ORAL ARGUMENT NOT YET SCHEDULED
No. 23-1143 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN STATES TRUCKING ASSOCIATION, INC., AND CONSTRUCTION INDUSTRY AIR QUALITY COALITION, INC., ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,

Intervenors.

On Petition for Review of an Order of the
United States Environmental Protection Agency
(Nos. EPA-HQ-OAR-2022-0330–0331)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), petitioners American Fuel & Petrochemical Manufacturers, Agricultural Retailers Association, American Petroleum Institute, American Royalty Council, California Asphalt Pavement Association, California Manufacturers & Technology Association, Consumer Energy Alliance, Domestic Energy Producers Alliance, Energy Marketers of America, Louisiana Mid-Continent Oil & Gas Association, National Association of Convenience Stores, Nevada Petroleum Marketers & Convenience Store Association, The Petroleum Alliance of Oklahoma, Texas Association of Manufacturers, Texas Oil & Gas Association, Texas Royalty Council, Western States Petroleum Association (collectively, Fuel Petitioners), Western States Trucking Association, Inc., Construction Industry Air Quality Coalition, Inc., Illinois Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, North Dakota Soybean Growers Association, Ohio Soybean Association, South Dakota Soybean Association, Clean Fuels Development Coalition, ICM, Inc., Diamond Alternative Energy, LLC, Owner-Operator Independent Drivers Association, Inc., The 200 for Homeownership, The 60 Plus Association, Orange County Water District, and Mesa Water

District respectfully submit this Certificate as to Parties, Rulings, and Related Cases.

A. Parties

Petitioners in Case No. 23-1143 are Western States Trucking Association, Inc. and Construction Industry Air Quality Coalition, Inc.

Petitioners in consolidated Case No. 23-1144 are State of Iowa, State of Alabama, State of Arkansas, State of Georgia, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of North Dakota, State of Ohio, State of Oklahoma, State of South Carolina, State of Utah, State of West Virginia, and State of Wyoming.

Petitioners in consolidated Case No. 23-1145 are Illinois Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, North Dakota Soybean Growers Association, Ohio Soybean Association, South Dakota Soybean Association, Clean Fuels Development Coalition, ICM, Inc., and Diamond Alternative Energy, LLC.

Petitioners in consolidated Case No. 23-1146 are American Fuel & Petrochemical Manufacturers, Agricultural Retailers Association, American Petroleum Institute, American Royalty Council, California Asphalt

Pavement Association, California Manufacturers & Technology Association, Consumer Energy Alliance, Domestic Energy Producers Alliance, Energy Marketers of America, Louisiana Mid-Continent Oil & Gas Association, National Association of Convenience Stores, Nevada Petroleum Marketers & Convenience Store Association, The Petroleum Alliance of Oklahoma, Texas Association of Manufacturers, Texas Oil & Gas Association, Texas Royalty Council, and Western States Petroleum Association.

Petitioners in consolidated Case No. 23-1147 are The 200 for Homeownership, The 60 Plus Association, Orange County Water District, and Mesa Water District.

Petitioner in consolidated Case No. 23-1148 is Owner-Operator Independent Drivers Association, Inc.

Respondents are the U.S. Environmental Protection Agency and Michael S. Regan in his official capacity as Administrator of the U.S. Environmental Protection Agency.

Intervenors on behalf of respondents are State of California, State of Colorado, State of Connecticut, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of Minnesota, State of New Jersey, State of New

York, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Washington, District of Columbia, City of Los Angeles, City of New York, Environmental Defense Fund, Center for Biological Diversity, Natural Resources Defense Council, Sierra Club, East Yard Communities for Environmental Justice, and People's Collective for Environmental Justice.

B. Ruling Under Review

Under review is the final action of the Administrator of the United States Environmental Protection Agency entitled *California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero Emission Power Train Certification; Waiver of Preemption; Notice of Decision*, published in the Federal Register at 88 Fed. Reg. 20,688 (Apr. 6, 2023).

C. Related Cases

Three other sets of consolidated cases before this Court involve many of the same parties and issues. These are:

(1) *Ohio v. EPA*, No. 22-1081, and consolidated cases (argued Sept. 15, 2023);

(2) *Texas v. EPA*, No. 22-1031, and consolidated cases (argued Sept. 14, 2023); and

(3) *Union of Concerned Scientists v. Nat'l Highway Traffic Safety Admin.*, No. 19-1230, and consolidated cases (held in abeyance pending *Ohio v. EPA*, No. 22-1081).

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, petitioners American Fuel & Petrochemical Manufacturers, Agricultural Retailers Association, American Petroleum Institute, American Royalty Council, California Asphalt Pavement Association, California Manufacturers & Technology Association, Consumer Energy Alliance, Domestic Energy Producers Alliance, Energy Marketers of America, Louisiana Mid-Continent Oil & Gas Association, National Association of Convenience Stores, Nevada Petroleum Marketers & Convenience Store Association, The Petroleum Alliance of Oklahoma, Texas Association of Manufacturers, Texas Oil & Gas Association, Texas Royalty Council, Western States Petroleum Association (collectively, Fuel Petitioners), Western States Trucking Association, Inc., Construction Industry Air Quality Coalition, Inc., Illinois Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, North Dakota Soybean Growers Association, Ohio Soybean Association, South Dakota Soybean Association, Clean Fuels Development Coalition, ICM, Inc., Diamond Alternative Energy, LLC, Owner-Operator Independent Driv-

ers Association, Inc., The 200 for Homeownership, The 60 Plus Association, Orange County Water District, and Mesa Water District respectfully submit the following Corporate Disclosure Statements:

American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association that represents American refining and petrochemical companies. AFPM has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

Agricultural Retailers Association (ARA) is a nationwide, not-for-profit association representing agricultural retailers and distributors of agronomic crop inputs with members covering all 50 states and representing over 70 percent of all crop input materials sold to America's farmers. ARA's mission is to advocate, influence, educate, and provide services to support its members in their quest to maintain a profitable business environment, adapt to a changing world, and preserve their freedom to operate. ARA's retail members provide their farmer customers with essential crop inputs like fertilizer, seed, pesticide, and equipment; application services; and crop consulting services, including conservation methodology. ARA has no parent company, and no publicly held company has a 10% or greater ownership interest in ARA.

American Petroleum Institute (API) represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API's nearly 600 members produce, process, and distribute the majority of the nation's energy, and participate in API Energy Excellence, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. API has no parent corporation, and no publicly held company owns 10% or more of its stock.

American Royalty Council (ARC) represents royalty owners and energy professionals across the United States and is dedicated to advancing domestic oil and natural gas production by creating best business practices through dialogue, communication, and education. ARC encourages, promotes, and supports energy issues on a local, state, and national level through educational efforts on the grassroots level in all 435 congressional districts on the importance of the oil and natural gas industry. ARC has no parent corporation, and no publicly held company owns 10% or more of its stock.

California Asphalt Pavement Association (CalAPA) is a nonprofit trade association established in 1953 that represents the asphalt

pavement industry in California, including asphalt producers, refiners, paving contractors, consultants, equipment manufacturers, and other companies that comprise the industry. CalAPA has no parent corporation, and no publicly held company owns 10% or more of its stock.

California Manufacturers & Technology Association (CMTA) is a nonprofit statewide trade association. Its members are companies engaged in the manufacturing and technology sectors in California who focus on improving and enhancing a strong business climate for California's manufacturing, processing, and technology-based companies. CMTA has no parent company, and no other entities have an ownership in, or voting control over CMTA.

Consumer Energy Alliance (CEA) is a nonpartisan, nonprofit organization advocating for balanced energy and environmental policies and responsible access to resources. CEA has no parent corporation, and no publicly held corporation has a 10% or greater ownership in CEA.

Domestic Energy Producers Alliance (DEPA) is a nonprofit, nonstock corporation organized under the laws of the state of Oklahoma. DEPA has no parent corporation, and no publicly held company owns 10% or more of its stock.

Energy Marketers of America (EMA) is a federation of 47 state and regional trade associations representing energy marketers throughout the United States. EMA, which is incorporated under the laws of the Commonwealth of Virginia, has no parent corporation, and no publicly held corporation has a 10% or greater ownership in EMA.

Louisiana Mid-Continent Oil & Gas Association (LMOGA) is a business association representing the interests of the oil and gas industry of the second largest oil producing and fourth largest gas producing state in the nation, Louisiana. The state ranks second in the nation in crude oil refining capacity. LMOGA has no parent company, and no publicly held company has a 10% or greater ownership in it.

National Association of Convenience Stores (NACS) is an international trade association that represents both the convenience and fuel retailing industries with more than 1,300 retail and 1,600 supplier company members. The United States convenience industry has more than 148,000 stores across the country and had more than $705 billion in sales in 2021. NACS has no parent corporation, and no publicly held corporation has a 10% or greater ownership in NACS.

Nevada Petroleum Marketers & Convenience Store Association (NPM&CSA) is a statewide trade group organized to foster professional relationships and advocate on behalf of members, who are petroleum marketers and convenience stores in Nevada. NPM&CSA has no parent corporation, and no publicly held corporation has a 10% or greater ownership in NPM&CSA.

The Petroleum Alliance of Oklahoma is a not-for-profit trade organization representing more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations working in the Mid-Continent and other oil and gas producing regions nationwide. Members of the Petroleum Alliance produce, transport, process, and refine the bulk of Oklahoma's crude oil and natural gas. In 2022, the industry was responsible for almost $65 billion in state economic activity. The Petroleum Alliance has no parent corporation, and no company has a 10% or greater ownership in the organization.

