ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1230 and consolidated cases

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

UNION OF CONCERNED SCIENTISTS, et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

On petition for review of agency action by the National Highway Traffic Safety Administration and the U.S. Environmental Protection Agency

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BRIEF OF AMICUS CURIAE URBAN AIR INITIATIVE, INC. IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Amicus curiae Urban Air Initiative, Inc. (UAI) certifies the following under D.C. Circuit Rule 28(a)(1):

(A) Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Brief of State and Local Government Petitioners and Public Interest Petitioners and in the Respondents' Initial Brief:

UAI is hereby filing a brief as *amicus curiae* in support of Respondents.

(B) Rulings Under Review

"The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

(C) Related Cases

Related cases are discussed in the Brief of State and Local Government Petitioners and Public Interest Petitioners.

/s/Jonathan Berry
JONATHAN BERRY

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, counsel for *amicus curiae* makes the following disclosures:

Urban Air Initiative, Inc. (UAI) is a social welfare organization incorporated in a manner consistent with Section 501(c)(4) of the Internal Revenue Code. UAI has no parent companies, and no publicly held company has a 10% or greater ownership interest in UAI.

/s/ Jonathan Berry
JONATHAN BERRY

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE & SEPARATE BRIEFING

All parties in these consolidated cases filed a notice on May 26, 2020 stating that they "have consented to the filing of amicus briefs in support of any party, or no party, provided amici comply with" applicable rules and orders of this Court. *See* Notice (May 26, 2020), Doc. No. 1844268. On September 16, 2020, *amicus curiae* Urban Air Initiative, Inc. filed a written representation of the parties' consent pursuant to D.C. Cir. R. 29(b) as a notice of intent to file.

Under D.C. Cir. R. 29(d), counsel for *amicus curiae* certifies that no other non-government amicus brief of which they are aware focuses on all of the subjects addressed herein, namely, EPA's prior failure to consider the enormous costs and paltry benefits of California's proposed Zero Emission Vehicle standards. UAI is well suited to provide the Court important context on the lack of environmental benefits and enormous costs of California's greenhouse gas and Zero Emissions Vehicle standards. UAI has sought to avoid duplication of Respondents' briefing.

/ Jonathan Berry
JONATHAN BERRY

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GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act
CARB	California Air Resources Board
CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
NHTSA	National Highway Traffic Safety Administration
NOx	Nitrous Oxide
NMOG	Non-Methane Organic Gases
UAI	Urban Air Initiative, Inc.
ZEV	Zero-Emission Vehicle

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addenda to Brief for State and Local Government Petitioners and Public Interest Petitioners as well as Brief for Petitioners National Coalition for Advanced Transportation, Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Advanced Energy Economy.

INTEREST OF *AMICUS CURIAE*[1] AND INTRODUCTION

Amicus curiae Urban Air Initiative, Inc. (UAI) is a non-profit organization dedicated to improving air quality and protecting public health by reducing vehicle emissions. UAI helps meet public policy goals to lower emissions and reduce carbon in the environment through scientific studies and real-world data to promote new fuels, engine design, and public awareness.

In 2013, EPA granted a waiver allowing California to impose stricter light-duty vehicle greenhouse gas (GHG) emissions standards. This waiver also allowed California to mandate that automakers either market a certain number of zero-emission vehicles (ZEVs) on a fleet-wide average basis, or purchase credits instead. This case concerns EPA's withdrawal of that waiver. *See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

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[1] Counsel for *amicus curiae* state that (1) this brief was authored by counsel for *amicus curiae* and not by counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money that was intended to fund preparing or submitting the brief; and (3) apart from *amicus curiae* and their counsel, no person contributed money that was intended to fund preparing or submitting the brief.

Amicus UAI agrees with EPA that California's GHG and ZEV standards are preempted by federal law; that EPA has authority to withdraw the waiver it issued for this program in 2013; and that a waiver should never have been granted in the first place, because California does not need these standards "to meet compelling and extraordinary conditions," as required by section 209(b)(1)(B) of the Clean Air Act (CAA), 42 U.S.C. § 7543(b)(1)(B).

