical statutory provision). Thus, Section 209(b)(1)(B)'s language does not limit California to addressing the smog problem present at the time of its enactment or establish that a smog-like nexus is required. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1752–53 (2020) (recognizing that "broad language" can lead to "many . . . applications . . . 'unanticipated' at the time of the law's adoption"). "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts*, 549 U.S. at 532 (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)); *see also id.* at 528–29. Atextual limitations on types of pollution (or pollution problems) should not be read into this broadly written provision simply because Congress was concerned about California's smog problem at the time of enactment.

Consistent with Congress's intent, EPA has historically left "the decisions on controversial matters of public policy, such as whether to regulate [certain] emissions, to California." 43 Fed. Reg. at 25,735. For example, EPA has granted at least one waiver over industry objections that the regulated pollutant was "harmless," deferring to California's judgment as to whether the State should control those emissions. *Id.* Congress has twice approved of EPA's deferential approach. First, when Congress amended Section 209(b)(1) in 1977 to expand California's discretion by instructing EPA to consider the protectiveness of the State's standards "in the

aggregate," Congress acknowledged and approved of EPA's practice of "liberally constru[ing] the waiver provision." H.R. Rep. No. 95-294 at 301–02; *see also Jackson*, 949 F.3d at 773 ("indication [of congressional affirmation] is particularly strong if evidence exists of the Congress's awareness of and familiarity with [the] interpretation"). And, second, when Congress enacted Section 209(e)(2)(A) in 1990 to establish a preemption waiver process for regulation of non-road vehicles and engines, it used language identical to Section 209(b)(1)(B) for the "need" prong, changing only "State" to "California." *Curran*, 456 U.S. at 382 n.66. Courts have likewise taken note of and approved of EPA's deferential approach: "[T]he agency has long interpreted the statute to give California very broad authority, and the court has held that this interpretation is not unreasonable." *MEMA II*, 142 F.3d at 463.

Nothing in the text of the statute, its statutory or legislative history, EPA's long-standing interpretations, or judicial opinions concerning the waiver provision supports the SAFE 1 "nexus" requirement. EPA should abandon it.

b. In SAFE 1, EPA crafted and imposed an unlawful categorical ban on state regulations that reduce vehicular greenhouse gas emissions

In addition to being untethered from text and legislative history, EPA's SAFE 1 interpretative efforts all started and ended in the same unlawful place: a categorical ban on state regulation of vehicular GHG emissions. *E.g.*, 84 Fed. Reg. at 51,347 (identifying purported "support" for the "conclusion" EPA had already reached: "that Congress did not intend the waiver provision in CAA section 209(b) to be applied to California measures that address pollution problems of a national or global nature…"). Indeed, SAFE 1's approach to Section 209(b)(1)(B) is understood most clearly by what it was designed to exclude: "globally elevated atmospheric concentrations of [greenhouse gases] and their environmental effects." 84 Fed. Reg. at 51,349. But any categorical pollutant-specific or pollution-problem-specific ban is irreconcilable with Section 209(b)(1)(B)'s plain text, statutory structure, and the statutory and legislative histories, as well as EPA's decades-old practices and court decisions interpreting the section.

First, as noted above, Section 209(b)(1)(B) contains none of the myriad adjectives—such as "local," "particularized," "state-specific," "global," or "national"—that EPA conjured in SAFE 1 to erect its categorical ban and distinguish between purportedly included and excluded pollutants or pollution problems. *See*, *e.g.*, 84 Fed. Reg. at 51,339–40. Congress's choice *not* to limit Section 209(b)(1)(B) to particular pollutants—as it limited other sections of the Act—is especially telling regarding the purported distinction between "local" and other pollution because Congress clearly knows that air pollution is not always "state-specific" or "local." *See*, *e.g.*, 42 U.S.C. §§ 7402(a) (encouraging interstate cooperation regarding air pollution), 7426 (addressing interstate pollution), 7415 (addressing international pollution).

Second, EPA's categorical ban creates structural conflict in the Clean Air Act. As explained above, Section 202(a) requires EPA to set standards applicable to emissions from new motor vehicles once EPA has found that they endanger public health or welfare. Section 209(a) preempts States from adopting new motor vehicle emission standards, and Section 209(b) requires EPA to waive that preemption for California vehicular emission standards unless EPA finds that one or more of the waiver criteria are not met. The scope of Section 209(b)—the

pollutants for which California may obtain a waiver—is not more limited than the scope of Sections 209(a) or 202(a).

The D.C. Circuit has already held as much as to Section 209(a): "whatever is preempted [by Section 209(a)] is subject to waiver under subsection (b)." *MEMA I*, 627 F.2d at 1106; *see also id.* at 1107–08. If state standards for GHG emissions from new motor vehicles are preempted under Section 209(a), California standards that regulate those emissions must be "subject to a waiver." EPA's SAFE 1 categorical ban creates a gap where none exists.

It is just as unreasonable to assert, as EPA did, that the scope of Section 209(b) is narrower than that of Section 202(a). As EPA has long recognized, Section 209(b) exists to allow California to take more aggressive action than EPA—including the regulation of pollutants EPA might not yet be regulating under Section 202(a). *E.g.*, 38 Fed. Reg. at 10,318 ("In general, Federal standards have followed California standards by at least 1 full model year."). California's history of doing precisely that is a primary reason Section 209(b) exists. *MEMA I*, 627 F.2d at 1111. And Congress has twice reaffirmed the value of California continuing to lead in this field: by expanding the State's discretion and permitting other States to adopt California's standards, in 1977, and by expanding the scope of California regulation to include non-road mobile sources in 1990. *See supra* at 5–6. Section 202(a) unambiguously embraces "all airborne compounds" despite the absence of specific references to carbon dioxide and other greenhouse gases, *Massachusetts*, 549 U.S. at 512, 529, and there is no reason to interpret Section 209(b)(1)(B) to categorically bar state regulation of greenhouse gases. Indeed, EPA continues to implement its federal vehicular GHG standards, adopted pursuant to Section 202(a), albeit in an unlawfully weakened state. Because EPA can regulate greenhouse gases under Section 202(a), it cannot reasonably conclude that California is categorically barred from doing so.

Third, both Congress and EPA have recognized that a "local" versus global distinction for pollutants is illusory. *See*, *e.g.*, 42 U.S.C. §§ 7410(a)(2)(D)(i); 7415; *see also Wisconsin v. EPA*, 938 F.3d 303, 309 (D.C. Cir. 2019) ("When upwind States pollute, downwind States can suffer the consequences."). For example, EPA has recognized that pollutants and pollutant pre-cursors other than greenhouse gases (such as those it deemed "local" in SAFE 1—i.e., ozone and particulate matter) "can involve long range transport." 78 Fed. Reg. at 2,128; 86 Fed. Reg. 23,054, 23,056 (Apr. 30, 2021) ("Studies have established that ozone transport occurs on a regional scale (i.e., hundreds of miles).").[26] In prior waiver proceedings, moreover, EPA concluded that "[t]here is a logical link between" reducing greenhouse gas emissions and "ground-level ozone formation" because temperature increases caused by the former contribute to the latter. 74 Fed. Reg. at 32,763. And, while in SAFE 1 EPA unjustifiably rejected this as a legal basis for the waiver, *see supra* at 32, it did not claim, let alone establish, that this well-understood link no longer exists. Nor could it have done so. *See supra* at 11. EPA unlawfully

[26] *See also* NGO SAFE Comments at 101-02 (Oct. 24, 2018) (EPA-HQ-OAR-2018-0283-5070) (citing Lin, M., et al., *US surface ozone trends and extremes from 1980 to 2014: quantifying the roles of rising Asian emissions, domestic controls, wildfires, and climate*, 17 ATMOS. CHEM. PHYS., 2943-2970 (2017); Ewing, S., et al., *Pb Isotopes as an Indicator of the Asian Contribution to Particulate Air Pollution in Urban California*, ENVIRON. SCI. TECHNOL., 44 (23), 8911–8916 (2010)).

interpreted Section 209(b)(1)(B) as drawing a bright, categorical line between local and global pollution that even the agency recognizes does not exist.

Finally, EPA's atextual, pollutant-specific categorical bar is inconsistent with other provisions in which Congress has recognized, and even relied on, the existence of California's GHG and ZEV standards. For instance, Congress required EPA to consider California's GHG emission standard when developing federal procurement policies, 42 U.S.C. § 13212(f)(3), and to consider California's zero-emission-vehicle standard when defining "Zero Emissions Vehicle" for a federal program, 42 U.S.C. § 7586(f)(4). Neither of these instructions makes sense if, as EPA claimed in SAFE 1, California's GHG and ZEV standards are preempted by Section 209(a) and no preemption waiver is available under Section 209(b).

Section 209(b)(1)(B) cannot be read as containing a categorical bar against state regulation of vehicular GHG emissions.

c. EPA unlawfully narrowed the term "extraordinary conditions"

In the instances where EPA actually interpreted specific words or phrases in the statute, those interpretations fare no better than its untethered "nexus" requirement or its categorical ban. Indeed, EPA's "conclusion that Congress did not intend the waiver provision in CAA section 209(b) to be applied to California measures that address pollution problems of a national or global nature" drove and infected all of its interpretations. 84 Fed. Reg. at 51,347. Specifically, EPA narrowly interpreted the phrase "compelling and extraordinary conditions" to require "state-specific" causes and effects, 84 Fed. Reg. at 51,344, although that limited reading is contrary to the plain text, congressional intent, statutory structure, and EPA's past practice.

Indeed, nothing in the text of Section 209(b)(1)(B) requires that California's conditions be peculiar or unique to the State. The plain meaning of "extraordinary" is "out of the ordinary." *SEC v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1045 (9th Cir. 2005); *see also Advance Pharm., Inc. v. United States*, 391 F.3d 377, 392 (2d Cir. 2004). And the word "conditions" simply refers to the "attendant circumstances" that California faces. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990) (citing Webster's Third New International Dictionary 473 (1961)).[27] These terms do not limit the relevant conditions to those unique to California or to those exclusively caused by California vehicles. The plain meanings of these terms provide no basis to exclude GHGs and climate impacts from the scope of the waiver provision.

EPA's attempt in SAFE 1 to exclude "global" pollution problems because they are not "specific to California" or "different from circumstances in the country at large," 84 Fed. Reg. at 51,342, also creates structural conflict with Section 177. Congress enacted Section 177 in 1977 after recognizing that the very circumstances it had considered in 1967—that other regions of the country may develop air pollution problems somewhat akin to those in California—had materialized. *See* 42 U.S.C. § 7507.[28] If Section 209(b) applies only to pollution problems

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[27] "Compelling" has a distinct plain meaning—"demanding attention"—that also does not justify EPA's constrained SAFE 1 approach to Section 209(b)(1)(B). Merriam-Webster Online Dictionary, https://www.merriam- webster.com/dictionary/compelling; *accord* Webster's Third New International Dictionary 463 (1961).