Texas Association of Manufacturers (TAM) actively represents the interests of more than 600 member companies in Austin and in Washington, D.C. Manufacturers in Texas account for more than 11.9 percent of the total output in the state—more than $226.95 billion in 2021—and employ more than 897,000 Texans in jobs that pay an average compensation of more than $93,000 annually. On average, each manufacturing job created also provides 5 additional jobs in a community. Texas remains the number one exporting state in the United States for manufactured goods, now for more than 20 years running. TAM has no parent corporation and no company has a 10% interest (or greater) in the association.

Texas Oil & Gas Association (TXOGA) is a statewide trade association representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces approximately 90 percent of Texas's crude oil and natural gas, operates nearly 90 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2022, the Texas oil and natural gas industry supported 443,000 direct jobs and paid $24.7 billion in state and local taxes and state royalties, funding our state's schools, roads and first responders.

TXOGA has no parent corporation, and no publicly held company owns 10% or more of its stock.

Texas Royalty Council (TRC) is a grassroots entity dedicated to representing and advancing the interests of Texas royalty owners and energy professionals. TRC was organized to monitor, advocate, and educate royalty owners, elected officials, and the energy industry on issues affecting royalty owners in Texas. TRC's primary focus is to promote the exploration and production of Texas oil, natural gas, and minerals while maximizing the return on the value of Texas's natural resources. TRC has no parent corporation, and no publicly held company owns 10% or more of its stock.

Western States Petroleum Association (WSPA) is a nonprofit trade association that represents companies engaged in petroleum exploration, production, refining, transportation, and marketing in Arizona, California, Nevada, Oregon, and Washington. The association has no parent company, and no publicly held company has a 10% or greater ownership in it.

Western States Trucking Association, Inc. (WSTA) is a non-profit California trade association representing the interests of thousands of members in a variety of businesses which own and operate on-road and non-road vehicles, engines, and equipment. WSTA has no parent companies. No publicly traded corporation has 10% or greater ownerships in WSTA.

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

The Illinois Soybean Association is a nonprofit trade association within the meaning of D.C. Circuit Rule 26.1(b). It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Illinois Soybean Association is a not-for-profit corporation, it is not a subsidiary of any corporation, and it does not have any stock which can be owned by a publicly held corporation.

The Iowa Soybean Association is a nonprofit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers and supporters of the agriculture and soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Iowa Soybean Association does not have a parent company, it has no privately or publicly held ownership interests, and no publicly held company has ownership interest in it.

The Minnesota Soybean Growers Association (MSGA) is a nonprofit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers, their supporters and members of soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. MSGA is a not-for-profit corporation, it is not a subsidiary of any corporation, and it does not have any stock which can be owned by a publicly held corporation.

The North Dakota Soybean Growers Association (NDSGA) is a nonprofit trade association within the meaning of D.C. Circuit Rule 26.1(b). It operates for the purpose of promoting the general commercial,

legislative, and other common interests of its members. NDSGA is a not-for-profit corporation, it is not a subsidiary of any corporation, and it does not have any stock which can be owned by a publicly held corporation.

The Ohio Soybean Association is a nonprofit trade association within the meaning of D.C. Circuit Rule 26.1(b). It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Ohio Soybean Association is a not-for-profit corporation, it is not a subsidiary of any corporation, and it does not have any stock which can be owned by a publicly held corporation.

The South Dakota Soybean Association (SDSA) is a nonprofit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers, their supporters and members of soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. SDSA is a not-for-profit corporation, it is not a subsidiary of any corporation, and it does not have any stock which can be owned by a publicly held corporation.

Clean Fuels Development Coalition is a business league organization established in a manner consistent with Section 501(c)(6) of the

Internal Revenue Code. Established in 1988, the Coalition works with auto, agriculture, and biofuel interests in support of a broad range of energy and environmental programs. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in the Coalition.

ICM, Inc. is a Kansas corporation that is a global leader in developing biorefining capabilities, especially for the production of ethanol. It is a wholly owned subsidiary of ICM Holdings, Inc., and no publicly held company has a 10% or greater ownership interest in ICM Holdings, Inc.

Diamond Alternative Energy, LLC, a Texas limited liability company, is a wholly owned direct subsidiary of Valero Energy Corporation, a Delaware corporation whose common stock is publicly traded on the New York Stock Exchange under the ticker symbol VLO.

Owner-Operator Independent Drivers Association, Inc. (OOIDA) has no parent corporation, and no publicly held corporation owns 10% or greater ownership in OOIDA.

The 200 for Homeownership is a California-based unincorporated association of community leaders, opinion makers, and advocates working in California and elsewhere on behalf of low-income minorities

who are affected by California's housing crisis and increasing wealth gap. The 200 for Homeownership has no parent corporation, and no publicly held corporation owns 10% or greater ownership in it.

The 60 Plus Association is a non-partisan senior's advocacy group with a free enterprise, less government, less taxes approach to senior's issues. The 60 Plus Association has no parent corporation, and no publicly held corporation owns 10% or greater ownership in it.

Orange County Water District (OCWD) is a California local independent special district that takes the limited water supply found in nature and supplements it to provide water for more than 2.4 million people in Orange County, California. Since 1933, when the California State Legislature formed it, OCWD has been entrusted to guard the region's groundwater basin. OCWD manages and replenishes the Orange County Groundwater Basin, ensures water reliability and quality, prevents seawater intrusion, and protects Orange County's rights to Santa Ana River water. OCWD has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

Mesa Water District (Mesa Water) is a California local independent special district, manages its finances and water infrastructure,

and advocates water policy, while reliably providing an abundance of clean, safe water to benefit the public's quality of life. Founded on January 1, 1960 and governed by a publicly-elected, five-member Board of Directors, Mesa Water provides 100% local groundwater to 110,000 residents in an 18-square-mile service area that includes most of the City of Costa Mesa, parts of Newport Beach, and unincorporated Orange County including John Wayne Airport. Mesa Water has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

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INTRODUCTION

This administration is on a mission to phase out the internal-combustion engine and mandate a transition from conventional cars and trucks to electric vehicles. President Biden, who campaigned on a promise to require that all new cars be electric, has announced a "goal that 50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles." Exec. Order No. 14,037, 86 Fed. Reg. 43,583, 43,583 (Aug. 5, 2021). No law authorizes any federal agency to mandate this transition. Undeterred, the President has developed a multipronged strategy to electrify the Nation's vehicle fleet, including by directing EPA to "coordinate" with California, *id.* at 43,584, where Governor Gavin Newsom has himself ordered a total ban on conventional passenger vehicle sales by 2035, Exec. Dep't of Cal., Cal. EO-N-79-20 (Sept. 23, 2020), https://tinyurl.com/bdhzvwe2.

This case involves the most recent of EPA's and California's concerted efforts to mandate a transition to electric vehicles. Here, EPA and California have repurposed a 1967 Clean Air Act provision, Section 209(b), which allows EPA to grant California (and California alone) a preemption waiver if California's emission standards are "consistent

with" EPA's own rulemaking authority and if California needs those standards to address its unique, local pollution problems. In granting the waiver at issue here, however, EPA purported to authorize California to go much further, by doing what EPA cannot do itself: mandate the electrification of large trucks, from Ford F-250 pickups to tractor trailers, in an effort to address the risks of global climate change.

But whether EPA mandates electric vehicles unilaterally or does so jointly with California, forcing electrification raises a "major question" and thus requires "clear congressional authorization." *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022). Forced electrification undoubtedly has "vast economic and political significance," *id.* at 2605, imposing billions in compliance costs, implicating millions of jobs, restructuring entire industries, and jeopardizing national security. Congress, unsurprisingly, has approached the issue carefully and deliberately, considering multiple bills that would mandate electric vehicles, but so far rejecting all of them. Congress certainly has not given EPA the "clear congressional authorization" necessary under *West Virginia* to impose such mandates—either unilaterally or in concert with California.

In fact, Section 209(b) forecloses EPA from granting California a preemption waiver for the State's electric-vehicle mandates targeting global climate change. This is so for two independent reasons.

First, EPA may waive preemption only for California standards that are "consistent with" Section 202(a) of the Clean Air Act. 42 U.S.C. § 7543(b)(1)(C). But Section 202(a) does not provide EPA with authority to mandate electric vehicles—let alone the "clear congressional authorization" required under *West Virginia*. Because an electric-vehicle mandate promulgated by EPA would be unlawful under Section 202(a), such a mandate promulgated by California is "not consistent with" Section 202(a) and is thus ineligible for a waiver under Section 209(b)(1)(C).

Second, EPA may grant a waiver only for California standards the State "need[s] … to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B). Here, California purports to "need" its electric-vehicle mandates to address the risks of global climate change—a phenomenon that is hardly "extraordinary," *i.e.*, unique, with regard to California, and one that California's standards will not "meet" because they will have no effect on climate-change conditions in California. What is more, multiple

clear-statement rules dictate that EPA may not construe an at best ambiguous provision to allow California—and only California—to regulate an inherently national and global issue like climate change. Section 209(b)(1)(B) not only fails to authorize such a constitutionally doubtful scheme; by its plain terms, it forecloses the waiver here.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 42 U.S.C. § 7607(b)(1) to review EPA's order noticed at 88 Fed. Reg. 20,688 (Apr. 6, 2023). EPA's order was a "final action taken" under the Clean Air Act, and petitioners timely petitioned for review on June 5, 2023, "within sixty days from the date notice of such … action … appear[ed] in the Federal Register."

STATEMENT OF THE ISSUES

1. Whether mandating a shift from conventional to electric vehicles raises a "major question" and thus requires "clear congressional authorization" under *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

2. Whether EPA's grant of a preemption waiver for California's electric-truck mandates violated Section 209(b)(1)(C) of the Clean Air Act because (a) electric-vehicle mandates exceed EPA's own authority under Section 202(a) and so are not "consistent with" Section 202(a); and (b) EPA failed to give "appropriate consideration" to cost.