But *amicus* offers an additional legal argument to justify EPA's revocation of California's waiver. When EPA granted the waiver in 2013, it failed to ensure that California's ZEV standards were "consistent with" section 202(a) of the CAA by "giving appropriate consideration to the cost of compliance" entailed by the mandate. 42 U.S.C. § 7521(a)(2). That failure violated EPA's statutory obligation.

Indeed, the benefits of the ZEV standards are likely zero because California's ZEV standards are "nested" within other state and national regulations. Each "clean" vehicle sold to comply with the ZEV standard can be offset with a dirtier conventional vehicle both within California and at the federal level. As a result, the ZEV standard simply shifts the type of vehicles being sold without any overall effect on vehicle

emissions or environmental pollution. This is especially true regarding GHG emissions, which affect the atmosphere globally rather than regionally or locally.

While the benefits of California's ZEV standard are paltry, the costs are enormous: more than $7 billion per year based on California's own numbers. Because the costs significantly outweigh any putative benefits from the program, the waiver should never have been granted in the first place.

SUMMARY OF ARGUMENT

1. EPA misinterpreted section 202(a) of the CAA, 42 U.S.C. § 7521(a), when it granted a waiver of preemption for California's ZEV standards in 2013.

a. Section 209(b)(1)(C) of the CAA provides that "[n]o . . . waiver shall be granted if the Administrator finds that . . . [the] State standards and accompanying enforcement procedures are not consistent with [section 202(a) of the CAA]." 42 U.S.C. § 7543 (b)(1)(C). Section 202(a) provides that any regulation prescribing vehicle emissions standards "shall be given effect after such period as the Administrator finds necessary to permit the development and application of the

requisite technology, *giving appropriate consideration to the cost of compliance within such period*." 42 U.S.C. § 7521(a) (emphasis added).

In its decision to grant the waiver, EPA asserted that

> [t]he scope of [its] review of whether California's action is consistent with section 202(a) . . . is limited to whether . . . California's standards are technologically infeasible, or . . . [whether] California's test procedures impose requirements inconsistent with the federal test procedure.

Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's ACC Program and ZEV Amendments, 78 Fed. Reg. 2112, 2125 (Jan. 9, 2013). This interpretation effectively reads out of the statute Congress's command to give "appropriate consideration" to "cost," violating the rule that sound interpretation must "give effect, if possible, to every word, clause and sentence of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955).

b. To give "appropriate" consideration to cost, EPA was required to consider the costs of the ZEV standards in relation to their putative benefits. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Thus, section 202(a) requires EPA to ensure that California's ZEV standards are cost-effective—something EPA failed to do when granting the 2013 waiver.

2. EPA could not have granted California a waiver for its ZEV standards if it had interpreted section 202(a) correctly. California's ZEV standards fails legally required cost-effectiveness analysis because the environmental benefits associated with the program are paltry.

a. The California Air Resources Board (CARB) admits that "[t]here is no benefit" in terms of vehicle (tank-to-wheel) emissions from the ZEV standards.[2] Because California's fleet-average emission standards have not changed, and because ZEVs are included in these fleet averages, California's requirement that manufacturers produce more ZEVs simply induces automakers to balance costs by making their conventional vehicles dirtier. Because California's ZEV standards are nested within state and federal standards, they have no regional or federal benefit. They simply shift the mix of vehicles being sold without reducing overall vehicle pollution.

b. The compliance costs imposed by California's ZEV standards are enormous. Even assuming a lower per-vehicle cost than CARB did

[2] California Air Resources Board, Staff Report: Initial Statement of Reasons, Advanced Clean Cars 2012 Proposed Amendments to the California Zero Emission Vehicle Program Regulations 72 (2011) ("ZEV Initial Statement").

when EPA granted the waiver, annual costs will exceed $7 billion per year. It is not "rational, never mind 'appropriate,' " for EPA to allow a California standard that will "impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 135 S. Ct. at 2707.

