ORAL ARGUMENT NOT YET SCHEDULED

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

No. 23-1143 and Consolidated Cases

WESTERN STATES TRUCKING ASSOCIATION, INC.; AND CONSTRUCTION INDUSTRY AIR QUALITY COALITION, INC.,
PETITIONERS,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; AND MICHAEL REGAN, in his official capacity as administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS.

On Appeal from the Environmental Protection Agency
EPA-HQ-OAR-2022-0330, EPA-HQ-OAR-2022-0331; FRL-9900-02-OAR

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TRUCKING ASSOCIATIONS, INC., TRUCKLOAD CARRIERS ASSOCIATION, NATIONAL TANK TRUCK CARRIERS, AND SPECIALTY EQUIPMENT MARKET ASSOCIATION & PERFORMANCE RACING, INC. IN SUPPORT OF PETITIONERS

ANDREW R. VARCOE
STEPHANIE A. MALONEY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

(*Additional counsel listed on following page.*)

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Counsel for Amici Curiae

RICHARD PIANKA
ATA LITIGATION CENTER
80 M Street, SE
Washington, DC 20003
(703) 838-1889
rpianka@trucking.org

Counsel for Amicus Curiae
American Trucking
Associations, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* Chamber of Commerce of the United States of America ("Chamber"), the American Trucking Associations, Inc. ("ATA"), Truckload Carriers Association ("TCA"), National Tank Truck Carriers ("NTTC"), and Specialty Equipment Market Association & Performance Racing, Inc. ("SEMA") certify the following:

(A) Parties and *Amici*. All parties and intervenors are listed in the opening briefs for Petitioners.

Amici curiae also acknowledge that additional *amici* may file briefs in support of Petitioners.

(B) Rulings Under Review. These petitions challenge actions 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 at 88 Fed. Reg. 20,688 (Apr. 6, 2023).

(C) Related Cases. An accurate statement regarding related cases appears in the Briefs for Petitioners.

/s/ Misha Tseytlin
MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici curiae* hereby submit the following corporate disclosure statement:

The Chamber states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

ATA, TCA, NTTC, and SEMA certify that each has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

/s/ Misha Tseytlin
MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties in the consolidated cases have consented to or affirmed no objection to the filing of this *amicus* brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici curiae* certifies that a separate brief is necessary to provide the broad perspective of the businesses that the *amici* represent, which cover every sector of the nation's economy, including the trucking industry, that will be directly affected by this litigation. *Amici curiae* are well-suited to provide the Court with important context on these subjects, which will assist the Court in resolving this case.

/s/ Misha Tseytlin
MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

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GLOSSARY OF TERMS

ACT Regulation	Advanced Clean Trucks Regulation
AFPM	American Fuel & Petrochemical Manufacturers
AFPM Comment	American Fuel & Petrochemical Manufacturers, Comment Letter Regarding California State Motor Vehicle Control Standards (Aug. 2, 2022)
ATA	American Trucking Associations
ATA Comment	American Trucking Associations, Comments on the California State Motor Vehicle Pollution Control Standards (Aug. 2, 2022)
CAA	Clean Air Act
CARB	California Air Resources Board
Chamber	Chamber of Commerce of the United States of America
Clean Energy Comment	Clean Energy, Comment Letter Regarding Advanced Clean Truck Request For Waiver of Preemption (Aug. 2, 2022)
EPA	U.S. Environmental Protection Agency
EPA ACT Waiver	Notice of Decision, Waiver of Preemption for California State Motor Vehicle and Engine Pollution Control Standards, 88 Fed. Reg. 20,688, 20,720 (Apr. 6, 2023)
GHG	Greenhouse Gas

NADA Comment	American Truck Dealers Division, National Automobile Dealers Association, Comment Letter Regarding CARB Request for Waiver of Preemption for ACT (Aug. 2, 2022)
NTTC	National Tank Truck Carriers
SEMA	Specialty Equipment Market Association & Performance Racing, Inc.
TCA	Truckload Carriers Association
Valero Comment	Valero Companies, Comment Letter Regarding CARB Request for Waiver of Preemption for ACT (Aug. 2, 2022)
WSPA	Western States Petroleum Association
WSPA Comment	Western States Petroleum Association, Comment Regarding California Resource Board's Request to Grant Federal Waivers of Preemption (Aug. 2, 2022)

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addenda to Petitioners' Briefs.