3. Whether EPA's grant of a preemption waiver for California's electric-truck mandates targeting global climate change violated Section 209(b)(1)(B) because the State does not "need" such standards "to meet compelling and extraordinary conditions" in California.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the Addendum.

STATEMENT OF THE CASE

I. Statutory Background

Title II of the Clean Air Act sets forth a comprehensive scheme for the federal regulation of motor-vehicle emissions. As most relevant here, Section 202(a) authorizes EPA to establish "standards" that are "applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

Title II also makes federal authority over the regulation of vehicle emissions both paramount and, by default, exclusive. Section 209(a) prohibits States from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles." *Id.* § 7543(a). This preemption provision, the "cornerstone of Title II," *Motor*

Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation, 17 F.3d 521, 526 (2d Cir. 1994), prevents "an anarchic patchwork of federal and state regulatory programs" targeting motor-vehicle emissions, *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (*MEMA*).

Congress authorized only one exception to Section 209(a)'s broad preemption provision: Section 209(b), which allows EPA to "waive application of" Section 209(a) for California, and only California, under certain circumstances. 42 U.S.C. § 7543(b).[1] Congress granted California this favored status because it faced "unique problems" with criteria pollutants—*i.e.*, ground-level ozone, carbon monoxide, sulfur dioxide, nitrogen oxides, and particulate matter, H.R. Rep. No. 90-728, at 22 (1967)—that made smog and other pollution conditions a more persistent problem in California than elsewhere. 49 Fed. Reg. 18,887, 18,890 (May 3, 1984) (citing 113 Cong. Rec. 30,948 (Nov. 2, 1967)); *see* H.R. Rep. No. 90-728, at 22. Section 209(b) allows California "to set more stringent standards to meet [its] peculiar local conditions." S. Rep. No. 90-403, at 33 (1967).

[1] Section 209(b) does not mention California by name, referring instead to "any State" that had adopted specified standards "prior to March 30, 1966." 42 U.S.C. § 7543(b). But as Congress knew, California was the only State that met this historical criterion and "is thus the only state eligible for a waiver." *MEMA*, 627 F.2d at 1100–01 n.1.

EPA may grant California such a waiver, however, only in limited circumstances. First, California must "determin[e] that [its own] State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). Second, notwithstanding California's determination, EPA must deny a waiver request if the agency "finds that":

> (A) the determination of the State is arbitrary and capricious,
>
> (B) [California] does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title [*i.e.*, Section 202(a) of the Clean Air Act].

Id.

In 1977, Congress added what is commonly known as "Section 177" to permit "any State" to "adopt and enforce" California standards "for which a waiver has been granted," if the adopting State "has plan provisions approved under this part." 42 U.S.C. § 7507. The referenced "plan provisions" are state programs designed to attain EPA's national ambient air-quality standards, which target criteria pollutants such as carbon monoxide and ozone. 84 Fed. Reg. 51,310, 51,350–51 (Sept. 27, 2019).

II. Regulatory Background

For almost four decades following Section 209(b)'s enactment, California sought waivers for standards targeting its local air-quality conditions by regulating criteria pollutants. *See, e.g.*, 38 Fed. Reg. 10,317, 10,318–19 (Apr. 26, 1973) (standards for carbon monoxide and nitrogen oxides); 59 Fed. Reg. 48,625, 48,626 (Sept. 22, 1994) (standards for carbon monoxide, nitrogen oxides, and particulate matter).

In 2005, California broke new ground by seeking approval of a "landmark" regulation designed to "control greenhouse-gas emissions from new passenger vehicles." Cal. Air Res. Bd., *Low-Emission Vehicle Greenhouse Gas Program*, https://tinyurl.com/2p8jsscv. Since that time, California has sought to convert Section 209(b) into a tool for regulating global climate change.

EPA initially refused California's bid to transform Section 209(b)'s waiver program and, in 2008, denied California's first waiver application for greenhouse-gas standards. EPA determined that Section 209(b) is best read as permitting California to address "local or regional" pollution, not global issues like climate change. 73 Fed. Reg. 12,156, 12,161 n.27

(Mar. 6, 2008). But one year later, after a change in presidential administration, EPA reversed course and granted a waiver for California's greenhouse-gas standards. 74 Fed. Reg. 32,744 (July 8, 2009).

EPA has since flip-flopped—depending on the presidential administration—on the legality of using Section 209(b) to address global climate change. In 2013, EPA granted California a waiver for its "Advanced Clean Cars" program, which set greenhouse-gas standards for light-duty vehicles and imposed a zero-emission-vehicle mandate that forced automakers to sell a minimum percentage of such vehicles each year. 78 Fed. Reg. 2,112, 2,114, 2,119 (Jan. 9, 2013).

In 2019, under a new presidential administration, EPA withdrew that waiver. 84 Fed. Reg. at 51,310. Returning to its original reading of the statute, EPA concluded that the phrase "compelling and extraordinary conditions" in Section 209(b)(1)(B) refers to California's local pollution conditions, not global climate change. *Id.* at 51,339–44. In addition, EPA determined that California did not "need" its greenhouse-gas standards or zero-emission-vehicle mandate to "meet" climate-change conditions because the standards "will not meaningfully address" those conditions. *Id.* at 51,349; *see also id.* at 51,341.

Most recently, President Biden—on his first day in office—directed EPA to reconsider its withdrawal of California's waiver. Exec. Order No. 13,990, 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021). A few months later, President Biden announced "the policy of [the] Administration" to achieve the "goal that 50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles." 86 Fed. Reg. at 43,583. President Biden directed EPA to "coordinate the agency's activities" with California, *id.* at 43,584, where just a few months earlier, Governor Gavin Newsom had issued an executive order calling for *100%* of in-state sales of new passenger cars and trucks to be zero-emission vehicles by 2035, Cal. EO-N-79-20, https://tinyurl.com/bdhzvwe2.

In 2022, EPA reinstated California's Advanced Clean Cars waiver. 87 Fed. Reg. 14,332 (Mar. 14, 2022). Rejecting the interpretation it had adopted in 2008 and again in 2019, EPA concluded that Section 209(b) authorizes waivers for California standards aimed at addressing the risks of global climate change. *Id.* at 14,358–62. EPA did not retract its prior finding that the State's standards would have no meaningful impact on climate-change conditions in California. But it nonetheless found that

the State "need[s]" its greenhouse-gas standards and zero-emission-vehicle mandate to "meet" those conditions. *Id.* at 14,366.[2]

California has now adopted a slew of other, increasingly aggressive programs for which it is seeking or will soon seek Section 209(b) waivers. These include: "Advanced Clean Cars II," which bans the sale of internal-combustion-engine passenger cars and light trucks by model year 2035, *see* Cal. Air Res. Bd., *Advanced Clean Cars II*, https://tinyurl.com/5n6ehjua; and "Advanced Clean Fleets," which similarly bans the sale of internal-combustion-engine medium and heavy-duty vehicles by 2036 and requires a significant portion of fleets operating (at least in part) in California to purchase zero-emission vehicles and phase out their existing conventional vehicles going forward, *see* Cal. Air Res. Bd., *Advanced Clean Fleets*, https://tinyurl.com/3v74adpv.

III. The Challenged Action

This case concerns EPA's latest decision granting a waiver for new emission standards aimed at addressing global climate change by forcing

[2] In other cases pending before this Court, many of the petitioners here are challenging EPA's reinstatement of the Advanced Clean Cars waiver, *Ohio v. EPA*, No. 22-1081 (argued Sept. 15, 2023), as well as EPA's own authority to mandate electric vehicles under Section 202(a) of the Clean Air Act, *Texas v. EPA*, No. 22-1031 (argued Sept. 14, 2023).

automakers to produce (and consumers to buy) electric vehicles. 88 Fed. Reg. at 20,688. As relevant here, EPA's decision waived Clean Air Act preemption for two sets of standards, both of which mandate the electrification of heavy-duty vehicles like trucks.[3]

First, EPA waived preemption for California's "Advanced Clean Trucks" program, which requires manufacturers of medium- and heavy-duty vehicles to produce and deliver for sale in California specified numbers of zero-emission vehicles and near-zero emission vehicles. *Id.* at 20,689; *see also* R4.7. This program applies to vehicles in weight classes 2b through 8 (*i.e.*, vehicles with gross weight ratings exceeding 8,500 lbs), *see* R4.7–8, thereby covering everything from a Ford F-250 pickup truck in Class 2b to tractor trailers and dump trucks in Class 8.[4] Beginning in model year 2024, the mandatory zero-emission-vehicle sales percentages

[3] EPA also waived preemption for two other California regulations. *See* 88 Fed. Reg. at 20,688–89. The waiver for the State's Zero Emission Powertrain Certification Regulations is not challenged here. The Western States Trucking Association and Construction Industry Air Quality Coalition (petitioners in No. 23-1143) challenge the waiver for the 2018 HD Warranty Amendments, for the reasons set forth in Part III, *infra*.

[4] *See, e.g.*, Badger Truck & Auto Grp., *Truck Classification Explained*, https://tinyurl.com/32aetudm; *see also* Greater New Haven Clean Cities Coal., *What Are The Various Vehicle Weight Classes And Why Do They Matter* (Apr. 21, 2016), https://tinyurl.com/ysy2t4kd.

increase steadily over time, reaching 40%, 55%, and 75% (depending on the type of vehicle) by model year 2035. *See* R4.8.

Second, EPA waived preemption for California's "Zero-Emission Airport Shuttle Regulation," which "sets steadily increasing [zero-emission airport shuttle] fleet composition requirements for airport shuttle fleet owners that service the 13 largest California airports." R4.11. By 2036, "no airport shuttle fleet owner shall operate an airport shuttle at a regulated airport unless it is a [zero-emission airport shuttle]." *Id.*

In December 2021, California asked EPA for a Section 209(b) waiver for these programs. R4.1. EPA granted California's request in April 2023. 88 Fed. Reg. at 20,688. These consolidated petitions followed.