[28] *See also, e.g.*, H.R. Rep. No. 95-564, at 156 (1977) (Conf. Rep.) (recognizing that other States had "automotive-related air pollution problems"); 113 Cong. Rec. at 30,947 (statement of Rep.

specific to California, then Congress's decision to permit Section 177 States to adopt and enforce California's standards serves no purpose. But a "cardinal principle of statutory construction" disfavors interpretations that render provisions "insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation marks omitted); *see also Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) ("Congress cannot be presumed to do a futile thing.").

Nor does the legislative history support EPA's SAFE 1 interpretation. In SAFE 1, EPA cited descriptions of "California's 'peculiar local conditions' and 'unique problems'" in the 1967 legislative history. 84 Fed. Reg. at 51,342 (quoting S. Rep. No. 90-403, at 33). But those passages simply highlight that Congress did *not* codify words like "peculiar" or "unique" in Section 209(b)(1)(B). The legislative history of Section 209(b) consistently emphasizes California's leadership as a laboratory of innovation that had benefited, and would continue to benefit, the rest of the country. *See, e.g.*, S. Rep. 90-43 at 33, 81; H.R. Rep. No. 95-204 at 301. If the only pollution problems California may tackle were specific to that State, there would be no reason to anticipate that the rest of the country would benefit from California's leadership. In fact, Congress understood, even in 1967, that "[o]ther regions of the Nation may develop air pollution situations related to automobile emissions which will require standards different from those applicable nationally." S. Rep. No. 90-403, at 33. As EPA previously recognized, nothing "in the language of section 209 or the legislative history [indicates] that California's pollution problem must be the worst in the country, for a waiver to be granted." 49 Fed. Reg. at 18,891.

Finally, EPA's SAFE 1 interpretations are inconsistent with its traditional ones. In granting past waivers, EPA has historically pointed to "factors that tend to produce higher levels of pollution," including "geographical and climatic conditions" as well as California's sizable motor vehicle population. 74 Fed. Reg. at 32,759–62; 78 Fed. Reg. at 2,129. EPA did not previously describe this as an exclusive list or as imposing the state-specific, cause-and-effect requirements EPA purported to read into the text in SAFE 1. In fact, EPA has traditionally rejected a constrained reading of "conditions," concluding that the term is not a direct reference to "levels of pollution." 78 Fed. Reg. at 2,129. In SAFE 1, EPA departed dramatically from its traditional interpretations to exclude GHGs because atmospheric levels of that pollution tend to be relatively consistent around the globe, 84 Fed. Reg. at 51,347, and to exclude climate change conditions because they are purportedly not "state-specific" enough, *id.* at 51,348. EPA did not explain its departure from its prior positions. *Fox Television*, 566 U.S. at 515–16. In fact, EPA's main attempt at this justification was to point to "global average" "concentrations" of GHGs, *id.* at 51,347, but that itself is a departure from EPA's prior position that the relevant "conditions" are not simply the levels of pollution. Simply stating one's new position cannot justify departing from a prior one. In any event, EPA's conclusory claim that the "factors looked at in the past … cannot form the basis of a meaningful analysis of" GHG-related conditions, 84 Fed. Reg. at 51,346, is simply not true. As explained below, California's large motor vehicle population, which is the State's largest source of greenhouse gas emissions, California's particular climate impacts, and the geographic, economic, and climatic conditions that exacerbate those impacts, all support the conclusion EPA correctly reached in 2013: that California has compelling and extraordinary conditions related to climate change.

Staggers) (noting smog-related deaths in New York); *id*. at 30,955 (statement of Rep. Roybal) (noting smog-related illnesses and deaths in Pennsylvania and New York).

d. EPA's SAFE 1 interpretation of "need" that required standards to "meaningfully address" climate change is inconsistent with the statute and past agency practice

EPA also adopted an unlawful interpretation of "need" in SAFE 1, concluding that even if California's climate change conditions were extraordinary, California would not need its GHG and ZEV standards "because they will not meaningfully address" global climate change. 84 Fed. Reg. at 51,347. This new interpretation is no more supported than the others.

First, the plain text of Section 209(b)—including the instruction that EPA "*shall* waive" preemption and the requirement to consider protectiveness "in the aggregate," 42 U.S.C. § 7543(b)(1) (emphasis added)—forbid EPA from "'overturn[ing] California's judgment lightly.'" *MEMA II*, 142 F.3d at 463 (quoting H.R. Rep. No. 95-294, at 302). But that is exactly what EPA did in SAFE 1 by concluding that California cannot "need" standards that substantially reduce the largest sources of its contribution to climate change—a serious threat the State identified almost twenty years ago.

Second, consistent with the Clean Air Act's overall objective to reduce dangerous emissions, other provisions of the Act have been interpreted not to constrain regulatory authority to sole, or even primary, sources of a given pollutant or sole, or even primary, causes of a pollution problem. *See Wisconsin*, 938 F.3d at 324 (recognizing the need to regulate sources "even if [their] emissions are not the but-for cause" of a pollution problem); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 500 (2014) (upholding EPA's determination that States contributing "less than one percent" of proscribed pollution levels "contributed significantly" to pollution such that further reductions should be considered); *Coal. for Responsible Regulation*, 684 F.3d at 123 ("EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers. It may base an endangerment finding on a lesser risk of greater harm ... or a greater risk of lesser harm or any combination in between.") (internal quotation marks omitted). Nothing in the text of Section 209(b)(1)(B) constrains California further. In fact, the text—which constrains *EPA*'s role and anticipates California will lead—indicates exactly the opposite.

Third, EPA has long and correctly understood that the word "need" does not limit California to tackling only air pollution problems that can be solved by its vehicular emission standards alone. Since the earliest days of waiver proceedings, it sufficed that California standards "may result in some further reduction in air pollution in California," and it was "not legally pertinent" that the improvement might be "only marginal." 36 Fed. Reg. at 17,458; *see also* 49 Fed. Reg. at 18,891; 79 Fed. Reg. at 46,262. That understanding of need is consistent with EPA's long-held, correct view of Congress's intent to leave decisions about "whether to regulate" particular pollutants to California. 43 Fed. Reg. at 25,735 (rejecting argument that "the intent of Congress was to control only detrimental [hydrocarbon] emissions and not" methane emissions commenter considered "harmless"). EPA did not justify its departure from this view. *Encino Motorcars*, 136 S. Ct. at 2126. Nor could it do so, particularly since Congress has twice ratified EPA's understanding. *See supra* at 26, 35. Moreover, to the extent EPA adopted its new interpretation of "need" solely for analyzing GHG-reducing standards, this is yet another improper pollutant-specific interpretation. *See supra* at 24.

Fourth, long before Congress enacted the original waiver provision, the Supreme Court had recognized that States can and do tackle large problems "one step at a time, addressing [themselves] to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955). There is no reason to think Congress eliminated this course for California in Section 209(b)(1). In fact, given that Congress has also expressly recognized that some air pollution problems cannot be solved by individual states acting alone, any intent to limit California to problems it could solve on its own would be clear and express. *See, e.g.*, 42 U.S.C. §§ 7402(a) (encouraging interstate cooperation regarding air pollution), 7410(a)(2)(D)(i) ("good neighbor" provision), 7426 (addressing interstate pollution). However, there is no such indication in Section 209(b)(1). That absence is all the more striking, given the Congress has amended or duplicated the provision, without change, while California has had to regulate an enormous array of sources of criteria pollution—not only vehicles—to improve its smog conditions. Put simply, Congress was and is well aware that air pollution problems are complex and multi-dimensional, and nothing in Section 209(b)(1)(B) suggests an intent to limit California to addressing only the simplest of these problems.

Finally, the Supreme Court has confirmed that greenhouse gas emissions are precisely one of the "massive problems" that cannot be tacked "in one fell regulatory swoop." *Massachusetts*, 549 U.S. at 524. EPA itself has found that vehicular greenhouse gas emissions in the United States cause or contribute to air pollution that endangers public health and welfare, 74 Fed. Reg. 66,496 (Dec. 15, 2009), and in SAFE 1 the agency failed to explain why California does *not* "need" to reduce the sizable contribution its vehicles make to this harmful pollution. In fact, a reduction from this highest-emitting sector "would slow the pace of global emissions increases, no matter what happens elsewhere." *Massachusetts*, 549 U.S. at 526.

Regardless of whether its inquiry focuses on California's program as a whole or on individual standards, Section 209(b)(1)(B) is logically read as asking whether California needs to reduce *its contribution* to pollution problems the State faces. No limiting language suggests otherwise. This reading, unlike the one adopted in SAFE 1, reflects congressional intent to afford California broad discretion. EPA's contrived requirement that standards "meaningfully address" global climate change is unlawful and should be reversed.

e. Equal sovereignty principles are not applicable here and, in any event, do not support EPA's interpretations

EPA also appealed to the rarely invoked constitutional doctrine of "equal sovereignty" to argue that Section 209(b)(1) provides "extraordinary treatment" to California that requires a "state-specific" and "particularized" pollution problem. 84 Fed. Reg. at 51,340 n.260, 51,347. California confronts such a problem with respect to greenhouse gas pollution, *see infra* at 43 (Section IV.C.2), and continues to confront such a problem with respect to criteria pollution as EPA has acknowledged, 84 Fed. Reg. at 51,344. But, in any event, the equal sovereignty doctrine does not apply here.[29]

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[29] We note that a group of States, led by Ohio, have asserted that equal sovereignty principles render Section 209(b) unconstitutional. Even if commenters raise that argument in this reconsideration proceeding, EPA need not address it. As noted above, EPA has long (and

Contrary to EPA's SAFE 1 position, "[f]ederal laws that have differing impacts on different states are an unremarkable feature of, rather than an affront to, our federal system." *Mayhew v. Burwell*, 772 F.3d 80, 95 (1st Cir. 2014); *see also, e.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070-71 (2016) (upholding "Alaska-specific" carve-out that "treated [Alaska] differently"). Accordingly, the Supreme Court has only applied the equal-sovereignty doctrine in the rare instance where Congress undertook "a drastic departure from basic principles of federalism" by authorizing "federal intrusion into sensitive areas of state and local policymaking"—namely, state elections. *Shelby Cnty. v. Holder*, 570 U.S. 529, 535, 545 (2013) (quotation omitted); *see also* Professor Leah M. Litman Amicus Br. 12–17 (*UCS v. NHTSA*, D.C. Cir. No. 19-1230). Congress did not so intrude in exercising its Commerce Clause power to structure interstate commerce in new motor vehicles or the regulation of air pollution those vehicles produce.