ARGUMENT

I. SECTION 202(A) OF THE CAA REQUIRES AN ASSESSMENT OF COST-EFFECTIVENESS, NOT JUST TECHNOLOGICAL FEASIBILITY.

Section 209(b)(1)(C) of the CAA requires the EPA to make certain findings before granting a state waiver. This includes a finding that a state waiver is "consistent with" section 202(a) of the CAA. When EPA granted a waiver of preemption for California's ZEV standards in 2013, the agency misinterpreted section 202(a) of the CAA. EPA avoided the cost-effectiveness analysis required by section 202(a) through an outdated and incorrect interpretation of case law.

A. EPA was required by law to consider the costs and benefits of CARB's proposed ZEV standards in the 2013 waiver application.

Section 209(b)(1) provides, "[n]o . . . waiver shall be granted if the Administrator finds that . . . [the] State standards and accompanying enforcement procedures are not consistent with [section 202(a) of the

CAA]." 42 U.S.C. § 7543(b)(1)(C). Section 202(a) in turn requires that any regulation prescribing vehicle emission standards "be given effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, *giving appropriate consideration to the cost of compliance within such period*." *Id.* § 7521(a) (emphasis added). Section 202(a) thus requires the Administrator to ensure that the proposed regulation allows the lead time "necessary to permit the development and application of the requisite technology," *and* "giv[es] appropriate consideration to the cost of compliance within such period."

"[A]ppropriate consideration to the cost" is best understood to require that the Administrator find the regulation cost-effective. Section 202(a) does not just require the Administrator to consider cost; it requires EPA to give "appropriate" consideration to cost. The word "appropriate" in section 202(a) must *add* something to the content of the main clause. When interpreting a statute, "[i]f possible, every word and every provision is to be given effect." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) 174.

This court has recognized that "[the correct] reading of 'appropriate' [is] dependent on the statutory context." *Murray Energy Corp. v. EPA*, 936 F.3d 597, 622 (D.C. Cir. 2019) (per curiam); *see also Sossamon v. Texas*, 563 U.S. 277, 286 (2011) ("the word 'appropriate' is inherently context dependent"). "Appropriate" consideration of the cost of compliance with California's ZEV standards requires that the Administrator weigh the potential benefits of the standards against the cost of compliance.

In a statutory context similar to the one in this case, the Supreme Court held that an agency decision would give "appropriate" consideration under the CAA only if that decision reflected a reasonable balancing of costs *and* benefits. *Michigan*, 135 S. Ct. at 2707. Indeed,"[o]ne 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.*

Under *Michigan*, an agency fails to give "appropriate" consideration to cost when it does not "pay[] attention to the advantages *and* the disadvantages of agency decisions." *Id.* (emphasis in original); *see also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 734 (D.C. Cir.

2016) (Kavanaugh, J., dissenting) ("the word 'appropriate' at issue in *Michigan v. EPA* . . . necessitate[s] a balancing of costs and benefits"). Under section 202(a), then, the Administrator could not lawfully grant California a waiver without finding the benefits of doing so outweighed the costs.

EPA's own Guidelines for Preparing Economic Analyses tracks *Michigan*'s holding. "The purpose of estimating social cost is to have a reference point for comparing the costs of a regulation with the estimated benefits. Social cost is not a particularly meaningful concept unless it is used as part of a *net* social welfare calculation[] . . . ." EPA, Nat'l Ctr. for Envtl. Econ., Office of Policy, Guidelines for Preparing Economic Analyses 8–2 (2014) (emphasis added). Thus, granting a waiver for standards that do not reflect a reasonable balancing of costs and benefits fails to give "appropriate consideration to cost." 42 U.S.C. § 7521(a).

B. EPA failed to give "appropriate" consideration to the cost of compliance because it did not weigh the regulatory burden of the waiver against its putative benefits.