INTEREST OF *AMICI CURIAE*

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

ATA is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States, and virtually all operate in interstate commerce among the States. ATA

regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

TCA is the only national trade association whose sole focus is the long-haul truckload segment of the trucking industry. TCA represents dry van, refrigerated, flatbed, and rail intermodal carriers operating in the 48 contiguous U.S. States, as well as Alaska, Mexico, and Canada.

NTTC has represented the tank truck industry since its founding in 1945. NTTC's membership includes over 600 companies that specialize in bulk transportation services by cargo tank throughout North America.

SEMA represents the automotive aftermarket, meaning all of those products and services provided after a vehicle's initial sale. SEMA's members include over 7,000 automobile equipment manufacturers, distributors, retailers, publishing companies, auto restorers, street-rod builders, restylers, car clubs, race teams, and myriad other related organizations. SEMA's members do not oppose—indeed, they support—EPA's goal of reducing greenhouse gas ("GHG") emissions consistent with the agency's statutory authority. SEMA, along with its members, works closely with the California Air Resources Board ("CARB") to ensure that aftermarket auto-parts meet applicable clean-air standards. Most

importantly, SEMA does not oppose electric vehicles—or the adoption of other alternatives to traditional ICE vehicles. To the contrary, SEMA is steadfastly technology neutral. And the specialty automotive aftermarket industry SEMA represents has led the way on alternative-fuel innovations, from replacing older engine technologies with newer, cleaner versions to converting older ICE vehicles to new electric or hydrogen-powered vehicles.

Amici and their members represent a wide range of businesses in the supply chain that are affected by California's imposition of new zero-emissions requirements on the trucking industry.[1]

[1] To be sure, affected businesses do not necessarily have a unified view of the issues implicated in this case. For example, various parties have entered into an agreement with CARB, committing signatory manufacturers to meet certain standards set forth in the ACT Regulation irrespective of the outcome of any litigation challenging the waivers or authorizations for those regulations or challenging CARB's overall authority to implement those regulations. *See generally* California Air Resources Board, *CARB and Truck and Engine Manufacturers Announce Unprecedented Partnership To Meet Clean Air Goals* (July 6, 2023), https://ww2.arb.ca.gov/news/carb-and-truck-and-engine-manufacturers-announce-unprecedented-partnership-meet-clean-air (all websites last visited Nov. 11, 2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Air Act ("CAA") generally supports the national market for motor vehicles (and motor vehicle services) by preempting States from establishing their own vehicle and engine emissions standards. 42 U.S.C. § 7543(a). At the same time, Congress has granted California leeway to develop its own standards, while permitting other States to adopt California's standards. *Id.* § 7543(b). Congress did not give California unreviewable free rein under this unique regime. Pursuant to 42 U.S.C. § 7543(b)(1), before California can implement its own standards that other States can adopt, California must obtain a waiver of preemption from the U.S. Environmental Protection Agency ("EPA"). Review by EPA serves to ensure that the standards proposed by California are "consistent with" Section 202(a) of the CAA and needed "to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1).

Alas, EPA failed in its review here. The Advanced Clean Trucks Regulation ("ACT Regulation") promulgated by CARB and blessed by EPA exceeds legal bounds. In granting California's request for a waiver and in failing to consider commenters' concerns over multiple fatal flaws in the ACT Regulation, EPA acted arbitrarily and capriciously. As a

result, California's decision to accelerate its in-state mandates for on-road, zero-emission medium- and heavy-duty trucks will force upheaval upon the national trucking sector, with serious repercussions for the consumers, communities, and industries that rely upon it nationwide.