Section 209(b) is not an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Shelby County*, 570 U.S. at 545. Rather, the balance Congress struck was a careful exercise of its enumerated powers. Congress recognized the potential detriments of subjecting automakers to up to 51 different regulatory regimes and, thus, concluded that some preemption was warranted to protect interstate commerce. *MEMA I*, 627 F.2d at 1109–10. It also, however, determined that the Nation's public health and welfare would be served by the continuation of a foundational benefit of our system of federalism—the existence of state-level laboratories for regulatory experimentation. *Id.*; *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Accordingly, Congress concluded that the protection of the Nation's residents and the interests of automakers would be best served by subjecting interstate commerce in new motor vehicles to two, but only two, emission control regimes. Congress has made similar choices in other Commerce Clause contexts. *E.g.*, 16 U.S.C. §§ 824k(k), 824p(k), 824q(h), 824t(f) (reserving to Texas's electric-grid operator several regulatory powers that, for other jurisdictions, belong to the Federal Energy Regulatory Commission); *see also* Litman Amicus Br. 22-23 (describing other examples). Equal sovereignty principles do not bar Congress's regulatory design or limit Congress to two stark choices: a single-federal-standard regime that would stifle innovation and, thus, less optimally protect the public health and welfare of Americans or a 51-standards regime that would impose greater burdens on interstate commerce in new motor vehicles.

Underscoring the point, construing Section 209(b) to limit the types of pollutants that California may regulate, as EPA did in SAFE 1, would diminish most States' sovereignty without enhancing the sovereignty of any State. Specifically, EPA's SAFE 1 categorical bar against state

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correctly) limited its consideration of waiver matters to the three statutory criteria laid out in Section 209(b)(1) and has thus declined to take up constitutional questions in waiver proceedings. *See supra* at 19 (Section III); *MEMA I*, 627 F.2d at 1114 ("We think the Administrator was entitled to refuse to pass on petitioners' constitutional claims"). In addition, "regulatory agencies are not free to declare an act of Congress unconstitutional." *Springsteen-Abbott v. SEC*, 989 F.3d 4, 8 (D.C. Cir. 2021); *see also MEMA I*, 627 F.2d at 1115. And, of course, doing so would have far-reaching consequences, given the number of still-active waivers EPA has granted, the reliance interests attached to those waivers, and the volume of emission reductions and number of SIPs dependent on California's various waiver standards. In any event, equal sovereignty principles are not applicable here for the reasons explained herein and in the SAFE 1 briefing.

GHG-reducing regulations would drastically reduce the regulatory options available to California and to other States that can opt to implement California's standards under Section 177. At the same time, it would alleviate no purportedly unjustified "burden[]" imposed by Congress on any State because Section 209(b)(1) imposes no such burdens. *See Shelby Cnty*, 570 U.S. at 536. Indeed, to the extent that Section 209(b)(1) imposes burdens on any State, Congress itself found those burdens would fall only on California, and only *if it chose to take them on.* Not only would California have to expend its resources designing its regulatory regime, but Californians, not the "general consumer of the Nation" would pay the "increased costs associated with new control systems" required under that regime. *See* S. Rep. No. 90-403, at 33. No court has ever applied the doctrine of equal sovereignty to limit state sovereignty, as EPA's SAFE 1 position would do. The doctrine did not support EPA's SAFE 1 interpretations and creates no barrier to reversal of EPA's SAFE 1 actions.

2. The record before EPA in 2013 and 2019, along with more recent information, demonstrates that California has compelling and extraordinary conditions related to climate change and needs its standards to meet them

a. California's climate change conditions are compelling and extraordinary

EPA correctly concluded in 2013 that California's climate change conditions are compelling and extraordinary. 78 Fed. Reg. at 2,129. In SAFE 1, EPA made no supported factual findings to justify departing from its 2013 conclusion. Indeed, the records before EPA both in 2013 and in 2019 are replete with evidence that California's climate change impacts from greenhouse gas emissions constitute "compelling and extraordinary conditions" under any reasonable interpretation of Section 209(b)(1)(B). This is true even under EPA's unlawful SAFE 1 interpretation that required "state-specific" conditions. And more recent evidence of climate impacts in California provides further confirmation still.

(1) The record before EPA in 2013 and 2019 amply demonstrated California's compelling and extraordinary climate change conditions

In its 2012 waiver request and supporting materials, CARB articulated the myriad ways California is particularly impacted by climate change. For instance, California faces increasing risks from record-setting fires, deadly heat waves, destructive storm surges, sea-level rise, water supply shortages, and extreme heat.[30] California also faces threats to the State's agriculture industry, which produces most of the United States' nuts and fruits, risks to the ecosystems in the State, which is one of the world's most ecologically diverse places, and "enormous risks" to the

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[30] CARB Oct. 2012 Supp. Comments at 7–18 (EPA-HQ-OAR-2012-0562-0371); *see also* 2002 Cal. Legis. Serv. Ch. 200 (A.B. 1493) (finding that "[g]lobal warming would impose on California, in particular, compelling and extraordinary impacts," including reductions in water supply, damage to the State's extensive coastline and ocean ecosystems, aggravation of existing and severe air quality problems and related adverse health impacts, increases in catastrophic wildfires, and threats to the State's economy, including its agricultural sector).

State's economy.[31] CARB also detailed the large size of California's motor vehicle population, which was and is the leading cause of greenhouse gas emissions in the State.[32]

In SAFE 1, EPA made no supported findings to justify departing from its 2013 conclusion. Nor could it. The record before EPA in 2019 confirms that California is "one of the most 'climate-challenged' regions of North America."[33] California is home to some of the country's hottest and driest areas, which are particularly threatened by record-breaking heatwaves and sustained droughts,[34] as well as dense forests increasingly susceptible to wildfires. In addition, the State's extensive coastline, unusually heavy dependence on snowpack for water storage, potential for land subsidence, and other geographic and climate factors render it particularly vulnerable to and impacted by climate change.[35] Consequently, California faces both existing and projected climate risks from sea-level rise that are expected to be more intense in California than other areas, water supply shortages and resulting impacts on the nation's most productive agricultural economy,[36] drought and land subsidence, increasingly frequent and severe wildfires, extreme heat events, and harm to coastal infrastructure.[37] And California's unique challenges with ozone pollution make it and its residents especially susceptible to greater ozone formation and

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[31] CARB Oct. 2012 Supp. Comments at 7–18.

[32] LEV III Initial Statement of Reasons at 75 (EPA-HQ-OAR-2012-0562-0011); 2002 Cal. Legis. Serv. Ch. 200 (A.B. 1493).

[33] California's Fourth Climate Change Assessment, *California's Changing Climate 2018: A Summary of Key Findings* at 3 (2018), https://www.energy.ca.gov/sites/default/files/2019-11/20180827_Summary_Brochure_ADA.pdf (submitted to the docket at EPA-HQ-OAR-2018-0283-5481).

[34] NOAA, State Climate Summary: California at 1 (EPA-HQ-OAR-2018-0283-5683); CalEPA, *Indicators of Climate Change in California* at 98–103 (May 2018) (EPA-HQ-OAR-2018-0283-5481); M. Mann & P. Gleick, *Climate Change and California Drought in the 21st Century*, 112 PNAS 3858, 3858–59 (Mar. 31, 2015) (EPA-HQ-OAR-2018-0283-5682).

[35] CARB SAFE Comments at 369 (citing California's Fourth Climate Change Assessment, *California's Changing Climate 2018: Statewide Summary Report* (2018), https://www.energy.ca.gov/sites/default/files/2019-11/Statewide_Reports-SUM-CCCA4-2018-013_Statewide_Summary_Report_ADA.pdf; *id.*, *A Summary of Key Findings*).

[36] NOAA, State Climate Summary: California at 3 (EPA-HQ-OAR-2018-0283-5683).

[37] CARB SAFE Comments at 367–69 (EPA-HQ-OAR-2018-0283-5054) (citing California's Fourth Climate Change Assessment, *California's Changing Climate 2018: Statewide Summary Report*; *id.*, *A Summary of Key Findings*; California Agricultural Production Statistics, California Department of Food and Agriculture, https://www.cdfa.ca.gov/statistics/); NGO SAFE Comments at 107–126 (EPA-HQ-2018-0283-5070) (citing, among others, California's Fourth Climate Change Assessment, *California's Changing Climate 2018: Statewide Summary Report*; NOAA, State Climate Summary: California; USGCRP, *Our Changing Planet: The U.S. Global Change Research Program for Fiscal Year 2017* (2016), https://downloads.globalchange.gov/ocp/ocp2017/Our-Changing-Planet_FY-2017_full.pdf; CalEPA, *Indicators of Climate Change in California* (May 2018); California Ocean Science Trust, *Rising Seas in California: An Update on Sea-Level Rise Science* (2017), http://www.opc.ca.gov/webmaster/ftp/pdf/docs/rising-seas-in-california- an-update-on-sea-level-rise-science.pdf); *see also* P.W. Mote, et al., *Dramatic Declines in Snowpack in the Western US*, 1 NATURE PARTNER JS. CLIM. ATMOS. SCI. (2018), https://doi.org/10.1038/s41612-018-0012-1.

corresponding health impacts from rising temperatures, a well understood connection between climate change and air quality.[38] *See supra* at 11.

A November 2018 study issued by EPA and twelve other federal government agencies corroborated these findings, documenting the impact of climate change in exacerbating California's recent record-breaking fire seasons, multi-year drought, heat waves, and flood risk, and explained that California faces a particular threat from sea-level rise and ocean acidification because the State has "the most valuable ocean-based economy in the country."[39] A 2019 study further demonstrated the extraordinary nature of these impacts by finding that prior studies had underestimated the impacts of sea-level rise, storms, and flooding in California.[40]

With respect to wildfire risk in particular, the extent of California's annual wildfires has increased fivefold since the 1970s.[41] California's Fourth Climate Change Assessment, released in 2018, suggested that climate change would lead to wildfires in the next few decades that will be unprecedented in size and severity.[42] One study projected that, if greenhouse gas emissions continue to rise, by 2100 the frequency of extreme wildfires burning 25,000 acres or more will increase by nearly 50 percent and average area burned statewide will increase by 77 percent.[43] More recent studies, also submitted to EPA in SAFE 1, have further cemented this connection between California's worsening and expanding fire seasons and climate change. For instance, Williams, et al. (2019)[44] examined several factors that can promote wildfire in California and concluded that warming-induced increases in vapor pressure deficits accounted for nearly all of the growth of California forest fires from 1972 to 2018. This has been particularly notable in the North Coast and Sierra Nevada regions, which have seen over 600 percent increases in annual burned area. And Gleason, et al. (2019)[45] documented that increased wildfires are causing earlier snowmelt—which in turn influences the frequency and degree of wildfires.