SUMMARY OF ARGUMENT

I. Mandating a shift of the Nation's vehicle fleet from conventional, internal-combustion-engine vehicles to electric ones implicates a "major question" and so requires "clear congressional authorization" under *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

A. Mandating electric vehicles will unquestionably have "vast economic … significance." *Id.* at 2605. Forced electrification would not

only "entail billions of dollars in compliance costs" and "substantially restructure" the American automotive market, *id.* at 2604, 2610, but it would also have devastating economic impacts on upstream and downstream industries and on American consumers more generally.

B. Whether to force electrification is also a question of "vast … political significance." *Id.* at 2605. The question of whether—or how—to shift to electric vehicles is "the subject of an earnest and profound debate across the country." *Id.* at 2614. This is unsurprising. Transitioning to electric vehicles would have serious national-security implications given the control this country's geopolitical rivals have over the critical components of electric-vehicle batteries and motors. Perhaps for this reason, Congress has considered but *rejected* all proposals to require manufacturers and consumers to transition away from conventional vehicles. Congress certainly has not provided EPA with the "clear congressional authorization" necessary under *West Virginia* to impose such mandates.

II. EPA's waiver decision not only lacks clear congressional authorization, it contravenes Section 209(b)(1)(C) because it is not "consistent with" Section 202(a).

A. Under the plain text of Section 202(a), EPA has the authority to impose emission standards only on pollutant-emitting vehicles. EPA lacks the authority—let alone the "clear congressional authorization" required under the major-questions doctrine—to mandate electric vehicles.

B. Because an electric-vehicle mandate promulgated by EPA would exceed the agency's authority under Section 202(a), such a mandate promulgated by California is "not consistent with" Section 202(a) and is therefore ineligible for a waiver under Section 209(b)(1)(C).

C. The waiver decision is also inconsistent with Section 202(a) because EPA failed to give "appropriate consideration" to cost. *See Michigan v. EPA*, 576 U.S. 743, 752 (2015).

III. EPA also lacks authority under Section 209(b)(1)(B) to grant a waiver to California for emission standards—including electric-vehicle mandates—aimed at addressing global climate change.

A. Construing Section 209(b) to authorize California to regulate a global issue like climate change would have vast political and economic significance and would radically alter the traditional federal-state balance. Consequently, unambiguous congressional authorization is required before EPA may grant such a waiver.

B. EPA lacks such clear authorization. In fact, the statute's plain text precludes such a waiver because global climate change is not an "extraordinary" condition within the meaning of Section 209(b)(1)(B). The term "extraordinary" refers to California's unique, local pollution conditions, like smog in Los Angeles, not to global issues like climate change.

C. California also does not "need" its own emission standards to "meet" climate-change conditions that those emission standards will not meaningfully address. To qualify for a waiver, California's standards must do *something* to address the conditions they target. But EPA made no finding that these standards would have *any effect* on conditions in California related to climate change. Nor can EPA salvage its waiver by recourse to its textually unmoored "whole-program" approach or by pointing to the impact of California's standards on criteria pollution.

D. Even if EPA's sweeping interpretation of Section 209(b)(1)(B) were not unambiguously foreclosed, the Court should reject it to avoid serious constitutional problems. The Constitution does not permit the federal government to give one State the authority to regulate a national and international issue like climate change, while prohibiting every other

State from doing so. At a minimum, the equal-sovereignty question is a serious one that requires construing Section 209(b) to avoid it.

STANDING

Petitioners include entities that produce or sell liquid fuels—including renewable diesel and biodiesel, which are sold to meet California's Low Carbon Fuel Standard—and the raw materials used to produce them, along with associations whose members include such entities. By design, California's zero-emission-vehicle mandates reduce the demand for all liquid fuels by forcing automakers to sell (or consumers to buy) vehicles that use no liquid fuel at all. *See* R33.50 (projecting an almost $9 billion decrease in fuel consumption through 2040); R42.171 (projecting a "significant decrease" in state government revenues "largely due to a decrease in gasoline and diesel fuel taxes"). As shown in the accompanying declarations, depressing demand for those fuels injures petitioners' members financially. This economic injury constitutes injury-in-fact under Article III that is caused by the challenged action and redressable by vacating EPA's waiver. *See*, *e.g.*, *Am. Fuel & Petrochemical Mfrs. v. EPA*, 3 F.4th 373, 379–80 (D.C. Cir. 2021).

Petitioners also include entities and associations whose members purchase, lease, or contract for the use of vehicles subject to the challenged programs. They will be harmed by the increased cost of accessing internal-combustion-engine vehicles or the requirement to access more expensive zero-emission vehicles. *See Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 111–13 (D.C. Cir. 1990); *Action on Smoking & Health v. Dep't of Lab.*, 100 F.3d 991, 992 (D.C. Cir. 1996).

The petitioners that are membership associations also have associational standing to challenge EPA's decision. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977). Their members have standing to sue in their own right, for the reasons described. The interests petitioners seek to protect are germane to their organizational purposes, which include safeguarding the viability of their members' businesses. And neither the claims asserted nor the relief requested requires the participation of individual members.

STANDARD OF REVIEW

This Court "shall hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accord-

ance with law," "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

ARGUMENT

I. Forced Vehicle Electrification Is A "Major Question."

Underlying the interpretive issues presented in this case is a common question: Does the Clean Air Act empower EPA—either unilaterally or in concert with California—to ban conventional, internal-combustion-engine vehicles and mandate the production and sale of electric vehicles? A "yes" to this question—and the assertion of that vast power—is fundamental to EPA's challenged action under Section 209(b). *See infra* Parts II & III. Yet the Supreme Court has repeatedly held that when an agency asserts authority to decide a "major questio[n]," a "merely plausible textual basis" for that authority will not do; only "clear congressional authorization" will suffice. *West Virginia* 142 S. Ct. at 2609–10 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Whatever else they may be, "major questions" are certainly those with "vast economic and political significance." *Id.* at 2605. And in applying that standard, the Court has focused on the implications of the underlying claim of authority when taken to its logical end—not just the

direct effects of the action at issue. *See id.* at 2612 ("[O]n this view of EPA's authority, it could go further, perhaps forcing coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether."); *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) ("Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act."). While an action's direct effects are relevant, agencies cannot evade major-questions scrutiny by "tailoring" an action to make "extravagant" assertions of authority appear "reasonable." *Utility Air*, 573 U.S. at 324–25.

Here, this means the question is not just whether EPA can mandate a certain percentage of electric vehicles, but whether it can mandate 100%—*i.e.*, ban the internal-combustion engine outright. And the question involves not just the trucks at issue here, but the entire vehicle fleet.

Thus, whether it concerns EPA's own authority to mandate electrification under Section 202(a), *see infra* Part II, or EPA's power to authorize California to mandate electric vehicles as part of the State's effort to regulate global climate change, *see infra* Part III, this is undoubtedly "a major questions case." *West Virginia*, 143 S. Ct. at 2610. The asserted authority to mandate electrification directly parallels *West Virginia* in

the "economic and political significance" of EPA's action, and, therefore, requires "clear congressional authorization." *Id.* at 2605, 2609.

A. Forced electrification has vast economic significance.

The economic impact of mandating a shift to electric vehicles "is staggering by any measure." *Nebraska*, 143 S. Ct. at 2373. It is not just that a single program partially forcing that shift—*e.g.*, Advanced Clean Trucks—will, by itself, "entail billions of dollars in compliance costs." *West Virginia*, 142 S. Ct. at 2604; *see* R33.50 (California cost projections). Rather, that authority implies the greater power to ban conventional vehicles entirely and thereby transform the automotive industry, sending upstream and downstream shocks through the Nation's economy.

Without doubt, forcing electrification would "substantially restructure" the American vehicle market. *West Virginia*, 142 S. Ct. at 2610. And while the implications of EPA's claimed authority extend well beyond the trucks at issue here, the impending market dislocations will be particularly stark in the trucking industry, where electric heavy-duty trucks currently represent a "tiny fraction" of national sales. R115.4. Despite these abysmal sales, EPA's waiver allows California to force a radical shift in a few short years, moving inexorably toward a world in which

automakers will be compelled to "cease making" conventional cars and trucks "altogether." *West Virginia*, 142 S. Ct. at 2612.

Such a radical transformation in the automotive industry will inevitably impact the millions of Americans employed (indirectly or directly) in that industry and will likely ship (at a minimum) tens of thousands of such jobs overseas. *See* Jim Barrett & Josh Bivens, *The Stakes For Workers In How Policymakers Manage The Coming Shift To All-Electric Vehicles* 7–8, Econ. Pol'y Inst. (Sept. 22, 2021), https://tinyurl.com/hnm2wes8. And even if more of the electric-vehicle supply chain moved onshore, significant job losses will ensue because electric-vehicle production is far more automated, "requir[ing] 30% less manufacturing labor when compared with conventional cars." Carlos Waters, *How Electric Vehicle Manufacturing Could Shrink the Midwestern Job Market*, CNBC.com (Sept. 4, 2022), https://tinyurl.com/msxp2s8j.

The effects of electrification will extend far beyond the automotive industry. As reflected by the diverse group of petitioners here, forced electrification will fundamentally change and harm many industries that Congress has not authorized EPA to regulate under Section 202, from truck owners and operators, to petroleum manufacturers, to the biofuel

and agricultural industries, to shippers and retailers, to name just a few. Congress usually reserves for itself decisions with such sweeping impacts on the American economy. *See West Virginia*, 142 S. Ct. at 2612–13.