Commenters opposing the waiver demonstrated multiple fatal flaws in the ACT Regulation, and EPA failed to respond adequately to their comments. California was arbitrary and capricious in determining that its standards are, in the aggregate, at least as protective as applicable federal standards. California failed to address adequately the development of the infrastructure or the procurement of raw materials needed to support battery-powered trucks on the road, as well as the upstream and downstream emissions produced by switching to battery power. California's standards are also inconsistent with federal requirements concerning technological feasibility and necessary leadtime, resulting in unattainable goals. Critically, the standards impose prohibitive costs on manufacturers and purchasers, with serious repercussions for the broader transportation industry, the U.S. supply chain, and the U.S. economy at a time of historically high inflation. This will shrink consumer choice in a major national market, placing great

pressure on small and medium-size businesses that cannot easily afford electric trucks, and mandating equipment with operational capabilities that are insufficient to meet the needs of the nation's supply chain. Because the trucking industry serves nearly all other sectors of the economy, the costs imposed by the standards will be passed on in the form of higher prices for countless goods and services.

This Court should vacate EPA's decision granting California's request for a preemption waiver as arbitrary and capricious.

ARGUMENT

I. EPA's grant of a waiver for CARB's ACT Regulation was arbitrary and capricious

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, this Court must reject agency action that is "'arbitrary and capricious, . . . or otherwise not in accordance with law' or if (it) fails to meet statutory, procedural, or constitutional requirements," which includes reviewing whether the agency gave "reasoned consideration to the issues before [it] and reach[ed] a result which rationally flows from this consideration." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1095–96 (D.C. Cir. 1979) ("*MEMA I*") (citation omitted).

EPA's grant of a preemption waiver for California's ACT Regulation was arbitrary and capricious. As Petitioners explain, EPA's determination was improper under multiple statutory criteria. This brief focuses on two points. First, commenters refuted California's conclusion that its ACT Regulation was at least as protective as the federal standard, showing the numerous ways in which a switch to battery-powered vehicles will increase emissions and create strain on an already overworked power grid. Second, commenters showed that the ACT Regulation is inconsistent with technological feasibility and compliance-cost requirements. Either reason suffices for this Court to reject EPA's grant of a waiver to California as arbitrary and capricious.

A. The CAA allows California to establish emission standards, while requiring EPA to curtail State overreach through federal preemption

Congress has long asserted federal control over motor vehicle emissions by preempting every State but one from establishing its own emissions standards. *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1078–79 (D.C. Cir. 1996) (quoting *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990)). This reflects Congress' recognition of the "difficulty of subjecting motor vehicles, which readily move across state boundaries, to

control by individual states," as well as its strong interest in avoiding the "spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for [ ] manufacturers." *Id.* at 1079 (quoting *MEMA I*, 627 F.2d at 1109).

For historical reasons, Congress has exempted California from the CAA's preemption of state regulation for motor vehicle emissions, allowing California "to act as a kind of laboratory for innovation" in emissions reduction. *MEMA I*, 627 F.2d at 1111. Congress nevertheless has required California to seek a waiver of preemption from EPA to implement its own emissions standards. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998) ("*MEMA II*"); 42 U.S.C. § 7543(b)(1). Once EPA validly grants such a waiver, any other State may adopt California's standards. *See* 42 U.S.C. § 7507; *MEMA II*, 142 F.3d at 453. As a result, today "motor vehicles must be either 'federal cars' designed to meet the EPA's standards or 'California cars' designed to meet California's standards." *Engine Mfrs. Ass'n*, 88 F.3d at 1080 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. N.Y. State Dep't of Env't Conservation*, 17 F.3d 521, 526–27 (2d Cir. 1994)).

EPA review of California's waiver requests reflects congressional intent to allow California "to blaze its own trail with a minimum of federal oversight," *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979), while ensuring that EPA remains an essential check on state claims of power. The CAA provides that EPA shall grant California's waiver request if the State determines that its standards are, in the aggregate, at least as protective of the public health and welfare as applicable federal standards. *MEMA I*, 627 F.2d at 1120; 42 U.S.C. § 7543(b); *see* Notice of Decision, Waiver of Preemption for California State Motor Vehicle and Engine Pollution Control Standards, 88 Fed. Reg. 20,688, 20,720 (Apr. 6, 2023) ("EPA ACT Waiver").