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[38] Union of Concerned Scientists, *Climate Change and Your Health: Rising Temperatures, Worsening Ozone Pollution* at 2-3 (2011) (EPA-HQ-OAR-2018-0283-5683).
[39] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* at 1107 (2018) (EPA-HQ-OAR-2018-0283-7447).
[40] Patrick L. Barnard, et al., *Dynamic Flood Modeling Essential to Assess the Coastal Impacts of Climate Change*, 9 SCI. REPTS. 4309 (Mar. 13, 2019) (submitted to the docket in NGO Letter, Apr. 5, 2019 (EPA-HQ-OAR- 2018-0283-7452)).
[41] A. Park Williams, et al., *Observed Impacts of Anthropogenic Climate Change on Wildfire in California*, 7 EARTH'S FUTURE 892 (2019), https://doi.org/10.1029/2019EF001210 (submitted to the docket in CARB Letter, Aug. 21, 2019 (EPA-HQ-OAR-2018-0283-7594)).
[42] California's Fourth Climate Change Assessment, *California's Changing Climate 2018: Statewide Summary Report* at 9.
[43] *Id.*
[44] Williams, et al. (2019) *supra* note 41.
[45] Kelly E. Gleason, et al., *Four-fold Increase in Solar Forcing on Snow in Western U.S. Burned Forests Since 1999*, 10 NATURE COMM. 2026 (2019), https://doi.org/10.1038/s41467-019-09935-y (study on feedback loop between increasingly severe wildfires and snowpack, with important water supply implications).

More destructive fire seasons result in significant damages to State lands and other property as well as utility grid infrastructure, and create substantial health risks for State residents.[46] Taken together, the climate-induced dramatic increase in acres burned by wildfires and the wildfire-snowpack feedback loop suggest a particularly stark future for California.

Because California is the most populous State in the country, these climate impacts put more people at heightened risk and are all the more compelling and extraordinary. Additionally, the sheer number of vehicles in the State causes the transportation sector's contribution to California's greenhouse gas emissions to be especially large—almost forty percent, as compared to approximately thirty percent nationally.[47] Even under EPA's improper state-specific constraint, this record evidence would satisfy Section 209(b)(1)(B).

Moreover, local carbon dioxide concentrations can result from *local* carbon-dioxide emissions and can have *local* impacts on, for instance, the extent of ocean acidification. A 2019 study demonstrated that locally enhanced carbon dioxide concentrations above Monterey Bay, California, fluctuate by time of day likely because of the magnitude of nearby urban carbon dioxide pollution and the effects of topography on offshore winds, and that this fluctuation increases the expected rate of acidification of the Bay.[48] For decades, the monthly average carbon dioxide concentrations off California's coast have been consistently higher and more variable than those at Mauna Loa (which are commonly used as the global measurements).[49] In fact, another more recent study shows that the waters of the California Current Ecosystem, off the coast of Southern California, have already acidified more than twice as much as the global average.[50]

The impacts of climate change in California and these multiple geographic, climatic, and economic exacerbating factors constitute "compelling and extraordinary conditions" under any reasonable interpretation of a statutory provision designed to give California the broadest possible discretion in reducing air pollution and its impacts. In addition, the severity of these factors, individually and collectively, in California is "sufficiently different" from the rest of the country to constitute compelling and extraordinary conditions even under the unlawfully constrained interpretations EPA applied in SAFE 1. Indeed, the particularly serious confluence of California's wide-ranging and severe climate risks—coupled with the size and nature of its economy, the size and import of its coastline and oceanic resources, the size and diversity of its

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[46] *See* California's Fourth Climate Change Assessment, *California's Changing Climate 2018: Statewide Summary* at 95 (2018) (projecting over $47 million annual damage costs from wildfires on utility grid infrastructure).
[47] CARB SAFE Comments at 369 (Oct. 24, 2018) (EPA-HQ-OAR-2018-0283-5054) (citing Greenhouse Gas Inventory, https://www.arb.ca.gov/cc/inventory/inventory.htm); *see also* 77 Fed. Reg. 62,624, 62,634 (Oct. 15, 2012).
[48] *See* Northcott, et al., *Impacts of urban carbon dioxide emissions on sea-air flux and ocean acidification in nearshore waters*, PLoS ONE (2019).
[49] *E.g.*, Cal. Office of Environmental Health Hazard Assessment, *Atmospheric Greenhouse Gas Concentrations* (Feb. 11, 2019), https://oehha.ca.gov/epic/climate-change-drivers/atmospheric-greenhouse-gas-concentrations.
[50] E.B. Osborne, et al., *Decadal Variability in Twentieth-century Ocean Acidification in the California Current Ecosystem*, 13 NAT. GEOSCI. 43 (2020), https://doi.org/10.1038/s41561-019-0499-z.

geography, and the size of its human and motor-vehicle populations—undeniably establish compelling and extraordinary conditions. EPA's conclusion to the contrary in SAFE 1 ignored the overwhelming weight of the record, and that conclusion should be reversed.[51]

(2) More recent evidence further confirms that California has compelling and extraordinary climate change conditions

Additional and more recent evidence of climate change impacts in California further demonstrates their extraordinary nature, and EPA can, and must, consider that evidence in this proceeding. In August 2020, heat waves in California were some of the worst to hit the State in years.[52] Data from NOAA's National Centers for Environmental Information[53] show that September 2020 officially ranks as California's hottest September since record-keeping began in 1880. And studies have already confirmed that local carbon dioxide emissions can alter local temperatures. For instance, domes of increased carbon dioxide concentrations above cities cause local temperature increases that in turn increase the amounts of local air pollutants, raising concentrations of health-damaging ground-level ozone as well as particulate matter in populated areas of California.[54]

Tracking with rising temperatures, California's 2020 fire season was record-breaking, not only because over 4 million acres burned but also because 5 of the 6 largest wildfires in California history occurred in 2020.[55] Some of those fires burned so hot that they created their own tornadoes and lightning storms.[56] At one point, California came under siege from record-

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[51] In SAFE 1, EPA pointed to only one study to support its new position that the effects of climate change in California are insufficiently unique to support a waiver for the State's GHG and ZEV standards. *See* 84 Fed. Reg. at 51,348 n.278 (citing S. Hsiang, et al. "Estimating Economic Damage from Climate Change in the United States," 356 Science 1362 (2017)). This study, however, did not even analyze multiple climate effects critical to California, including wildfires and droughts, and it predates multiple studies in the record that firmly demonstrate the particularly challenging collection of climate impacts that California faces. EPA's reliance on this single study to justify its change in position was inappropriate. *Genuine Parts Co.*, 890 F.3d at 346 ("[A]n agency ... may not minimize such evidence without adequate explanation.").

[52] Tony Barboza, "As Second Heat Wave Sears California, Experts Say Health Impacts Will Worsen With Climate Change," L.A. TIMES, Sept. 5, 2020, https://www.latimes.com/california/story/2020-09-05/heat-health-risks.

[53] NOAA, "Earth Just Had its Hottest September on Record," Oct. 14, 2020, https://www.noaa.gov/news/earth-just-had-its-hottest-september-on-record.

[54] M.Z. Jacobson, *Enhancement of Local Air Pollution by Urban CO2 Domes*, 44 ENVIRON. SCI. TECHNOL. 2497 (2010), DOI: https://doi.org/10.1021/es903018m.

[55] John Myers, "California Unveils Sweeping Wildfire Prevention Plan Amid Record Fire Losses and Drought," L.A. TIMES, Apr. 8, 2021, https://www.latimes.com/california/story/2021-04-08/california-wildfire-prevention-536-million-newsom-lawmakers.

[56] *See* Susanne Rust & Tony Barboza, "How Climate Change Is Fueling Record-Breaking California Wildfires, Heat and Smog," L.A. TIMES, Sept. 13, 2020, https://tinyurl.com/y4skzftm; Matthew Cappucci, "California's Wildfire Smoke Plumes Are Unlike Anything Previously Seen," WASH. POST, Sept. 12, 2020, https://tinyurl.com/y5au5r9z.

breaking heat waves and smoke from thousands of fires burning simultaneously, and the Bay Area even awoke to an eerie, dark, and deep-orange sky.[57] A recent study suggests that smoke from wildfires like these is a rapidly growing health threat and could become one of the deadliest climate impacts within decades.[58] And the economic toll of California's fires has been enormous—the 10 costliest wildfires in U.S. history all occurred in California[59]—and will only continue to grow. Since 2015, California has incurred as much as $100 billion in costs from 10 billion-dollar disasters, nearly half of which is attributable to wildfires.[60]

This year, California saw only a little over half of its traditional snowpack levels, and the snowpack is already melting rapidly—putting substantial areas of the State in emergency drought situations and amplifying the potential for another extremely dangerous wildfire season.[61] According to the National Drought Mitigation Center, approximately 95 percent of the State is in a "severe" drought, meaning the fire season will be extended, and 85 percent of the State is in an "extreme" drought, meaning the fire season is year-round.[62] As of May 2021, 41 counties in California are under a drought state of emergency.[63]

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[57] Thomas Fuller & Christopher Flavelle, "A Climate Reckoning in Fire-Stricken California," N.Y. TIMES, Sept. 10, 2020, https://www.nytimes.com/2020/09/10/us/climate-change-california-wildfires.html.

[58] Tony Barboza, "Wildfire smoke now causes up to half the fine-particle pollution in Western U.S., study finds," L.A. TIMES, Jan. 13, 2021, https://www.latimes.com/california/story/2021-01-13/wildfire-smoke-fine-particle-pollution-western-us-study (new study links climate change to worsening air quality and health risks in both urban and rural communities in recent years); Marshall Burke, et al., *The Changing Risk and Burden of Wildfire in the United States*, PNAS 118(2) e2011048118 (Jan. 12. 2021), https://doi.org/10.1073/pnas.2011048118.

[59] Insurance Information Institute, Facts + Statistics: Wildfires, https://www.iii.org/fact-statistic/facts-statistics-wildfires.

[60] Senator Henry Stern, California Must Prepare for Financial Fallout as Cost of Climate Emergency Threatens to Drain Budgets, Sept. 25, 2020, https://sd27.senate.ca.gov/news/20200925-california-must-prepare-financial-fallout-cost-climate-emergency-threatens-drain; https://www.ncdc.noaa.gov/billions/.

[61] *E.g.*, Jeremy P. Jacobs, "Crisis mode: California Confronts Drought, Infrastructure Mess," E&E NEWS, May 11, 2021, https://www.eenews.net/greenwire/2021/05/11/stories/1063732257?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Agreenwire; *see also* "As Drought Intensifies, State Seeing More Wildfires," E&E NEWS, May 26, 2021, https://www.eenews.net/climatewire/2021/05/26/stories/1063733501?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aclimatewire.

[62] Drought.gov, Current U.S. Drought Monitor Conditions for California (updated as of June 29, 2021), https://www.drought.gov/states/california.

[63] Ca.gov, Governor Newsom Expands Drought Emergency to Klamath River, Sacramento-San Joaquin Delta and Tulare Lake Watershed Counties, May 10, 2021, https://www.gov.ca.gov/2021/05/10/governor-newsom-expands-drought-emergency-to-klamath-river-sacramento-san-joaquin-delta-and-tulare-lake-watershed-counties/.