Shifting from conventional to electric vehicles will, for example, devastate the American petroleum industry. Two-thirds of petroleum demand comes from the transportation sector. *See* U.S. Energy Info. Admin., *Monthly Energy Rev.* 80 (Sept. 2023). Countless supply chains and end products reliant on petroleum such as asphalt, chemicals, and lubricants will be affected. Phasing out conventional vehicles will also decimate the renewable fuels industry. According to one estimate, a ban on conventional vehicles by 2035 will reduce GDP by $321 billion and cost 255,000 jobs, heavily concentrated in corn-producing States. Agricultural Retailers Ass'n, *Economic Impacts to U.S. Biofuels, Agriculture, and the Economy from Subsidized Electric Vehicle Penetration* 13, 16 (Oct. 2020).

Nor is the fuel sector alone. Even electrifying just heavy-duty trucks will affect countless downstream industries. "As the[y] say in [the trucking] industry, if you got it, a truck brought it." R98.2. Electrification will force truck fleets to drive shorter routes, carry less freight, and incur

higher overhead costs, *see* R95.10–12, all of which increase transportation costs that will surely be passed along to consumers, *see* Fed. Highway Admin., *The Economic Costs of Freight Transportation*, https://tinyurl.com/58u7vsy5; *see also* R115.6–7.

By any relevant economic measure—"the amount of money involved for regulated and affected parties, the overall impact on the economy, [or] the number of people affected," *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)—the power to force a transition from gasoline- and diesel-powered vehicles to electric ones represents "an enormous and transformative expansion in … regulatory authority," affecting "a significant portion of the American economy." *Utility Air*, 573 U.S. at 324.

B. Forced electrification has vast political significance.

Electrification's political significance is just as vast. To begin, whether (or how) to shift to electric vehicles is "the subject of an earnest and profound debate across the country." *West Virginia*, 142 S. Ct. at 2614. California is moving aggressively to accelerate electrification by regulatory fiat. But other States oppose efforts to shift from liquid fuels

to other sources. *See, e.g.*, Act Relating to Financial Institutions Engaged in Boycotts of Energy Companies, 2022 W. Va. Legis. Ch. 235.

Congress itself is debating this very question, which makes EPA's claim to such policymaking authority "all the more suspect." *West Virginia*, 142 S. Ct. at 2614. Congress has yet to reach an answer and is still studying the benefits and risks of forced electrification. *See, e.g.*, Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, §§ 25006, 40435–40436, 135 Stat. 429, 845–49, 1050 (2021) (requiring reports on implications of electrification from various agencies, notably not including EPA).

Thus far, however, both Houses of Congress have "considered and rejected" multiple bills mandating electric vehicles. *West Virginia*, 142 S. Ct. at 2614; *see, e.g.*, Zero-Emission Vehicles Act of 2019, H.R. 2764, 116th Cong. (2019); Zero-Emission Vehicles Act of 2018, S. 3664, 115th Cong. (2018). Where Congress has promoted electric-vehicle adoption, it has consistently done so by using only its spending power to provide incentives, not to make consumers' choices for them. *E.g.*, Inflation Reduction Act of 2022, Pub. L. No. 117-169. §§ 13401, 13502, 50142–50143, 136 Stat 1818, 1954–62, 1971–81, 2044–45 (grants and tax credits); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, tit. IV & §§

1141–1144, 123 Stat. 115, 138, 326–33 (similar). Congress's "consistent judgment" against mandating electrification undercuts any claim of congressional authorization. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147–48, 160 (2000).

Likewise, when Congress has sought to address greenhouse-gas emissions from the transportation sector, it has done so by promoting corn ethanol and other renewable fuels, which require conventional vehicles. *See, e.g.*, Inflation Reduction Act of 2022 §§ 13202, 13404, 22003, 136 Stat at 1932, 1966–69, 2020. Congress has consistently legislated with the expectation that conventional vehicles powered by liquid fuels are lawful and will remain on the market. In Title II itself, for instance, Congress created the Renewable Fuel Standard, which requires specified amounts of renewable fuels to be blended into the Nation's transportation fuels. 42 U.S.C. § 7545(o).

Electrification also implicates a "vital consideratio[n] of national policy" that must remain in Congress's hands: national security. *West Virginia*, 142 S. Ct. at 2612–13. The National Highway Traffic Safety Administration has acknowledged that the United States "has very little capacity in mining and refining any of the key raw materials" for electric

vehicles. 86 Fed. Reg. 49,602, 49,797 (Sept. 3, 2021). And unlike renewable fuels and petroleum, most of the supply of critical components of batteries and motors for electric vehicles is controlled by geopolitical rivals or unstable foreign powers, in particular China, *see* R95.9, and Russia, *see* Int'l Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* 30 (Mar. 2022); Allysia Finley, *Russia Can Hold Nickel Hostage*, Wall. St. J. (Mar. 14, 2022). Mandating electric vehicles would thus make the American automotive industry critically dependent on two of the Nation's primary geopolitical rivals. But judgments about the security risks implicated by electrification are "ones that Congress would likely have intended for itself," rather than for an "agency [with] no comparative expertise." *West Virginia*, 142 S. Ct. at 2612–13.

* * *

By any measure, electrifying the Nation's vehicle fleet is an issue of "vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324. EPA tries to sidestep the consequences of forced electrification by arguing that they are not among the "statutory waiver criteria." 88 Fed. Reg. at 20,724 n.336. But that misses the point of the major-questions doctrine. The question is how the statutory waiver criteria should be read, and the

teaching of the major-questions doctrine is that the statute cannot be read to grant EPA the sweeping power it asserts without "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2614. As shown next, there is no clear congressional authorization for the waiver here.

II. EPA's Waiver Violates Section 209(b)(1)(C).

The Clean Air Act does not just fail to clearly authorize EPA's waiver here; it forecloses a waiver in these circumstances. Under Section 209(b)(1)(C), EPA may not grant a waiver if California's standards are "not consistent with" Section 202(a). 42 U.S.C. § 7543(b)(1)(C). Under Section 202(a), EPA itself cannot impose an electric-vehicle mandate. Because state standards must be "consistent with" Section 202(a), EPA cannot authorize California to do what EPA itself is forbidden to do.

A. Section 202(a) does not authorize EPA to mandate electric vehicles.

The text and structure of Title II of the Clean Air Act make plain that EPA cannot use its Section 202(a) authority to force production of electric vehicles. Section 202(a) does not grant EPA the power to make the internal-combustion engine go the way of the horse and carriage. At the very least, Section 202(a) is hardly clear in granting that awesome power—which is what matters under the major-questions doctrine.

Section 202(a)(1) authorizes EPA to prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Three features of this text make clear that EPA's emission standards may apply only to pollutant-emitting vehicles and that EPA lacks statutory authority to mandate zero-emission vehicles like electric vehicles.

First, the statute authorizes standards for the "emission" of an air pollutant, which demonstrates that Congress targeted vehicles that actually "emi[t]" the relevant pollutant. *Id.* Electric vehicles, as defined by California, do not. Cal. Code Regs. tit. 13, § 1963(21) ("[A zero-emission vehicle] … produces zero exhaust emission of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions."). A grant of authority to impose "emission" standards on vehicles that "emi[t]" pollutants would be a particularly "oblique or elliptical" way to authorize an agency to mandate a different type of vehicle that is, by definition, incapable of "emi[tting]" pollutants. *See West Virginia*, 142 S. Ct. at 2609.

Second, the statute is explicit that the things for which EPA sets standards must "in [EPA'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)(1). The key textual question is thus *what* exactly EPA must "judg[e]" to "cause, or contribute to" potentially dangerous air pollution. The grammatical structure of the provision offers only two plausible options. Because the verbs "cause" and "contribute" are in the plural form, their subject must be plural as well. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012) ("Judges rightly presume … that legislators understand subject-verb agreement[.]"). The only plural nouns that could plausibly "cause" or "contribute" to pollution are either the "new motor vehicles or new motor vehicle engines," or the "class or classes" of those vehicles or engines.

Either way, *all* the covered vehicles must be pollutant-emitting. If it is the "vehicles" or "engines" that EPA must judge to "cause, or contribute to, air pollution," then Section 202(a) authorizes EPA to set standards only for "new motor vehicles or new motor vehicle engines which in [EPA's] judgment cause, or contribute to" potentially dangerous pollution. In other words, EPA may set standards only for motor vehicles that

actually emit pollutants. The converse is equally true: Section 202(a) does not authorize EPA to set standards for—let alone mandate—vehicles that it deems not to cause or contribute to pollution.

That is the natural reading of the statute under the "grammatical 'rule of the last antecedent,'" which provides that a "limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Here, the relevant limiting phrase is: "which in [EPA's] judgment cause, or contribute, to air pollution." And the immediately antecedent phrase is "new motor vehicles or new motor vehicle engines." The rule of the last antecedent thus indicates that it is the "vehicles" in the class that must "cause, or contribute" to the pollution, and not the "class" as a whole.

This Court and others have adopted that natural reading. This Court has observed that Section 202(a) "requires the EPA to set emissions standards for new motor vehicles and their engines *if they emit harmful air pollutants*." *Truck Trailer Mfrs. Ass'n v. EPA*, 17 F.4th 1198, 1201 (D.C. Cir. 2021) (emphasis added); *see NRDC v. EPA*, 954 F.3d 150, 152 (2d Cir. 2020) (Section 202(a) "requires EPA to regulate emissions

from new motor vehicles if EPA determines that *the vehicles* 'cause, or contribute to,' [potentially dangerous] air pollution." (emphasis added)).

Alternatively, if it is the "class or classes" of vehicles or engines that must "cause, or contribute to, air pollution," the result is the same. When we refer to a class of objects that does something, the ordinary and precise meaning is that all the members of the class do that thing. *See Oxford English Dictionary* (2d ed. 1989) (defining "class" as "[a] number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name"). For example, when a doctor warns a patient about a "class of medications that cause drowsiness," the class does not include stimulants. And that is the best way to read the statute here: a class that causes or contributes to air pollution is most naturally defined to include only those vehicles that cause or contribute to air pollution. EPA can then group those vehicles into classes how it sees fit. *See NRDC, Inc. v. EPA*, 655 F.2d 318, 338 (D.C. Cir. 1981). But the vehicles must actually emit pollutants in the first place.