On the other hand, the CAA requires EPA to reject California waiver requests in certain circumstances. Specifically, EPA must deny a waiver if it finds that: (1) California's protectiveness determination was arbitrary or capricious, (2) California does not need its own standards to meet "compelling and extraordinary conditions," *see* Private Pet'rs Br. at 50–58, or (3) California's standards and enforcement procedures are inconsistent with Section 202(a) of the CAA, 42 U.S.C. § 7521(a), which concerns technical feasibility, adequate lead time to respond to and

address changes, and compliance costs. *MEMA II*, 142 F.3d at 453; 42 U.S.C. § 7543(b)(1).

Agreeing with Petitioners that EPA's findings on these criteria were improper, *see generally* Private Pet'rs Br. 28–37, 50–58; State Pet'rs Br. 38–37, *amici* underscore the particular relevance of the first and third requirements. Under the first requirement, California must show that "its standards will be 'in the aggregate, at least as protective of public health and welfare as applicable Federal standards' before promulgating them," *MEMA II*, 142 F.3d at 453 (quoting 42 U.S.C. § 7543(b)(1)), and a challenger can refute California's showing by providing "clear and compelling evidence" that California's protectiveness determination was arbitrary and capricious, *MEMA I*, 627 F.2d at 1122–23. On the third requirement, California must show that its standard and enforcement procedures are consistent with Section 202(a) of the CAA, meaning that they are technologically feasible, with "appropriate consideration to cost, energy, and safety factors associated with the application of such technology." 42 U.S.C. § 7521(a)(3)(A)(i); *see MEMA I*, 627 F.2d at 1111, 1122; *see* Private Pet'rs Br. 28–37; State Pet'rs Br. 28–37. In addition, California must show that it provided regulated entities with adequate

lead time and technological feasibility, 42 U.S.C. § 7521(a)(3)(C), which is a *necessary* prerequisite to any waiver, requiring a court to "reject an interpretation that would permit such a frustration of congressional purpose" by allowing California to proceed without providing the four-year lead time required by the CAA, *see Am. Motors Corp. v. Blum*, 603 F.2d 978, 981 (D.C. Cir. 1979). Opponents can defeat a waiver request by demonstrating that California has failed to meet this criterion. *MEMA I*, 627 F.2d at 1122–23.

B. EPA's waiver violates the CAA requirement that any protectiveness determination not be arbitrary and capricious

1. Commenters, including numerous Petitioners, showed that California's protectiveness determination was itself arbitrary and capricious. *See* 42 U.S.C. § 7543(b)(1)(A). Under this criterion, EPA must "conduct[ ] its own analysis of the newly adopted California standards" to determine whether the new standards, taken as a whole, are more or less protective than comparable federal standards, performing this analysis "within the broader context" of previously waived programs that "rel[y] upon protectiveness determinations that EPA has previously

found were not arbitrary and capricious." EPA ACT Waiver, 88 Fed. Reg. at 20,695, 20,697.

California claimed to have adopted the ACT Regulation to "accelerate the market for on-road zero-emission vehicles and to reduce emissions" of various pollutants and GHGs "from medium- and heavy-duty on-road vehicles," by requiring vehicle manufacturers to produce increasingly higher percentages of their fleet of medium and heavy-duty trucks as zero-emission vehicles. Cal. Code Regs. tit. 13, §§ 1963(a), (c), 1963.1. But California did not adequately address the development of the infrastructure or the procurement of raw materials needed to support these vehicles on the road. Nor did California consider how requiring production of zero-emissions and electric vehicles would cause additional upstream and downstream emissions from producing the batteries and the electricity needed to power this new fuel-independent system.

Commenters opposing EPA's waiver of the ACT Regulation argued persuasively that California's protectiveness determination with respect to the regulation's new standards was arbitrary and capricious because California underestimated the emissions that the standards would generate. "CARB failed to conduct a full lifecycle analysis to understand

the full emissions impacts of battery-electric trucks." Valero Companies, Comment Letter Regarding CARB Request for Waiver of Preemption for ACT 2 (Aug. 2, 2022) ("Valero Comment").[2] For example, commenters explained that CARB failed adequately to account for significant upstream and downstream emissions associated with powering "zero-emissions" trucks, including those produced in the process of generating the electricity to power the cars, mining the components necessary to produce the batteries, producing and replacing the batteries, and safely disposing of batteries at the end of their useful life, as well as tire emissions generated by heavier battery-operated vehicles. *See* American Fuel & Petrochemical Manufacturers, Comment Letter Regarding California State Motor Vehicle Control Standards, at 8–12 (August 2, 2022) ("AFPM Comment");[3] Valero Comment at 2 n.4.