These recent unprecedented fire seasons, droughts, and the rising temperatures that help fuel them reaffirm that California's climate conditions are compelling and extraordinary and that EPA's conclusion to the contrary in SAFE 1 was arbitrary and capricious.

b. The record also demonstrates that California needs its GHG and ZEV standards now

The record also demonstrates 1) that California's GHG and ZEV standards effectively reduce greenhouse gas emissions now, 2) that these immediate emissions reductions are critical in avoiding climate "tipping points"—thresholds of abrupt and irreversible change—and 3) that the standards are necessary now to incentivize technological advancements essential to longer-term emission reductions. In SAFE 1, EPA failed to identify any contrary evidence that would undermine the inevitable conclusion that California needs these standards.

In erroneously concluding that California did not need its GHG and ZEV standards, EPA claimed California's standards would cause "indistinguishable change[s] in global temperatures." 84 Fed. Reg. at 51,341. That assertion rests on an inappropriately narrow construction of "need." *See supra* at 40. Indeed, if governments were limited to taking actions that would, by themselves, solve a particular problem, only the smallest of problems would ever be solvable. EPA's approach to "need" also ignores the incremental emission reductions that will result from California's GHG and ZEV standards as well as CARB's analysis in the record showing larger emissions impacts. CARB SAFE Comments at 57, 370; Waiver Request at 10, 16–17. Recently, CARB conducted another analysis of the emission reductions attributable to its GHG standards, confirming that these standards effectively reduce greenhouse gas emissions today and will increasingly do so in the future. Appendix C at 5–6, 9–11.

These incremental emissions reductions in greenhouse gas emissions are needed now because greenhouse gases can remain in the atmosphere for long time periods. Carbon dioxide in particular remains in the atmosphere longer than the other major greenhouse gases emitted as a result of human activities: once emitted, 40 percent will remain in the atmosphere after 100 years and 20 percent will reside after 1000 years; only after about 10,000 years will the remainder break down. As explained in the Fourth National Climate Assessment, "[w]aiting to begin reducing emissions is likely to increase the damages from climate-related extreme events (such as heat waves, droughts, wildfires, flash floods, and stronger storm surges due to higher sea levels and more powerful hurricanes)."[64]

Even moderate climate change could pose serious risks. For instance, there may be tipping points in the climate system such that even a small incremental change in temperature could push Earth's climate into catastrophic runaway global warming. Indeed, a recent commentary in the journal *Nature* warned that nine major climate tipping points (including the accelerating ice loss from the West Antarctic ice sheet) are "dangerously close" to being triggered.[65] Therefore, serious efforts to reduce GHG emissions are needed now to avoid scenarios where steeper (and

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[64] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, at 1488 (2018) (EPA-HQ-OAR-2018-0283-7447).

[65] Timothy M. Lenton, et al., *Comment: Climate Tipping Points - Too Risky to Bet Against*, NATURE (Apr. 9, 2020), https://www.nature.com/articles/d41586-019-03595-0.

likely more expensive) emission reductions are needed later. Delaying efforts to mitigate carbon dioxide emissions will have negative—and potentially irreversible—consequences for global warming and its impacts, including more extreme wildfires, rising sea levels, greater ocean acidification, and increased risks to food security and public health.

Finally, California's regulations are critical not just for immediate emissions reductions but also because they incentivize technological advancement that facilitates greater emission reductions in the future. Waiver Request at 2, 4–5, 16–17; CARB SAFE Comments at 373. Notably, in SAFE 1, EPA did not contest that California's GHG and ZEV standards are critical for incentivizing production and deployment of zero-emission vehicles, reducing greenhouse gas emissions, and achieving California's long-term greenhouse gas emission reduction goals. 84 Fed. Reg. at 51,337. Nor could it, given CARB's demonstration in its 2012 waiver request and the confirmation provided by the remainder of the record. *See, e.g.*, Waiver Request at 2–3, 8–9, 16–17; CARB Board Resolution 12-11.

In SAFE 1, EPA inappropriately narrowed its interpretation of "need" to exclude the incremental emission reductions from California's GHG and ZEV standards. EPA's SAFE 1 Section 209(b)(1)(B) Determination should be reversed on this additional ground: because this unjustified change in interpretation was unlawful, as explained above, and because the record firmly indicates that California does need these standards to reduce its contribution to its climate crisis,.

V. EPA Should Withdraw Its Section 177 Determination

In Section 177 of the Clean Air Act, Congress conferred directly on States the discretionary authority to adopt California motor vehicle emission standards, so long as: 1) the States' standards are identical to standards for which California has been granted a waiver by EPA; and 2) the States provide two years of lead time. 42 U.S.C. § 7507. This authority belongs exclusively to States, with no intermediary role for EPA. As the agency has long acknowledged: "States are not required to seek EPA approval under the terms of section 177."[66] The one prerequisite for a State to avail itself of Section 177 is that the State must have "plan provisions approved under" Part D of Subchapter I of the Act. *Id*.

Thirteen States have adopted California's light-duty vehicle GHG emission standards pursuant to Section 177, and many have been implementing these GHG standards for up to a decade. These standards play an important role in State's planning for reaching their GHG emission reduction targets and mandates[67] as well as in planning for attainment of NAAQS, which States face legal

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[66] https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations#state

[67] For example, in 2019, New York State adopted the Climate Leadership and Community Protection Act, which mandates an 85% reduction in GHG emissions in New York by 2050. New York Environmental Conservation Law, Article 75. In 2021, Massachusetts enacted new climate change legislation that mandates the Commonwealth achieve net-zero economywide greenhouse gas emissions by 2050, with interim milestones in 2030 and 2040 and a requirement to adopt sector-specific greenhouse gas emissions sublimits, including for the transportation sector. 2021 Mass. Acts Ch. 8. §§ 8–10. In 2007 New Jersey's legislature passed, and in 2018 modified, the Global Warming Response Act which mandates an 80% reduction in greenhouse

jeopardy for failure to attain. 42 U.S.C. § 7509. EPA has not only acquiesced to this longstanding practice but has affirmatively approved inclusion of California's GHG emission standards into state implementation plans, thus deepening States' already substantial reliance interests.[68]

As part of its SAFE 1 action, EPA broke from past practice and finalized its proposed determination that "states cannot adopt California's GHG standards under [] Section 177" even if California has a waiver for those standards (the "Section 177 Determination"). 84 Fed. Reg. at 51,350. EPA did not explain how it would implement the Section 177 Determination, acknowledging only that its action "may have implications" for state implementation plans, but deferring "whether and how to address those implications" to unspecified future "separate actions." *Id*. at 51,338, n.256.

We appreciate EPA's prompt reconsideration of the Section 177 Determination and urge the agency to withdraw the determination for several reasons, including that: EPA had no legal authority to make the determination; the determination conflicts with the statute's plain language; and the determination's reversal of EPA's longstanding past practice disregarded reliance interests and created significant, undue uncertainty for Section 177 States. Regardless of whether the Section 177 Determination was a final action for purposes of judicial review (*see*, 86 Fed. Reg. 22,426, n.42), it is imperative that EPA formally withdraw the determination to remove the harmful uncertainty that the determination has caused for State planning processes and to reduce any threat of third party litigation the determination created by asserting that States are preempted from adopting California's GHG standards.

EPA seeks comment on three issues relevant to its reconsideration of the Section 177 Determination: 1) whether it was appropriate for EPA to provide an interpretation of Section 177 within the SAFE 1 proceeding; 2) to the extent it was appropriate to provide an interpretation, did EPA properly interpret the statute; and 3) whether California's mobile source emission standards adopted pursuant to Section 177 "may have both criteria emission and GHG emission benefits and purposes." 86 Fed. Reg. at 22,429. We address each issue below.

A. It Was Not Appropriate for EPA to Provide an Interpretation of Section 177

It was not appropriate for EPA to provide an interpretation of Section 177 that would have any legal force or effect, as EPA apparently intended in SAFE 1, for at least two reasons: a) EPA had no legal authority to make such an interpretation; and b) the plain language of Section 177 is unambiguous and leaves no room for interpretation.

First, Congress gave EPA no role in implementing Section 177 and no authority to constrain States' decisions regarding adoption of California emissions standards. On the contrary, Section

gas emissions below 2006 levels by 2050. N.J. Stat. Ann. § 26:2C-28. Vermont is required to reduce statewide greenhouse gas emissions by 80% from 1990 levels by 2050, and to achieve net zero emissions across all sectors by 2050. 10 V.S.A. §§ 578(a)(3) & 592(b)(4).

[68] For example, EPA has approved California's GHG standards into the SIPs for Connecticut (80 Fed. Reg. 13,768 (Mar. 17, 2015)), Delaware (80 Fed. Reg. 61,752 (Oct. 14, 2015)), Maine (82 Fed. Reg. 42,233 (Sept. 7, 2017)), Maryland (80 Fed. Reg. 40,917 (July 14, 2015)), Pennsylvania (77 Fed. Reg. 3,386 (Jan. 24, 2012)), and Rhode Island (80 Fed. Reg. 50,203 (Aug. 19, 2015).

177's plain language confers exclusively upon qualifying States the discretionary authority to adopt whatever vehicle emission standards California has adopted, subject only to the requirements of identicality and lead time. EPA's "single, narrow responsibility" related to Section 177 is to issue regulations to define the commencement of the model year for use in measuring lead time. *Motor Vehicle Mfrs. Ass'n v. NYSDEC*, 17 F.3d 521, 535 (2d Cir. 1994). This express grant of limited authority confirms that Congress was not assigning EPA any other role under Section 177.

Second, EPA asserted that it had authority to finalize the Section 177 Determination for the sole reason that it is "the agency charged with implementing the Clean Air Act." 84 Fed. Reg. at 51,351. However, that general principle is inapposite because the plain language of Section 177 leaves no gap, explicit or implicit, for EPA to fill with an interpretation. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). Moreover, EPA may not rely on any general interpretive authority it may have to override Section 177's more specific congressional delegation of authority to States to determine for themselves whether to adopt California's standards. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018).[69] EPA should therefore explicitly disavow any further interference with authority that Congress conferred directly on States.

B. Assuming There Were Some Room for Interpretation, EPA Did Not Properly Interpret Section 177

Assuming arguendo that EPA had authority to issue the Section 177 Determination, which it did not, EPA's interpretation of Section 177 was erroneous and ran counter to basic principles of statutory construction. EPA's stated basis for the Section 177 Determination was that "the text (including both the title and main text), structural location, and purpose of [Section 177] confirm that it does not apply to GHG standards." 84 Fed. Reg. at 51,350. Specifically, EPA asserted that Section 177's threshold requirement that a State "has plan provisions approved under this part [D]," as well as the title ("New motor vehicle emission standards in nonattainment areas") and placement in Part D of Subchapter I ("Plan Requirements for Nonattainment Areas") should all be read to limit the type of California standard a 177 State may adopt to those that explicitly target criteria pollutants. These assertions all lack merit.

First, EPA's reading of the text was flawed in at least two ways. As to the threshold requirement, EPA failed to note that States with "plan provisions approved under [Part D]," are expressly not limited to States with nonattainment plans (Section 172).[70] Rather, States are also included if, for

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[69] In the SAFE 1 litigation, EPA belatedly added the new argument that its authority to approve SIPs under Section 110 somehow encompasses the implicit authority to decide which California vehicle emission standards Section 177 States may adopt. Resp. Br. at 106. States may and do adopt California standards without including them in SIPs, however, and EPA cannot limit a State's discretion to make that decision for itself. *Cf. Virginia v. EPA*, 108 F.3d. 1397, 1412-13 (D.C. Cir. 1997).