Third, Section 202(a)'s focus on pollutant-emitting vehicles is further confirmed by the provisions applicable to heavy-duty vehicles. Section 202(a)(3)(A)(i) provides that "regulations under [Section 202(a)(1)]"

for certain criteria pollutant emissions from "heavy-duty vehicles or engines … shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology" that is economically feasible. 42 U.S.C. § 7521(a)(3)(A)(i). "[I]n the parlance of environmental law, Section [202(a)(3)(A)(i)] directs the Agency to impose '*technology-based* standards for hazardous emissions." *West Virginia*, 142 S. Ct. at 2600 (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 485 n.12 (2004)). Such a standard "focuses on improving the emissions performance of individual sources." *Id.* at 2611. In other words, a technology-based emission standard like Section 202(a)(3)(A)(i) presumes that the target source is *capable* of emitting pollutants. It makes little sense to speak of the "degree of emission reduction achievable" for a source whose emissions are, by definition, zero. *Cf. id.* at 2612 n.3 ("Section 111(d) empowers EPA to guide States in 'establish[ing] standards of performance' for 'existing source[s],' § 7411(d)(1), not to direct existing sources to effectively cease to exist.").

In multiple ways, the text of Section 202(a) shows that EPA's authority to set emission standards applies only to vehicles that emit pollutants. Because electric vehicles do not fall in that category, Section 202(a)

does not authorize—let alone clearly authorize—EPA to mandate the production and sale of electric vehicles.

B. Section 209(b)(1)(C) precludes a waiver for standards that exceed EPA's authority under Section 202(a).

EPA cannot grant California a waiver unless the proposed standards are "consistent with" Section 202(a). 42 U.S.C. § 7543(b)(1)(C). Section 209(b)(1)(C), in other words, incorporates into EPA's waiver authority the limits on EPA's own standard-setting power in Section 202(a)—including the lack of authority to mandate electric vehicles.

The statute does not define "consistent," so "we turn to the phrase's plain meaning at the time of enactment." *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). One thing is "consistent" with another when the two "agre[e] or accor[d] in substance or form." *Oxford English Dictionary* (2d ed. 1989); *accord Black's Law Dictionary* (5th ed. 1979) ("Having agreement with itself or something else; accordant; harmonious; congruous; compatible; compliable; not contradictory."). EPA must therefore deny a waiver unless California's standards accord with Section 202(a).

For that reason, this Court has long recognized that Section 209(b)(1)(C) requires EPA to deny a waiver if California's regulation exceeds the limits on EPA's own authority under Section 202(a). *See Am.*

Motors Corp. v. Blum, 603 F.2d 978, 981 (D.C. Cir. 1979) (vacating EPA waiver for California regulation that was inconsistent with the lead-time requirement in Section 202(a)); *cf. Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 629 (D.C. Cir. 2010) (Kavanaugh, J.) (noting that the similar "consistent with" requirement in Section 209(e)(2)(A)(iii) incorporates Section 202(a)(2)'s requirement to consider compliance costs).

The plain text of Section 209(b)(1)(C) and this Court's precedent therefore preclude EPA from granting a waiver for a California standard that EPA itself could not promulgate under Section 202(a). If EPA cannot prescribe a particular standard under Section 202(a), neither can California. Because an electric-vehicle mandate promulgated by EPA would exceed its authority under Section 202(a), *see supra* Part II.A, such a mandate promulgated by California is "not consistent with" Section 202(a). EPA's waiver therefore violates Section 209(b)(1)(C).

EPA cannot avoid this result by pointing to authorities interpreting "consistent with" to require mere "congruence and compatibility." 88 Fed. Reg. at 20,712. True, "the phrase 'consistent with'" does not always mandate "lock-step correspondence." *Wisconsin v. EPA*, 938 F.3d 303, 316 (D.C. Cir. 2019) (quoting *Envtl. Def. Fund Inc. v. EPA*, 82 F.3d 451, 460

(D.C. Cir. 1996)). Rather, the question is whether the "statutorily designed relationship" between the provisions requires California to comply with the limits on EPA's authority under Section 202. *Id.* It does. Allowing California to receive a waiver for standards that EPA lacks authority to set would "subvert [the statutory] scheme," *id.*, which is designed to secure nationwide uniformity subject to a limited exception for California standards that are "consistent with" Section 202(a). The statute cannot reasonably be read to grant California a power that Congress withheld from both EPA and every other State. *See Blum*, 603 F.2d at 981 (Section 209(b)(1)(C) prevents EPA from "obviat[ing] by a waiver" the limitations on EPA's own authority in Section 202(a)).

In the waiver decision here, EPA contended that on its reading of "consistent with," California need not "comply with *every* provision in section 202(a)." 88 Fed. Reg. at 20,712. The statute's text, however, incorporates all of Section 202(a)'s provisions through its unqualified reference to "section 7521(a) of this title." *See North Carolina v. EPA*, 531 F.3d 896, 911–12 (D.C. Cir. 2008); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018) ("The most natural reading is that 'this section' refers to

§ 1610 as a whole ….”). As the State petitioners explain, this includes the lead-time and stability requirements in Section 202(a)(3)(C).

But even if EPA were right about Section 202(a)(3)(C), it would not follow that California can mandate electric vehicles even though, under Section 202(a), EPA cannot. EPA contends that exempting California from Section 202(a)(3)(C) is necessary to “give proper effect to the ‘in the aggregate’ language in section 209(b)(1), and for California to retain its ability to set more stringent standards for some pollutants and less stringent for others.” 88 Fed. Reg. at 20,714. Requiring California, like EPA, to set standards only for pollutant-emitting vehicles in no way impinges on California’s ability to set standards for certain pollutants that are less stringent than the corresponding federal standards, so long as California’s standards, in the aggregate, are at least as protective as EPA’s. It means only that California, like EPA, cannot mandate electric vehicles.

C. EPA failed to give “appropriate consideration to the cost of compliance.”

The waiver also is not “consistent with” Section 202(a) because EPA failed to “giv[e] appropriate consideration to the cost of compliance.” 42 U.S.C. § 7521(a)(2); *see also id.* § 7521(a)(3)(A)(i) (requiring EPA to give

"appropriate consideration to cost"). According to EPA, giving appropriate consideration to cost does not require consideration of whether the costs are justified by corresponding benefits. *See* 88 Fed. Reg. at 20,693 ("[W]hether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost … is not legally pertinent." (quoting 78 Fed. Reg. at 2,115)). Additionally, EPA will deem costs to be excessive only if they result in "*doubling or tripling* the cost of motor vehicles to purchasers." *Id.* at 20,705 (quoting *MEMA,* 627 F.2d at 1118); *see also id.* ("[T]he cost of compliance must reach a very high level before the EPA can deny a waiver.").

EPA is wrong on both counts. As to the first, the Supreme Court has held that giving "appropriate" consideration to cost requires a reasonable balancing of costs *and* benefits. *Michigan*, 576 U.S. at 753. "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* at 752. For the same reason, it is arbitrary to ignore economic costs unless they reach a "very high level." The Clean Air Act strikes a balance between environmental protection and "productive economic activity." *Energy Future Coal. v. EPA*, 793 F.3d 141, 145

(D.C. Cir. 2015) (Kavanaugh, J.). EPA must give meaningful consideration to both sides of the equation. EPA failed to do that here. *See* 88 Fed. Reg. at 20,710–11 (finding the standards are consistent with Section 202(a) because commenters "have not demonstrated that the compliance costs are so excessive to make the standards infeasible").

III. EPA's Waiver Violates Section 209(b)(1)(B).

EPA also lacks authority to waive preemption for California's electric-vehicle mandates, which are aimed at addressing global climate change, because the State does not "need" these standards "to meet compelling and extraordinary conditions," as required by Section 209(b)(1)(B). Both the major-questions doctrine and the federalism canon dictate that EPA must identify "clear congressional authorization" before allowing one State to mandate electric vehicles in an effort to address global climate change. Section 209(b)(1)(B) not only lacks such authorization but also, by its plain text, prohibits EPA from granting such a waiver. Because EPA's contrary reading renders Section 209(b)(1)(B) pointless—and unconstitutional—the Court should reject it.

A. Multiple clear-statement rules apply here.

For the reasons already explained, the authority to mandate vehicle electrification is a major question. *See supra* Part I. That is no less true

when EPA is authorizing California to wield that immense power—a power that potentially permits the other 49 States to enforce identical electric-vehicle mandates under Section 177.

In addition to the major-questions doctrine, the federalism canon requires "exceedingly clear language" before a statute may be construed to grant a single State authority to address global climate change in ways that would upend the Nation's transportation and energy sectors. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020). Congress must be "unmistakably clear in the language of the statute" if it "intends to alter the 'usual constitutional balance between the States and the Federal government.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Courts apply that "background principl[e] of construction" in a variety of contexts implicating "the relationship between the Federal Government and the States." *Bond v. United States*, 572 U.S. 844, 857–58 (2014); *see, e.g.*, *Gregory*, 501 U.S. at 461 (federal preemption); *Atascadero*, 473 U.S. at 243 (state sovereign immunity).

Applying this federalism-based clear-statement rule, the Supreme Court has repeatedly rejected "broad" or "expansive" readings of statutes

in favor of narrower ones when the broad reading would "significantly chang[e] the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349–50 (1971). That cautious approach "assures that the legislature has in fact faced, and intended to bring into issue, the[se] critical matters." *Id.* at 349. And it avoids constitutional questions by eschewing constructions that reach the "outer limits of Congress' power." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001); *see infra* Part III.D.