In its decision to grant the waiver, EPA asserted that "[t]he scope of [its] review of whether California's action is consistent with section

202(a) . . . is limited to whether . . . California's standards are technologically infeasible, or . . . [whether] California's test procedures impose requirements inconsistent with the federal test procedure." *Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's ACC Program and ZEV Amendments*, 78 Fed. Reg. at 2125. EPA thus expressly avoided cost-benefit analysis under section 202(a) because it believed "case law clearly precludes EPA's consideration of this issue within the waiver context." *Id.* at 2143. This "case law," however, was no more than dicta from a decades-old court decision which held only that EPA may not consider effects on *competition* as a basis for denying a waiver, rather than cost effectiveness in general. *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1116–20 (D.C. Cir. 1979).

In the *Motor & Equipment Manufacture's* case, the petitioners claimed that California's regulations were anticompetitive "because they [we]re designed to reduce the business available to the automotive parts and services industry and because they allegedly create[d] a financial and psychological tie-in . . . between vehicle purchasers and franchise dealerships." *Id.* at 1116. The petitioners argued that EPA

had a "duty . . . to consider these claims" when granting a waiver. *Id.* This Court rejected that argument, pointing out that antitrust concerns were not a "cost of compliance" under 202(a). *Id.* at 1118. In deciding that discrete issue, the Court had no occasion to pass on the question of whether EPA had to balance benefits against the costs of compliance, nor did it decide what standard of cost EPA should apply.

Based on dictum from that case, EPA stated that it could only deny California a waiver if the cost represented "a 'doubling or tripling' of the vehicle cost." 78 Fed. Reg. at 2142 (quoting *Motor & Equipment Manufacture's*, 627 F.2d at 1118). Under this generous cost standard, EPA believed that the projected cost of the ZEV standards—$500 per new light-duty vehicle sold when spread over the entire fleet, according to CARB—passed muster. Since it did not "doubl[e] or tripl[e]" vehicle cost, EPA found section 202(a) satisfied. EPA's decision to ignore the cost-effectiveness of ZEV standards cannot be squared with the much more recent Supreme Court precedent in *Michigan*.

EPA's 2013 waiver of California's electric-vehicle standards is a mirror image of EPA's power plant air toxics regulation in the *Michigan* case. There, EPA found an air toxic rule was "appropriate and

necessary" even though it would impose "costs of $9.6 billion per year" on regulated entities. 135 S. Ct. at 2706. EPA "concede[d]" that these costs " 'played no role' in its appropriate-and-necessary finding." *Id.* at 2706. That concession was fatal. EPA "must consider cost" "before deciding whether regulation is appropriate" because "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.* at 2711, 2707; *accord Mingo Logan Coal*, 829 F.3d at 732 (Kavanaugh, J., dissenting) ("reasoned decisionmaking requires assessing whether a proposed action would do more good than harm").

Although EPA's 2013 waiver decision here considered the cost of the electric-vehicle mandate, it did so without "paying attention to the advantages" in relation to those costs. *Id.* at 2707. EPA's prior failure to consider the costs of the standards *in relation to its benefits* failed to comport with *Michigan's* requirement of reasoned decision-making.

II. EPA COULD NOT HAVE GRANTED THE 2013 WAIVER IF IT HAD INTERPRETED SECTION 202(A) CORRECTLY, BECAUSE THE COSTS OF THE ZEV STANDARDS OUTWEIGH ANY PUTATIVE BENEFITS.

Had EPA fulfilled its statutory obligation to consider the costs and benefits of the ZEV standards together, it could not have granted the 2013 waiver. EPA failed to recognize that any GHG emissions benefit in

California would be offset by increased emissions in other states, given that CARB's mandates are nested within national fleet-wide emissions standards.

A. The ZEV standards have no vehicle pollution benefits.

Had EPA scrutinized CARB's reasoning more carefully, it would have been apparent that the putative environmental and public-health benefits of the ZEV standards are paltry at best. EPA's failure to do so renders its decision unlawful and arbitrary and capricious.