[70] EPA also cited to an irrelevant, superseded version of Section 172, and legislative history for that outdated provision, as support for its interpretation. 84 Fed. Reg. at 51,351, n.286. Leaving aside that EPA failed to provide an opportunity for notice and comment by failing to reference either the superseded (or current) version of Section 172, or the legislative history for that

example, they have achieved attainment but have approved maintenance plans (Section 175A) or have other approved plan provisions related to being within the Ozone Transport Region (Section 184). Compounding its misreading of the threshold qualifying requirement, EPA completely failed to address, much less to reconcile its interpretation with, Section 177's operative language which unambiguously vests States with discretionary and plenary authority to determine which California "standards relating to control of emissions from new motor vehicles" to adopt, subject only to the identicality and lead time requirements. The text includes no modifier for the word "standards" and there is no other textual basis to impose a limitation based on the type of air pollutant a California standard may target. *See supra* at 35 (establishing Congress knows how to limit sections of the Act to specific pollutants when it intends to do so). Rather, the relevant standards are broad, including those "for *any* model year." 42 U.S.C. § 7507 (emphasis added).[71]

Notably, Congress did not limit States to adopting only those California standards that address the specific pollutant(s) for which such States have approved SIP provisions under Part D. Thus, for instance, a State with only ozone nonattainment areas can still adopt California standards that address other criteria pollutants. Section 177's purpose, as reflected in the text and legislative history, was to allow States flexibility to devise plans and choose measures to deal with their own individual and complex air pollution challenges.[72] In short, while Congress may have constrained which States can make use of Section 177, the unambiguous text places no restriction on which California standards 177 States can choose to adopt, nor does it carve out any space for EPA to insert itself into the process.

EPA's attempt to rely on Section 177's title – "New Motor Vehicle Standards in Nonattainment Areas" – and its placement in subchapter I was equally without merit. It is well established that where a statute's text is clear, as it is in Section 177, title and placement serve no interpretive role. *See, e.g.*, *Whitman*, 531 U.S. at 483 (where statutory text is clear, "[t]his eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself.") (internal quotation marks omitted); *Nat'l Ctr. For Mfg. Sci. v. Dept. of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000) ("There is no reason to cloud the plain meaning of subsection (d) because of its placement in section 1006."). Regardless, EPA's reading of the title and placement was also substantively flawed. For instance, the reference in the title to "nonattainment areas" is not a limitation to "nonattainment (i.e., criteria) pollutants" or standards that target them. Indeed, the presence of that phrase in the title only underscores the absence of any limitation on *pollutants*—in the title or, more importantly, the statutory text itself. EPA's focus on the placement of Section 177 in subchapter I was also misplaced. EPA could not explain why

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superseded version, in the SAFE 1 proposal, citation to superseded text cannot overcome the plain language of Section 177. Nor does including vehicle criteria pollutant emissions in SIP inventories, as the superseded Section 172 required, reflect any intent to limit the standards States may elect to adopt.

[71] In the SAFE 1 litigation EPA conceded that Section 177 authorizes States to adopt and enforce "any" California standards. Resp. Br. at 111.

[72] As stated by Congressman Rogers of Florida during floor debate: "It is the feeling of the committee that if there are States . . .which have a very heavy pollution problem, that might desire to adopt and enforce the California option for themselves they may do so . . . . No one will force the State to make a judgment. It is left up to the State. They can either do it or not do it." Legislative History of the Clean Air Act Amendments of 1977 P.L. 95–95 (1979).

Congress would have intended Section 209(e)(2)(B) – which is virtually identical to Section 177 but is placed in subchapter II – to authorize States to adopt *any* California standards for non-road vehicles while Section 177 purportedly limits States to adopting only criteria pollutant standards for on-road vehicles solely because it is placed in subchapter I.

EPA's reading of Section 177 also ran counter to other canons of statutory construction. For example, while Congress imposed enumerated, explicit limitations on States' exercise of their authority under Section 177 (the identicality and lead time requirements), it did not express any limitation as to the types of pollutants covered and/or types of California standards to which States may opt-in. Principles of statutory construction dictate that the presence of two explicit limitations reflects Congress' intent to exclude the additional limitation that EPA sought to read in to the statute. *See, e.g. Halverson v. Slater*, 129 F.3d 180, 185–86 (D.C. Cir. 1997) (statutory delegations to only Coast Guard officials excludes delegations to non-Coast Guard officials). EPA's interpretation also overlooked that under Section 177, States may adopt and enforce standards "identical to the California standards for which a [Section 209(b)(1)] waiver has been granted," 42 U.S.C. § 7507(1), and, in describing that set of standards, Congress used essentially "the same words" as in Section 209(b)(1), *NYSDEC*, 17 F.3d at 532. *Compare* 42 U.S.C. § 7543(a), (b)(1) (describing standards for "control of emissions from new motor vehicles or new motor vehicle engines"), *with id.* § 7507 (same). Both provisions describe State authority to adopt vehicular emission standards, and the context does not suggest a different scope. *See UARG v. EPA*, 573 U.S. 302, 319-20 (2014) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Finally, EPA's reading ran afoul of the canon of statutory construction that statutes must be read to avoid absurd or patently unreasonable results. A reading that prevents Section 177 States from adopting California's GHG standards, but not any other California standards, could require States to either: 1) extract just the GHG portion of the Advanced Clean Cars rules from their programs, thus potentially creating type of "third vehicle" forbidden by Section 177 (i.e., a vehicle subject to a hybrid combination of the other California standards and the (now weakened) federal GHG standards; or 2) drop all California standards, negating States' discretionary authority, not disputed by EPA, to adopt California criteria pollutant standards. Either outcome would be absurd and clearly contrary to what Congress intended in Section 177.[73]

C. California's GHG Standards Adopted by 177 States Have Both Criteria Emission and GHG Emission Benefits and Purposes

Although EPA sought to justify the Section 177 Interpretation by asserting that Section 177 States' adoption of vehicle GHG emission standards are "far removed from NAAQS attainment planning" (84 Fed. Reg. at 51,351), both the factual record and EPA's own past findings and actions refute this bald assertion. As set forth in detail above, California's mobile source GHG standards clearly have both GHG and criteria pollutant emission purposes and benefits. *See supra* at 9 (Section I.B). Moreover, EPA has repeatedly reaffirmed the connection between state GHG emission standards and NAAQS nonattainment by approving the adoption of California's

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[73] *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

GHG standards into Section 177 States' SIPs. *See supra* n.68. Thus, even assuming for the sake of argument that Section 177 requires a connection between NAAQS attainment and/or maintenance and the standards that States elect to adopt, the California GHG standards meet that requirement.

In conclusion, EPA's Section 177 Determination amounted to an *ultra vires* attempt to usurp discretionary authority that Congress conferred directly, and exclusively, on States. The determination is contrary to the plain language of the statute and harms States both by injecting uncertainty into legally mandated State planning processes and subjecting States to the threat of third-party litigation. Accordingly, we urge EPA to withdraw the Section 177 Determination.

VI. EPA NEED NOT ISSUE A SECTION 209(B)(1)(C) DETERMINATION HERE, BUT CALIFORNIA'S STANDARDS REMAIN FEASIBLE

As EPA observes, it has not departed from its 2013 conclusion that California's GHG and ZEV standards, along with the rest of California's program, are consistent with Section 202(a) within the meaning of Section 209(b)(1)(C). *See* 86 Fed. Reg. at 22,425, 22,428–29. Although EPA proposed to make contrary findings under that prong of the waiver provision, it ultimately opted not to finalize any such findings in SAFE 1. 84 Fed. Reg. at 51,350. EPA's 2013 Section 209(b)(1)(C) determination stands and has not been reopened here because EPA is only reconsidering the determinations it finalized in SAFE 1. 86 Fed. Reg. at 22,428 ("EPA is not soliciting comments on issues raised and evaluated by EPA in the 2013 ACC program waiver decision that were not raised and evaluated in the final SAFE 1 decision."). EPA, thus, should not make a new determination under Section 209(b)(1)(C), regardless of whether other commenters ask it to do so. *See Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (agency does not "reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter"). Indeed, if EPA were to reconsider its 2013 Section 209(b)(1)(C) Determination, it would need to provide California, the Section 177 States, and the public with notice of that intent and a specific opportunity to comment on those issues.[74] Nonetheless, should any commenters claim there are feasibility concerns related to California's GHG and ZEV standards that somehow counsel in favor of leaving EPA's SAFE 1 action in place, the record demonstrates otherwise, as discussed below. In addition, since these standards have been part of the California Code of Regulations since 2012, there can be no argument that California provided insufficient lead time to auto manufacturers. *See also supra* at 15 (describing automakers' assertions that they would have to plan to comply with California's standards unless and until the SAFE 1 litigation were resolved).

A. The Record Demonstrates California's GHG Standards Are Feasible

EPA made numerous findings in 2013 that compliance with California's GHG standards is feasible within the meaning of Section 209(b)(1)(C): that the costs of compliance were not "excessive," 78 Fed. Reg. at 2,134; that increases in vehicle costs from the GHG standards, if

[74] EPA would also need to apply the appropriate burden of proof to any objections to the consistency of California's standards under Section 209(b)(1)(C), as well as the agency's traditional "narrow" review under this criterion. 78 Fed. Reg. at 2,116, 2,132; *see also MEMA I*, 627 F.2d at 1122.

passed on to consumers, would "be more than offset by consumer fuel savings over the life of the vehicles," *id.* at 2,138; that "a reasonable technology path forward ha[d] been projected in support of the MY 2022-2025," at least in part because California GHG standards provided a "substantial amount of lead-time," *id.* at 2,137; and that the record "clearly indicates that [California's GHG standards] are feasible," with or "even without the deemed to comply provision," *id.* at 2,138. EPA received only one objection in 2013 "regarding the technology assessment or cost analysis done by CARB in support of their GHG standards." *Id.* at 2,137. That was an unsupported claim (easily rejected by EPA) that technological feasibility for MYs 2022-2025 was not sufficiently knowable at the time. *Id.*

There is no reason for EPA to revisit, let alone depart from any of these findings, or to otherwise question the feasibility of California's GHG standards, now. In fact, in 2017, when CARB completed its Mid-Term Review of its Advanced Clean Cars program, it concluded that manufacturers were successfully employing "a variety of technologies that reduce GHG emissions," "many at a faster rate" than originally anticipated. CARB Mid-Term Review ("CARB MTR") at ES-2 (EPA-HQ-OAR-2018-0283-5705). Manufacturers were, in fact, "over complying with the GHG requirements" and already "offering various vehicles" capable of complying with the standards for later model years. *Id.*