Commenters also raised the serious concern that the exorbitant costs associated with implementing California's standards would "send a strong economic signal" to truck purchasers "to retain older heavy-duty

[2] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0108.

[3] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0088.

vehicles and forgo purchases of newer, cleaner, heavy-duty vehicles" to avoid the "prohibitive" costs associated with adopting the technologies mandated by the ACT Regulation within the prescribed timeframe, thereby slowing fleet turnover and increasing "criteria emissions compared to maintaining the federal standards." *See* AFPM Comment at 3; American Trucking Associations, Comments on the California State Motor Vehicle Pollution Control Standards, at 3 (August 2, 2022) ("ATA Comment");[4] American Truck Dealers Division, National Automobile Dealers Association, Comment Letter Regarding CARB Request for Waiver of Preemption for ACT, at 5 (August 2, 2022) ("NADA Comment");[5] Clean Energy, Comment Letter Regarding Advanced Clean Truck Request for Waiver of Preemption, at 2 (August 2, 2022) ("Clean Energy Comment");[6] Valero Comment at 7.

These concerns are well-founded. There are significant emissions associated with vehicle production, operation (recharging/refueling),

[4] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0091.

[5] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0090.

[6] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0093.

required infrastructure modifications, battery replacement, and end of life disposal options. AFPM Comment at 8. Indeed, the greater weight of battery-electric vehicles may *increase* harmful emissions, including both airborne and soil and water pollutants, through increased tire wear. *See* Emissions Analytics, *Gaining Traction, Losing Tread Pollution from Tire Wear Now 1,850 Times Worse Than Exhaust Emissions* (cited by AFPM Comment at 5 & n.20).[7] Moreover, California's aggressive rule will incentivize the trucking industry to drive older, more polluting vehicles for longer periods, and to pre-buy or no-buy before and after compliance deadlines, in both cases undermining stated emissions goals. Despite expectations that upfront prices for battery-electric vehicles will fall over the next decade, "[t]ractor trucks . . . are generally the most challenging heavy-duty segment to electrify due to their heavy weight and their need to often travel long distances at a time." Ben Sharpe & Hussein Basma, *A Meta-Study of Purchase Costs for Zero-Emission Trucks*, 2 (Int'l Council on Clean Transp., Working Paper No. 2022-09, Feb. 2022)[8] (cited

[7] Available at https://www.emissionsanalytics.com/news/gaining-traction-losing-tread.

[8] Available at https://theicct.org/wp-content/uploads/2022/02/purchase-cost-ze-trucks-feb22-1.pdf.

by Valero Comment at 4). Additional significant barriers stand in the way of ensuring adequate infrastructure to support the electrification of this challenging industry. *See generally* Andrew Burke, Nat'l Ctr. for Sustainable Transp., *Assessment of Requirements, Costs, and Benefits of Providing Charging Facilities for Battery-Electric Heavy Duty Trucks at Safety Roadside Rest Areas* (Feb. 2022)[9] (cited by Valero Comment at 4). As history has shown, "[t]echnology that is not properly tested, more expensive, or creates uncertainty for fleets is a recipe for pre-buys/low-buys or no-buys; a scenario that is not good for fleets, manufacturers, the supply chain, the economy, and the environment." ATA Comment at 3; NADA Comment at 3; Western States Petroleum Association, Comments Regarding the California Air Resources Board's Request to Grant Federal Waivers of Preemption, at 2 (Aug. 2, 2022) ("WSPA Comment").[10]

California's decision to force the transition to battery-electric vehicles has global consequences, particularly if the transition is not accompanied by appropriate safeguards. As the United Nations Conference on Trade and Development has warned, the drive toward

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[9] Available at https://escholarship.org/uc/item/3c07s2jh.