CARB concedes that there is *no* benefit in terms of average vehicle (tank-to-wheel) emissions from its amendments to the ZEV program: "[t]here is no benefit from including the ZEV proposal in terms of vehicle . . . emissions," because without the ZEV standard, "manufacturers would . . . produce cleaner conventional vehicles" to meet the separate air pollution and greenhouse gas standards. ZEV Initial Statement 77. Greenhouse gases affect the atmosphere globally rather than locally. And according to CARB's own analysis, any future

reductions in light-duty vehicle ozone-precursor emissions are entirely attributable to California's emission standards, not the ZEV standards.

Further, California's emission standards are now identical to the federal Tier 3 motor vehicle emission standards, so the ZEV standards will also have no vehicle pollution benefits at the federal level. *See Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards*, 81 Fed. Reg. 23414, 23414 (Apr. 28, 2014) ("These vehicle standards are intended to harmonize with California's Low Emission Vehicle program, thus creating a federal vehicle emissions program that will allow automakers to sell the same vehicles in all 50 states.").

This is because the federal and state mandates are nested within each other: California's ZEV standards are nested within California's broader vehicle emissions standards, and the ZEV standards are also nested within federal emissions standards—including the federal GHG standards at the time EPA initially granted the waiver. *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and*

Corporate Average Fuel Economy Standards; Final Rule, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

That nesting matters because both federal and CARB's emission standards apply to a manufacturer's fleet on a "production-weighted average basis," rather than to individual vehicles. *Compare* 40 C.F.R. § 86.1865-12(e), *with* Cal. Code Regs. tit. 13, § 1961.3(a). As a result, requiring the additional production of "zero emission" electric vehicles will not result in a cleaner overall vehicle mix in California or elsewhere in the country: each electric vehicle sale allows automakers more room to sell dirtier conventional gasoline cars under both state and federal standards. While a ZEV standard changes the mix of vehicles sold in each state, it does nothing to reduce aggregate vehicle pollution in California or nationally.

This conclusion tracks the economic literature. According to one study, California and thirteen other states' heightened standards "effectively loosen[ ] the national standard and give[ ] automakers scope to profitably increase sales of high-emissions automobiles in non-adopting states." Lawrence H. Goulder, et al., *Unintended consequences from nested state and federal regulations: The case of the Pavley*

greenhouse-gas-per-mile limits, 63 J. of Envtl Econ. & Mgmt. 187 (2012). The study concludes that granting a waiver "would lead to 'emissions leakage' of 100 percent at the margin: the reductions within [California and other] states would be *completely* offset by emissions increases outside of those states." *Id.* (emphasis added). A simplified chart comparing carbon dioxide emissions with and without a ZEV standard illustrates the point:

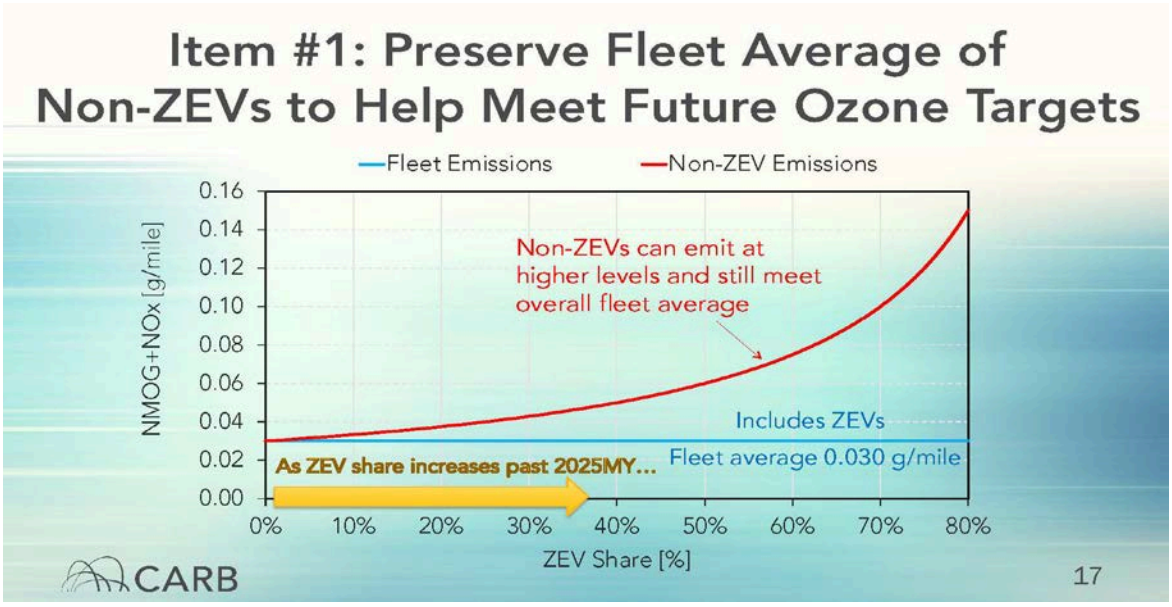
Model Year 2022 CO_2 Standards Comparison