Further analysis by CARB in 2018 found that GHG standards *more stringent* than its current ones for MYs 2024 and 2025 would also be feasible with reasonable costs. CARB SAFE Comments at 384 n.966. CARB now submits additional analysis demonstrating that automakers are continuing to over-comply, collectively, and there is no reason to conclude automakers will suddenly become unable to comply with any of the model years at issue here. Appendix D at 9 (Figure 1). Specifically, through MY 2020, "[a]uto manufacturers have complied with the federal GHG emission standards…, thereby complying with California's GHG standards as well." *Id.* at 2. For MY 2021 and beyond, "[a]uto manufacturers are well positioned to meet California's standards." *Id.* "As a whole, the industry will enter the 2021 model year in compliance with California's standards and, given the progression of technologies, are on a trajectory to continue to comply at or below previous cost projections." *Id.*

B. The Record Demonstrates California's ZEV Standards Are Feasible

EPA also made multiple findings in 2013 regarding California's ZEV standards, including: that "compliance with the ZEV standards … is feasible giving consideration to cost and lead time available," 78 Fed. Reg. at 2,142; that the underlying technology was already available and would improve, *id.*; that "there is no real question about the basic feasibility of this technology," *id.* at 2,144; that incremental per-vehicle consumer cost estimates of approximately $10,000 were not excessive and did not support a finding of infeasibility, *id.* at 2,142; and that the lead time provided was "substantial" and sufficient to allow manufacturers and others to take steps "to facilitate compliance," *id.* at 2,144. Moreover, as EPA noted in the 2013 Waiver Grant, CARB received no comments on its rulemaking to adopt these ZEV standards "questioning the overall technological feasibility" of them. *Id.* at 2,139.

As with the GHG standards, there is no reason for EPA to revisit, let alone depart from any of these findings, or to otherwise question the feasibility of the ZEV standards, now. In its 2017 Mid-Term Review, CARB found that battery technology had improved and that battery costs had declined "dramatically," "leading to an increase" in the number of PHEV and BEV models

offered—from 25 in 2017 to an anticipated 70 by 2022. CARB MTR at ES-3. CARB also found that "improvements in ZEV and PHEV attributes, such as all-electric range and vehicle price, are expected to further broaden the appeal of these vehicles beyond the initial consumers and help achieve necessary future market expansion." *Id.* at ES-7. In sum, ZEV "[t]echnology ha[d] progressed faster than staff anticipated during the development of the" ZEV standards in 2012, *Id.* at ES-41; the incremental costs of a ZEV, over a conventional vehicle, were significantly lower than anticipated, *id.* at ES-43; and, as with the GHG standards, manufacturers were over-complying, *id.* at ES-49. *See also id.* at ES-57 (noting signs "that the industry is starting to shift towards greater electrification").

In addition, as CARB demonstrated in its 2018 comments in the SAFE proceeding, "ZEV infrastructure in California [was] already sufficient to fuel the mandated number of vehicles through at least 2023, and additional planned infrastructure is expected to far exceed the level necessary to meet regulatory mandates through 2025." CARB SAFE Comments at 385. And, as others' comments demonstrated, ZEV sales and ZEV market share have both been increasing steadily since 2015, underscoring, again, the feasibility of the ZEV standards. Multi-State SAFE Comments, Appendix B at 2. Current data confirms that these trends have continued since those comments were submitted.[75]

It is not surprising, then, that manufacturers, as a whole, have continued to over-comply with California's ZEV standards, and by increasing margins, since CARB's 2017 Mid-Term Review. Appendix E at 4 (Figure 1). In fact, more and more auto manufacturers are complying on their own—without the need to purchase credits from others. *Id.* at 2. To further demonstrate the absence of any feasibility issues with restoring the waiver for the ZEV standards, CARB modeled credit balances and compliance requirements based on the counterfactual scenario where the industry remains stagnant at MY 2019 levels with none of the anticipated (and even trumpeted) expansions in ZEV fleets. Even in that scenario (which the automakers themselves do not anticipate), the industry as a whole could still comply—with credit trading—well past model year 2025. *Id.* at 4–6. In truth, the automakers themselves project a world in which ZEV sales increase significantly between 2019 and 2025, which is also a world in which they can easily comply with the standards if they are restored. *Id.* at 8–9. The significant progress in the development of zero-emission technologies only underscores that compliance is readily feasible. *Id.* at 9–12.

VII. NEITHER CARB'S DEEMED-TO-COMPLY CLARIFICATION RULEMAKING NOR THE FRAMEWORK AGREEMENTS PROVIDE A REASON TO LEAVE EPA'S SAFE 1 ACTIONS IN PLACE

In its SAFE 1 decision, EPA referenced several actions by CARB: 1) a rulemaking that clarified a provision of the California Code of Regulations under which automakers would be "deemed-to-comply" with CARB's GHG standards by complying with EPA's 2012 standards; and 2)

[75] Argonne National Laboratory, Light Duty Electric Drive Vehicles Monthly Sales Updates, Figure 3: PEV [Plug-in Electric Vehicle] Sales Share of New Vehicle Sales, *available at* https://www.anl.gov/es/light-duty-electric-drive-vehicles-monthly-sales-updates, last visited July 5, 2021.

"Framework Agreements" CARB entered into with five automakers[76] to ensure the continuation of annual reductions in vehicle GHG emissions through MY 2026 while providing certainty to automakers regarding their compliance obligations under California's program. None of these actions formed a basis for EPA's SAFE 1 actions, none substantively altered the codified emission standards for which EPA granted California a waiver in 2013, and none is material to the reversal of EPA's SAFE 1 actions or the reinstatement of the withdrawn portions of the 2013 waiver.

A. The Clarification of the Deemed-to-Comply Provision Changed Nothing about California Law, Was Not a Basis for the Waiver Withdrawal, and Provides No Reason to Leave that Withdrawal in Place

1. Background

California's deemed-to-comply provision was included in California's program as an "alternative option to achieve compliance with California's regulations." CARB Initial Statement of Reasons for Amendments to GHG Standards for MY2017–2025 (Sept. 14, 2012) (EPA-HQ-OAR-2012-0562-0374) at 5 ("DTC ISOR"). Under it, California would deem "compliance with the 2017 through 2025 MY National Program as compliance with California's greenhouse gas emission standards in the 2017 through 2025 model years." CARB Board Resolution 12-11 at 18. The federal GHG standards EPA proposed in 2011 and adopted in 2012 were the relevant part of the National Program. *See* 77 Fed. Reg. at 62,628.

The deemed-to-comply provision stemmed from commitments made in July 2011 by the federal government, California, and automakers to a series of actions that, among other things, would allow for the development of harmonized GHG emission standards for MY 2017-2025. DTC ISOR at 2.[77] Assuming EPA proposed federal GHG standards "substantially as described in the July 2011 Notice of Intent" and then "adopt[ed] standards substantially as proposed," California would deem compliance with those federal GHG standards as compliance with state GHG standards for the same MYs. Letter from CARB Chair Mary Nichols to DOT and EPA (July 28, 2011) at 2.

In December 2011, EPA and NHTSA jointly proposed to adopt their National Program standards for MYs 2017-2025, noting California's commitment. 76 Fed. Reg. 74,854, 74,863 (Dec. 1, 2011). Shortly thereafter, in January 2012, CARB approved for adoption GHG standards for MYs 2017-2025 as part of its LEV III regulations under the ACC Program and restated its commitment to conduct a future rulemaking to accept compliance with federal GHG standards as compliance with California GHG standards if the federal standards "at a minimum preserve[d] the greenhouse [gas] reduction benefits" described in EPA's proposal. CARB Board Resolution 12-11 at 19, 20. At a March 2012 public hearing, CARB reiterated this intent for its deemed-to-

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[76] The automakers are BMW of North America (and Rolls Royce), Ford, Honda, Volkswagen Group of America (including VW and Audi), and Volvo.

[77] *See* Presidential Memorandum Regarding Fuel-Efficiency Standards (May 21, 2010) (directing EPA and NHTSA to develop a "coordinated national program" that will "produce joint Federal standards that are harmonized with applicable State standards, with the goal of ensuring that automobile manufacturers will be able to build a single, light-duty national fleet" and "reduc[e] transportation sector greenhouse gas emissions").

comply provision, finding that such a provision would be appropriate "provided that the greenhouse gas reductions set forth in U.S. EPA's December 1, 2011 Notice of Proposed Rulemaking for 2017 through 2025 model year passenger vehicles are maintained." CARB Board Resolution 12-21 at 8 (EPA-HQ-OAR-2012-0562-0006).

CARB then sent EPA a request to waive preemption for its ACC Program as a whole. Waiver Request at 1, 15. A month after the National Program standards were finalized in October 2012, CARB approved amendments to its LEV III GHG regulations to permit compliance with its standards through a showing of compliance with the federal GHG standards. CARB Board Resolution 12-35 (EPA-HQ-OAR-2012-0562-0374); 77 Fed. Reg. at 62,624. CARB determined that EPA had adopted federal GHG standards "substantially as proposed," and that California's deemed-to-comply provision would not disturb CARB's finding that California's standards were at least as protective as applicable federal standards. DTC ISOR at 5; CARB Board Resolution 12-35 at 8–9. CARB also restated its intention that the deemed-to-comply option remain available as long as applicable federal standards "provide equivalent or better overall greenhouse gas reductions nationwide than California's program." DTC ISOR at 4; *see* 78 Fed. Reg. at 2,138 (noting that the federal and state programs were substantively comparable). As CARB repeatedly indicated, California always intended to accept compliance with federal standards as compliance with state standards so long as the former resulted in similar emission reductions. *See* CARB Nov. 2012 Supp. Comments at 3 ("That is exactly what the proposed deemed-to-comply provision is designed to do: ensure GHG emission reductions accruing to California will always be at least as great as under the Board-approved January 2012 standards."); *California v. EPA*, 940 F.3d 1342, 1346 (D.C. Cir. 2019) ("California reconfirmed its commitment to deem compliance with the federal standards as compliance with its standards, so long as the proposed reductions are maintained." (internal quotation marks omitted)).

EPA clearly understood California's intention to condition its deemed-to-comply option on applicable federal GHG standards maintaining sufficient emission reductions. It explicitly quoted CARB's statement of intent when it adopted the National Program standards and again when it granted California's waiver request. 77 Fed. Reg. at 62,638 (quoting CARB's finding that accepting compliance with federal standards as compliance with state standards "is appropriate . . . provided that the greenhouse gas reductions set forth in U.S. EPA's December 1, 2011 Notice of Proposed Rulemaking for 2017 through 2025 model year passenger vehicles are maintained"); 78 Fed. Reg. at 2,122 (same). Moreover, in the 2013 waiver decision, EPA restated CARB's position that "a waiver 'will remain an important backstop in the event the national program is weakened or terminated.'" 78 Fed. Reg. at 2,128–29.