The federalism clear-statement rule applies with full force here. Construing Section 209(b) as authorizing EPA to grant California a special dispensation, denied to all other States, to overhaul the national vehicle and fuel industries to address global climate change would radically depart from the "usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. The "usual constitutional balance" is that Congress either leaves state authority intact; preempts it uniformly, without playing favorites; or, very rarely, distinguishes among States based on truly local differences. But it is unheard of for Congress to give a single State the vast authority to target "a uniquely international problem of national concern" like climate change. *City of New York v. Chevron*

Corp., 993 F.3d 81, 85–86, 93 (2d Cir. 2021). If Congress indeed meant to grant that type of novel and unprecedented authority, it surely would have done so clearly. *See Bass*, 404 U.S. at 349.

EPA does not claim any such clear and unambiguous permission to approve California's global-climate-change targeting electric-vehicle mandates. Instead, EPA claims merely that "the language of section 209 provides clear statutory authorization for the *waiver framework*." 88 Fed. Reg. at 20,701–02 n.135 (emphasis added). But the relevant question for major-questions and federalism purposes is the *scope* of that framework. As to that issue, EPA merely asserts that its current reading is "the best interpretation of the statute." *Id.* at 20,690 n.25. That is wrong, as explained below. And here—where "we would expect [Congress] to speak with the requisite clarity to place [its] intent beyond dispute," *Cowpasture*, 140 S. Ct. at 1849—it is not enough.

B. Global climate change is not a "compelling and extraordinary condition" under Section 209(b)(1)(B).

Even without clear-statement rules, the statute's text, structure, and history demonstrate that the phrase "compelling and extraordinary conditions" refers to California's distinctive local pollution problems and does not encompass the causes or effects of global climate change.

1. California's conditions are "extraordinary" only if California suffers a distinct, localized problem.

Under the ordinary meaning of the term "extraordinary," California may obtain permission to deviate from uniform federal emission standards only to address a pollution problem that is distinctive to the State. Climate-change related risks may be "compelling" conditions, but they are not "extraordinary" vis-à-vis California.

Because the statute does not define either "compelling" or "extraordinary," we look to the terms' ordinary meaning. *See Tanvir*, 141 S. Ct. at 491. A condition is "compelling" if it is "force[ful]" or "hold[s] one's attention." *Webster's New International Dictionary* 463 (3d ed. 1961). And a condition is "extraordinary" if it is "most unusual" or "far from common." *Id.* at 807; *see American Heritage Dictionary* 466 (1969) ("Beyond what is ordinary, usual, or commonplace.").

California must satisfy both requirements—"connected" as they are "by the conjunctive 'and'"—to be eligible for a waiver. *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–21 (2021). In other words, California cannot deviate from the uniform national framework to address

minor, insufficiently "compelling" conditions in the State. Nor can California deviate from that framework to address conditions that are not "extraordinary"—*i.e.*, conditions that prevail similarly in other States.

The latter point is critical. In context, the term "extraordinary" in Section 209(b) must mean "unusual" as compared to conditions in other States, not as compared to other, less serious conditions. First, Section 209(b) is an exception from uniform federal regulation. It may make sense to allow a State to act independently when it faces conditions unique to that State, but it would make little sense to waive preemption when a broadly shared condition is especially serious. Indeed, the opposite is true: the more serious a national or international issue is, the more appropriate it is for the federal government to be responsible. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). Second, to avoid redundancy, "extraordinary" must have semantic content that "compelling" does not share. *See Bailey v. United States*, 516 U.S. 137, 146 (1995). If "extraordinary" meant "unusual" in terms of the condition's magnitude, it would be redundant of "compelling."

Statutory context reinforces this point. As discussed below, California must "need" separate standards to "meet" the conditions it faces. *See*

infra Part III.C. As EPA has previously concluded, those surrounding terms make clear that Section 209(b) contemplates conditions that "have their basic cause, and therefore their solution, locally in California," 73 Fed. Reg. at 12,163—not global conditions that California-specific standards cannot meaningfully "meet" (*i.e.*, affect).

Section 177 confirms that Section 209(b)(1)(B) refers to conditions caused by "pollutants that affect local or regional air quality and not those relating to global air pollution." 84 Fed. Reg. at 51,351. Section 177 permits other States to adopt California's standards if the State "has plan provisions approved under this part." 42 U.S.C. § 7507. The referenced "plan provisions" are state plans to attain EPA's national ambient air-quality standards, which address the criteria pollutants that cause smog and other local pollution problems, not greenhouse-gas emissions or climate-change risks. 84 Fed. Reg. at 51,350. Congress thus plainly contemplated that the standards California would adopt under Section 209(b)—and the standards that other States might embrace as their own—would be aimed at helping States attain and maintain local ambient air-quality standards within their respective borders.

Section 209(b)'s history also confirms this reading. As this Court has recognized, "[i]t was clearly the intent" of the waiver provision to "focus on local air quality problems … that may differ substantially from those in other parts of the nation." *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979). Congress sought to empower California "to meet peculiar local conditions," S. Rep. No. 90-403, at 33; *see* 84 Fed. Reg. at 51,342, *i.e.*, the "unique problems" resulting from California's local emissions and pollution concentrations interacting with the State's distinctive "climate and topography," H.R. Rep. No. 90-728, at 22, 50. Congress thus found that California's exemption from an otherwise uniform national program was justified by local conditions with local causes and effects that were "sufficiently different from the Nation as a whole." *Id.* at 21. While the unique "susceptibility of the Los Angeles basin to concentrations of smog," *id.* at 50, might make *those* California conditions "extraordinary," the State's concerns about global climate change do not.

2. California's conditions related to global climate change are not "extraordinary."

As EPA found previously, "[m]any parts of the United States, especially western States, may have issues related to drinking water … and wildfires, and effects on agriculture; these occurrences are by no means

limited to California." 84 Fed. Reg. at 51,348. As a result, "California is not worse-positioned in relation to certain other areas of the U.S., and indeed is estimated to be *better*-positioned, particularly as regards the Southeast region of the country." *Id.* at 51,348 n.278 (emphasis added). So "while effects related to climate change in California could be substantial, they are not sufficiently different from the conditions in the nation as a whole to justify separate State standards." *Id.* at 51,344; *see also id.* at 51,342–43, 51,343 n.265; 83 Fed. Reg. 42,986, 43,248–50 (Aug. 24, 2018). Put simply, the risks of global climate change are not "extraordinary" as to California.

EPA nonetheless stated that "global warming continues to pose an extraordinary threat" to California. 88 Fed. Reg. at 20,703. EPA incorporated its similar assertions in its decision reinstating the Advanced Clean Cars waiver. *Id.* But neither there nor here did EPA grapple with its prior findings that other regions of the country will experience similar, and in some cases *worse*, risks from global climate change. *See* 84 Fed. Reg. at 51,348 & n.278. EPA's failure to explain why it rejected those findings—if, in fact, it meant to reject them—vitiates its claim about the "extraordinary" impact of climate change in California. *See FCC v. Fox Television*

Stations, Inc., 556 U.S. 502, 515 (2009) (requiring "a more detailed justification" when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy").

Even if California could establish that it suffered materially distinct climate-change impacts, global climate change still would not be a condition covered under Section 209(b). California's greenhouse-gas emissions "bear no particular relation" to "California-specific circumstances" like the thermal inversions resulting from local geography and wind patterns that Congress identified when enacting Section 209(b). R95.3. Greenhouse gases thus remain outside the type of "extraordinary" conditions that Congress created Section 209(b) to address—*i.e.*, "localized pollutants that can affect California's local climate, or that are problematic due to California's specific topography." 84 Fed. Reg. at 51,348.

3. EPA's counterarguments lack merit.

EPA's waiver decision does not parse the term "extraordinary" or assign it a meaning distinct from "compelling." Instead, EPA merely incorporates by reference its decision reinstating the waiver for Advanced Clean Cars. *See* 88 Fed. Reg. at 20,701. But even there, EPA merely asserted that "words like 'peculiar' and 'unique'" cannot be used to "define

'extraordinary and compelling,'" because they "appear nowhere in the text." 87 Fed. Reg. at 14,357; *see id.* at 14,359. Of course, Congress did not need to use the words "peculiar" or "unique" because it instead used a word that is, in context, a synonym: "extraordinary." The question is whether Congress used the term "extraordinary" to mean peculiar or unique *to California*. And EPA elsewhere—including in this waiver decision—has acknowledged that very meaning of "extraordinary," emphasizing that the phrase "compelling and extraordinary conditions" encompasses California-specific conditions, including its "geographical and climatic conditions (like thermal inversions)." 88 Fed. Reg. at 20,702.

Rather than parsing Section 209(b)'s text and context, EPA instead invokes the provision's supposed purpose, contending that "Congress intended that California would serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards and developing control technology." *Id.* at 20,702 & n.136. But if Congress had wanted to give California free rein to experiment with motor-vehicle emission standards, regardless of whether those standards are needed to meet "compelling and extraordinary conditions" in the State, it would have

granted California a blanket preemption exemption, as it did for California's fuel regulations. *See* 42 U.S.C. § 7545(c)(4)(B). It did not, and this Court must give effect to Congress's choice to adopt a more limited exemption here. *Russello v. United States*, 464 U.S. 16, 23 (1983).

C. California does not "need" its own emission standards to "meet" climate-change conditions that the standards will not meaningfully address.

Even if California's conditions related to global climate change were "extraordinary," EPA still could not have granted the challenged waiver. California does not "need" its zero-emission-vehicle mandates to "meet" conditions associated with global climate change because the mandates will have no meaningful effect on those conditions.

1. California "need[s]" separate standards to "meet" conditions only if those standards have some meaningful effect.

A Section 209(b) waiver is not "need[ed]"—and therefore not permitted—if a California-specific emission standard would not affect the conditions that supposedly warrant it.