	Conventional Vehicle 1	Conventional Vehicle 2	Conventional Vehicle 3	Fleet Average
No ZEV Waiver	241 g/mi	241 g/mi	241 g/mi	**241 g/mi**
	ZEV 1	Conventional Vehicle 2	Conventional Vehicle 3	
ZEV Waiver	0 g/mi	411 g/mi	312 g/mi	**241 g/mi**

This chart exemplifies how nested standards make it possible for manufacturers to simply reallocate compliance with CO_2 standards across their fleet for a given model year, producing no overall benefits.

The same is true for other pollutants. In a recent presentation, CARB admitted that due to rising ZEV sales, non-ZEV, conventional vehicle emissions for non-methane organic gases (NMOG) and nitrous

oxide (NOx) will increase dramatically in the future:



Advanced Clean Cars (ACC) II Workshop, California Air Resources Board (Sept. 16, 2020), Slide 17, https://ww2.arb.ca.gov/advanced-clean-cars-ii-meetings-workshops. This stunning figure demonstrates that there is no environmental benefit from waiving the CAA's preemption of California's ZEV standards.

B. The ZEV standards impose enormous costs.

While the ZEV mandate's benefits are paltry, the compliance costs of the 2013 waiver are enormous. CARB projects that an electric vehicle will cost $6,500 to $14,200 *more* than an average conventional vehicle in model year 2025. *See* Goulder et al., 63 J. Envtl Econ. & Mgmt. at C-1. Based on a similar estimate, a more recent study concludes that the

ZEV standard will increase average light-duty vehicle prices by $440 to $462 in 2025 (below CARB's own 2013 estimate of $500). Sanya Carley *et al.*, A Macroeconomic Study of Federal and State Automotive Regulations 77 (Mar. 2017).

The California mandates' costs can be estimated by multiplying the cost increase by the 16,428,922 new light-duty vehicles that EPA projects will be sold in 2025. *See* EPA, Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 4-10 (July 2016). This estimate implies an annual compliance cost of $7.2 to $7.6 billion in 2025.

"[I]n an age of limited resources available to deal with grave environmental problems, . . . too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232–33 (2009) (Breyer, J., concurring in part). It is not "rational, never mind 'appropriate,' " for EPA to waive preemption for a California standard that will "impose

billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 135 S. Ct. at 2707.

CONCLUSION

The petition should be dismissed, and EPA's revocation of the waiver should be upheld.

Dated: September 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation set forth in this Court's May 20, 2020 Order because this brief contains 3,344 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

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

/s/ Jonathan Berry
JONATHAN BERRY

CERTIFICATE OF SERVICE

I hereby certify that on this 16th Day of September, a true and correct copy of the foregoing Brief of Amicus Curiae Urban Air Initiative, Inc. in Support of Respondents was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF System and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Jonathan Berry
JONATHAN BERRY