Consistent with this understanding, EPA agreed with CARB's determination that the deemed-to-comply provision did not undermine the protectiveness of California's program. *Id*. at 2,124. EPA reasoned that "CARB's regulation will achieve, in the aggregate, equal or even additional GHG emission reductions in California relative to federal GHG standards, even if manufacturers choose to comply with the California regulations by complying with EPA's GHG emission standards." *Id.* This conclusion is predicated on the understanding that the deemed-to-comply provision was never intended to undercut the protectiveness of California's program by allowing manufacturers to emit substantially more under federal standards and yet be deemed in compliance with California's standards.

As active participants in the proceedings described above, automakers also understood California's intention with regard to the deemed-to-comply provision. They were well aware of

CARB's statements reiterating its intent that the deemed-to-comply option would be available so long as the federal standards achieved emission reductions equivalent to or better than California's standards. *See* Comments of Ass'n of Global Automakers, *et al.* (Oct. 19, 2012) at 2 (EPA-HQ-OAR-2012-0562-0349) (citing California's July 2011 commitment letter as well as the draft regulations, support documents, and notice of hearing for the deemed-to-comply provision, which all clearly explain California's intent as described herein). They also had notice that CARB intended the California GHG standards to function as a backstop in the event the federal standards diverged or ended. 78 Fed. Reg. at 2,128; *see also* Letter from Ass'n of Global Automakers to DOT and EPA (July 29, 2011) at 2 (acknowledging that California's commitment to offer a deemed-to-comply option was conditioned on EPA's National Program standards not diverging substantially from its proposal). Further demonstrating that the automakers understood CARB's intentions, they took the position in the 2013 waiver proceeding that, if CARB changed its standards, those amendments "will require analysis to determine whether the amendments fall within the scope of this waiver, or, if not, whether they qualify for a separate waiver under Section 209(b) of the Clean Air Act." 78 Fed. Reg. at 2,132 n.99. In other words, the automakers understood that the California and federal GHG standards might diverge—that California's "deemed-to-comply" provision did not tie the two sets of standards together indefinitely.

In January 2017, EPA determined that its federal GHG standards for MYs 2022-2025 remained appropriate after conducting a Mid-Term Evaluation it had agreed to perform as part of the National Program. Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle GHG Emissions Standards under the Mid-Term Evaluation ("Final Determination") at 1 (EPA-HQ-OAR-2018-0283-5481, Appendix C). CARB subsequently found that compliance with those federal standards would "result in equivalent or greater GHG benefits . . . than originally projected for California," noting that California may revisit its finding if the stringency of the federal standards were substantially reduced despite EPA's Final Determination. CARB MTR at ES-4.

After a change in Administrations, however, EPA withdrew its Final Determination and instead concluded that the federal GHG standards for MYs 2022-2025 may be too stringent and should be revised as appropriate. 83 Fed. Reg. 16,077, 16,077 (Apr. 13, 2018). Then, in August 2018, EPA proposed to significantly weaken the federal standards. 83 Fed. Reg. 42,986.

In light of these actions, CARB adopted non-substantive amendments to its LEV III regulations to make it even more clear that, as California had always indicated, the deemed-to-comply option for MYs 2021-2025 would only apply if the federal GHG standards remained substantially as they were as of the date of the 2017 Final Determination. Office of Administrative Law, Notice of Approval of Regulatory Action (Dec. 12, 2018); DTC Clarification ISOR at 11-12. The clarification was entirely consistent with California's commitment to offer the alternative compliance mechanism conditioned on federal standards that resulted in similar emission reductions to the State's standards. *See* CARB Board Resolution 12-11 at 20; CARB Board Resolution 12-21 at 8; DTC ISOR at 4; CARB Board Resolution 12-35 at 7. The amendments merely clarified that the text of the deemed-to-comply provision had always meant what CARB had said it did: "The 'deemed to comply' option is the acceptance of federal program compliance as providing equivalent or better overall greenhouse gas reductions in the state compared to California's program." Office of Administrative Law, Notice of Approval of Regulatory Action at 1. Thus, the clarification to the deemed-to-comply provision (Section 1961.3(c)) did not result

in any substantive change to California law. Particularly relevant here, it made no change to Section 1961.3(a) of the California Code of Regulations—California's actual emission standards.

In SAFE 1, EPA made clear that the clarification of the deemed-to-comply provision was not a basis for the Waiver Withdrawal. 84 Fed. Reg. at 51,328, 51,334. Specifically, EPA expressly declined to "take any position at this point on what effect California's December 2018 amendment to its 'deemed to comply' provision . . . [may] have had on the continued validity of the January 2013 waiver." *Id.* at 51,329 n.208. Unsurprisingly, then, EPA also stated that the clarification rulemaking was not a "necessary part of the basis for the waiver withdrawal and other actions that EPA finalizes in this [SAFE 1] document." *Id.* at 51,329. Indeed, EPA asserted it "would be taking the same actions" if CARB had never undertaken that rulemaking. *Id.*[78]

2. The clarification rulemaking has no bearing on EPA's reconsideration of its Waiver Withdrawal

The clarification of the deemed-to-comply provision is equally immaterial to the reversal of the Waiver Withdrawal. That action was expressly predicated on EPA's decision to rely on NHTSA's Preemption Rule and its Section 209(b)(1)(B) Determination, neither of which was based on the clarification rulemaking. Both can and should also be reversed on the grounds discussed herein.

EPA's 2013 treatment of the deemed-to-comply provision in the waiver grant confirms the point. EPA determined that, because the deemed-to-comply option would achieve the same or greater emission reductions relative to federal standards, the provision would not undermine California's protectiveness determination *concerning the state standards themselves*. 78 Fed. Reg. at 2,124. This demonstrates both the distinction between the deemed-to-comply provision and the standards for which the waiver issued (which have not changed) and that a deemed-to-comply provision that ensures intended emissions benefits supports, rather than undercuts, waiver issuance (and reinstatement). In addition, EPA's finding that the State's standards would be at least as protective as federal standards *with or without the deemed-to-comply provision* renders that provision immaterial to the 2013 decision. Clarification of that provision is, thus, equally immaterial here, particularly because the intention behind the provision has been consistent throughout, as described above.

Moreover, in the 2013 Waiver Grant, EPA's consideration of the deemed-to-comply provision focused on EPA's protectiveness determination, which is not at issue here. EPA specifically rejected the argument that California no longer needed its standards once CARB adopted the

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[78] EPA did claim that the deemed-to-comply clarification rulemaking "confirm[ed]" and "provide[d] further support" for its SAFE 1 actions. 84 Fed. Reg. at 51,311, 51,334 n.230. But EPA never explained how the rulemaking did so. Specifically, it never tied the clarification rulemaking to either of the determinations upon which the Waiver Withdrawal rested—EPA's unprecedented decision to rely on factors outside Section 209(b)(1) to revoke a previously issued waiver or EPA's Section 209(b)(1)(B) Determination. EPA asserted that the clarification rulemaking conflicted with Congress's intent that there be one, national GHG program. 84 Fed. Reg. at 51,311. But, even setting aside the erroneous and conclusory nature of that claim, it was California's separate GHG standards—which were not altered by the clarification rulemaking—that would have conflicted with EPA's desire for a singular program.

deemed-to-comply provision, explaining that this argument attacks "[t]he stringency of California's standards [which] is at issue in section 209(b)(1)(A), …, but it is not an issue under section 209(b)(1)(B)." *Id*. at 2,129; *id*. at 2,130 (further noting that "[r]edundancy [between federal and state standards] is not the criterion" to determine protectiveness). And even if the clarification of the deemed-to-comply provision was somehow relevant to the "need" issue now before EPA, it does not undermine California's need for its GHG and ZEV standards (much less its entire program) because the deemed-to-comply provision continues to ensure that emissions are reduced as expected and needed.

Accordingly, the clarification of the deemed-to-comply provision has no bearing on—and certainly does not preclude—reversal of EPA's SAFE 1 Waiver Withdrawal.

B. The Framework Agreements Likewise Changed Nothing about California Law, Were Not a Basis for the Waiver Withdrawal, and Provide No Reason to Leave that Withdrawal in Place

Like the clarification of the deemed-to-comply provision, the Framework Agreements have no bearing on the reversal of EPA's Waiver Withdrawal, because they, too, do not change the codified standards for which the waiver issued and were not a rationale for the Waiver Withdrawal. *See* 84 Fed. Reg. at 51,329. Rather, under each Framework Agreement, California committed "to accept [an individual automaker's] compliance with the terms of [that individual] Settlement Agreement as an agreed upon compliance plan to achieve the objectives of the CA Standards for Model Year 2021 through Model Year 2026." *E.g.*, "Settlement Agreement" between CARB and BMW (BMW Agreement) at 7–8. Like other exercises of enforcement discretion in which an agency agrees to forego potential prosecution in light of a regulated party's agreement to perform a specified set of actions, these agreements do not change the underlying and generally applicable law. *See, e.g.*, *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001) (observing that "federal agencies … routinely approve[] settlement agreements in enforcement proceedings").[79] Nor do these agreements effectuate such changes when viewed, alternatively, as an exercise of CARB's contracting authority. *See* BMW Agreement at 8 ("CARB further accepts this Agreement as a contractual commitment.").

As the Framework Agreements do not alter California's standards, they have no bearing on the Section 209(b)(1) criteria, including the only one of those at issue here—namely, EPA's conclusion in SAFE 1 that California does not "need" its GHG and ZEV standards. Moreover, on their faces, the Agreements indicate that their emission benefits will be equal to or better than those of California's standards. *See* BMW Agreement at 7 (stating that the Framework Agreement "will deliver environmental benefits commensurate with" California's pollution reduction goals "that may not be realized in the absence of an agreement"). Nothing about these Agreements indicates California has less need for its standards or the emission benefits they produce.

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[79] Any questions concerning the propriety of CARB's exercise of its enforcement discretion would be questions of state law for California courts, not EPA, to decide in a proper case, just as federal courts decide those questions for federal agencies acting under federal statutes. *See, e.g.*, *Baltimore Gas & Elec. Co.*, 252 F.3d at 461.

Finally, and importantly, these Agreements were not a basis for EPA's Waiver Withdrawal. 84 Fed. Reg. at 51,328–29, 51,334. As with the clarification rulemaking, EPA explicitly stated that it "would be taking this action even in their absence," because the Agreements were "not necessary" to EPA's final decision. *Id*. at 51,334. Nor were the Agreements essential to EPA's reliance on NHTSA's Preemption Rule or EPA's Section 209(b)(1)(B) Determination, which were the actual bases for the Waiver Withdrawal. *Id*. at 51,328–29, 51,334. Those bases should be reversed on different grounds, as discussed herein.

For these reasons, the Agreements provide no support for leaving EPA's Waiver Withdrawal in place.

CONCLUSION

The undersigned States and cities welcome EPA's reconsideration of its SAFE 1 actions and urge the agency to reverse those actions. As shown above, there are numerous, independent, alternative grounds upon which to do so, and those reversals would increase protections for public health and welfare, thereby facilitating the objectives of the Clean Air Act.

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