The verb "need" means to "be *necessary*." *Webster's New International Dictionary* 1512 (3d ed. 1961) (emphasis added). And the term "necessary" ordinarily means "essential; indispensable." *American Herit-*

age Dictionary 877 (1969). Terms of necessity, moreover, "must be construed in a fashion that is consistent with the[ir] ordinary and fair meaning … so as to limit 'necessary' to that which is required to achieve a desired goal." *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000).

The verb "meet" means "[t]o satisfy (a demand, need, obligation)." *American Heritage Dictionary* 816 (1969). And consistent with this ordinary meaning, Congress used forms of the verb "meet" at least 50 times in Title II to mean "to satisfy." *See, e.g.*, 42 U.S.C. §§ 7514(a), 7545(c)(4)(C)(ii)(III), 7545(g)(2), 7545(o)(4)(A). The word should be read identically here. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

Putting the terms together, and reading them in the context of Section 209(b) as a whole, two things are clear. First, California must "need"—*i.e.*, require as essential or very important—standards that differ from federal standards. If the federal standards would resolve California's pollution problems, then California-specific standards are hardly necessary. *See* S. Rep. No. 90-403, at 33. Second, the standards must, at a minimum, meaningfully affect the conditions causing California's need

for separate standards. If the standards have *no impact* on those conditions, then they cannot be said to be even helpful—let alone necessary or indispensable—to "meet" the conditions the State faces.

EPA previously found, when withdrawing the Advanced Clean Cars waiver, that California's standards "will not meaningfully address global air pollution problems of the sort associated with [greenhouse-gas] emissions." 84 Fed. Reg. at 51,349; *see also id.* at 51,341 (California's standards would "result in an *indistinguishable* change in global temperatures" and "likely *no change* in temperatures or physical impacts resulting from anthropogenic climate change in California" (emphases added)). EPA has never disturbed these findings as to the futility of California's standards. Nor did EPA here make any finding that California's electric-truck mandates will affect either global temperatures or any climate-change conditions in California.

Instead, EPA simply referred to its decision reinstating the Advanced Clean Cars waiver, where the agency asserted that there is "no basis" to require a waiver request to "independently solve a pollution problem," 87 Fed. Reg. at 14,366, and that it was enough for regulations

to "whittle away" at climate change "over time." *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007)). True enough, Section 209(b)(1)(B) does not require that California's standards fully solve a given pollution problem. It does, however, require a finding that the standards will do at least *something* to meaningfully ameliorate the conditions at which they are targeted. EPA may not simply assume that California's standards will make a marginal difference over an indefinite period. The statute requires EPA to "*fin[d]*" that California "need[s]" its standards to "meet" the relevant conditions. 42 U.S.C. § 7543(b)(1) (emphasis added). Absent any finding by EPA that California's electric-truck mandates will actually ameliorate climate-change conditions in California, the waiver is unlawful. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence.").

2. EPA cannot rely on its "whole-program" approach to avoid applying the statutory waiver criteria.

Unable to show that California's electric-vehicle mandates satisfy the requirements of Section 209(b)(1)(B), EPA contends that such a demonstration is irrelevant. According to EPA, the only question relevant under Section 209(b)(1)(B) is "whether California needs a separate motor-

vehicle program" at all—not whether it needs the specific standards in a particular waiver application. *See* 88 Fed. Reg. at 20,699. That is wrong.

As EPA previously acknowledged, Section 209(b)(1)(B) does not refer to California's need for "any" standards or for its own "program." 84 Fed. Reg. at 51,342. It refers to "such State standards"—that is, the previously described "standards … for the control of emissions from new motor vehicles" that California "has adopted" and for which it is seeking a waiver. 42 U.S.C. § 7543(b)(1).

A whole-program approach, moreover, would render Section 209(b)'s "need[s] … to meet" requirement effectively meaningless. California "long ago established a 'need' to have *some form* of its own vehicle emissions program." 84 Fed. Reg. at 51,339. That is why Congress enacted Section 209(b) in the first place. But just because California needs separate emission standards for, say, smog—and may need such standards in perpetuity—does not mean that the Clean Air Act perpetually empowers the State to enact any other emission standards it desires. Section 209(b)(1)(B) is not a blank check. And EPA may not interpret an important statutory limitation like Section 209(b)(1)(B) into practical "insignifican[ce]." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

EPA's whole-program approach would also make a hash of Section 209(b)(1)(C). It would make no sense to ask whether California's entire program, as opposed to a particular standard, is "consistent with" Section 202(a). And if "such State standards" in subsection (C) requires consideration of individual standards, then the same phrase should operate identically in subsection (B). *See Brown v. NHTSA*, 673 F.2d 544, 546 n.5 (D.C. Cir. 1982) ("[W]hen the same phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in [the other]." (quoting *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978))).

EPA primarily seeks to justify its whole-program approach by pointing to Section 209(b)(1), which requires that California "determin[e] that the State standards will be, *in the aggregate*, at least as protective" as federal standards. 42 U.S.C. § 7543(b)(1) (emphasis added). EPA then has a corresponding duty to determine that California's aggregate protectiveness finding is not "arbitrary and capricious." *Id.* § 7543(b)(1)(A). But EPA's aggregate "protective[ness]" review under subsection (A) does not justify an aggregate "need" determination under subsection (B), or an

aggregate "consistency" determination under subsection (C). To the contrary, Congress's choice to include "in the aggregate" in one provision—and to omit it in subsections (B) and (C)—shows that Congress permitted an aggregate assessment in one place but not the others. *Gallardo ex rel. Vassallo v. Marstiller*, 142 S. Ct. 1751, 1758 (2022).

EPA also invokes its past practice, contending that, "[w]ith two noted exceptions"—*i.e.*, the 2008 denial of California's first greenhouse-gas waiver request and the 2019 withdrawal—it has "consider[ed] whether California needs a separate motor vehicle emission program rather than the specific standards in the waiver request at issue." 88 Fed. Reg. at 20,699. Of course, no amount of prior agency practice can supplant the statute's plain meaning. *See Medellín v. Texas*, 552 U.S. 491, 532 (2008). Regardless, as EPA's caveat makes clear, its practice has been inconsistent. It also has never mattered to EPA's waiver decisions. To avoid commenters' concerns about EPA's obvious statutory misreading, "EPA's practice has been to nevertheless … determine whether California needs th[e] *individual* standards to meet compelling and extraordinary conditions." 87 Fed. Reg. at 14,337 (emphasis added).

Finally, even if the whole-program approach were permissible for standards aimed at California's local pollution conditions, it cannot justify a preemption waiver for standards aimed at global conditions that are outside Section 209(b)'s scope. Section 209(b) categorically forbids a waiver for standards aimed at global conditions because such conditions do not "fall within the scope of the 'compelling and extraordinary conditions' encompassed by the [statute's] terms." 84 Fed. Reg. at 51,349. And EPA cannot use its authority to waive preemption for standards aimed at California's local pollution problems "as a bootstrap" to allow California to regulate global climate change. *AFGE, Loc. 2953 v. FLRA*, 730 F.2d 1534, 1538–39 (D.C. Cir. 1984).

3. EPA cannot justify the waiver based on the standards' impact on local criteria pollution.

EPA also purports to justify the waiver for California's standards by pointing to their impact on local criteria-pollution conditions. *See* 88 Fed. Reg. at 20,702. EPA claims—incredibly—that the impact of California's sweeping electrification mandates renders them "no different from all prior standards addressing criteria emissions that EPA has found to satisfy the section 209(b)(1)(B) inquiry." *Id.* This argument also fails.

An express purpose of California's zero-emission-vehicle mandates is to address global climate change. *Id.* at 20,700; R4.3. And an otherwise-preempted regulation is not "saved from pre-emption simply because the State can demonstrate some additional," permissible purpose. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106–07 (1992). In other words, even where a regulation serves a "dual purpose"—one goal preempted, the other permissible—the regulation is still preempted. *See Associated Builders & Contractors Fla. E. Coast Chapter v. Miami-Dade County*, 594 F.3d 1321, 1324 (11th Cir. 2010). Just so here. It would "make a mockery of" Section 209(b)(1)(B) to permit California to evade preemption merely by "framing" its electrification mandates as aimed at criteria-pollution benefits in addition to their manifest and overarching purpose of addressing global climate change. *Cf. Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012).

D. Any ambiguity should be construed to avoid the serious constitutional problem with EPA's reading.

Finally, even if the scope of Section 209(b) were unclear, the Court should reject EPA's reading to avoid serious constitutional problems. As the State petitioners have shown, construing Section 209(b) to permit

California—and only California—to enact standards targeting global climate change would violate the "fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900). Climate change is not a "*local* evi[l]" peculiar to California that could justify giving that State alone the unique ability to redress it. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

At a minimum, the equal-sovereignty question is a serious one. And because Section 209(b) is at best ambiguous for EPA, this Court should construe the statute "to avoid the need even to address the serious questio[n]" about its constitutionality. *See United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019); *Utility Air*, 573 U.S. at 310–11, 327 (declining to adopt EPA's "unprecedented expansion of [its] authority" given concerns about "the Constitution's separation of powers"). Adopting private petitioners' reading—which permits waivers only where California seeks to tackle a truly "*local* evi[l]" like smog in Los Angeles, *Nw. Austin*, 557 U.S. at 203, and which "is at least [a] 'fairly possible'" interpretation, *United States v. Hansen*, 599 U.S. 762, 781 (2023)—would do just that.

CONCLUSION

For the foregoing reasons, the Court should set aside EPA's action granting California's preemption waiver.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

This brief complies with the word-count limitation of Fed. R. App. P. 32(e) and this Court's September 19, 2023 order. This brief contains 11,511 words, not counting the parts excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

/s/ *Eric D. McArthur*
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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I caused the foregoing document to be electronically filed through this Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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