[10] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0109.

battery-electric vehicles presents "challenges in ensuring that the raw materials are sustainably sourced given that their exploitation is often associated with undesirable environmental footprints, poor human rights and worker protection," and it remains uncertain whether "there is enough supply of these raw materials to meet rising demand given that available quantities are low for some of the raw materials, they are not widely geographically distributed in high concentrations and they have low substitutability." *See* United Nations Conference on Trade and Development, *Commodities at a Glance: Special Issue on Strategic Battery Raw Materials* (Feb. 2020)[11] (cited by AFPM Comment at 9 & n.33). Recent studies indicate that the concerns and data brought to EPA remain just as salient today. *See generally* McKinsey, *The Race to Decarbonize Electric—Vehicle Batteries* (Feb. 23, 2023).[12]

2. EPA's only response to these weighty arguments was unsupported *ipse dixit*, violating EPA's duty to "act[ ] reasonably," *MEMA I*, 627 F.2d at 1123; *see Int'l Harvester Co. v. Ruckelshaus*, 478

[11] Available at https://unctad.org/system/files/official-document/ditccom2019d5_en.pdf.

[12] Available at https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/the-race-to-decarbonize-electric-vehicle-batteries.

F.2d 615, 642–43 (D.C. Cir. 1973), as well as its "obligation[ ] to explain and expose every step of its reasoning'" so that "reviewing courts [are] able to discern the basis for [its] decision." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002) (quoting *Am. Lung Ass'n v. EPA,* 134 F.3d 388, 392 (D.C. Cir. 1998)).

EPA declined to consider commenters' evidence that the ACT Regulation was less protective than existing federal standards. *See* EPA ACT Waiver, 88 Fed. Reg. at 20,698. EPA ignored well-documented concerns regarding the lifecycle emissions of battery-powered vehicles, stating—again without support—that 42 U.S.C. § 7543(b)(1) "does not require California or EPA to consider lifecycle emissions" or "look broadly outside motor vehicle emissions." EPA ACT Waiver, 88 Fed. Reg. at 20,698. And EPA refused to address commenters' evidence regarding the emissions increases resulting from slowed fleet turnover, merely stating in a conclusory manner that these "statements" about "purchasing decisions" failed to "demonstrate that CARB's emissions standards are less protective than applicable Federal standards." *Id.* But EPA cannot ignore its duty to consider whether California's standard

was, in the "aggregate," at least as protective as the federal standard. *MEMA I*, 627 F.2d at 1120.

C. EPA's waiver is arbitrary and capricious because the ACT Regulation is inconsistent with CAA Section 202(a)

1. As State and Private Petitioners both make clear, EPA also improperly determined that California's ACT Regulation is inconsistent with the federal statutory requirements set forth in CAA Section 202(a). Commenters showed that there is presently no adequate technology to allow the trucking sector to comply with California's ACT Regulation, and California did not allow adequate lead time for the development of necessary technology that would allow for compliance. *See* 42 U.S.C. § 7543(b)(1)(C). EPA must consider "whether adequate technology is either presently available or already in existence and in-use." EPA ACT Waiver, 88 Fed. Reg. at 20,710; *see Am. Motors Corp.*, 603 F.2d at 981. If the answer to this initial question is no, the agency must then consider "[w]hether California has provided adequate lead time for the development and application of necessary technology." EPA ACT Waiver, 88 Fed. Reg. at 20,710; *see MEMA II*, 142 F.3d at 463. EPA must also "assess the 'economic costs' of California's proposed emissions standards,

including the costs resulting from 'the timing of a particular emission control regulation,'" as Private Petitioners discuss at length. *Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 629 (D.C. Cir. 2010) (citing *MEMA I*, 627 F.2d at 1118); Private Pet'rs Br. 37.

Here, as State Petitioners note, adequate technology does not currently exist to allow the trucking sector to comply with California's ACT Regulation, and California did not allow adequate time for the development of technology that would allow manufacturers to comply. State Pet'rs Br. 29.

As an initial matter, current technology does not allow for mass transition of the trucking industry to zero-emission and battery-powered vehicles. "[T]here are no hydrogen fuel cell tractor trucks available commercially in North America or Europe," and that technology is not likely to be developed within the next ten years. *See* Valero Comment at 4 (citing Burke, *supra*, at 16). This fact, in combination with the aggressive timeline imposed by the ACT Regulation, means that the ACT Regulation effectively forces the industry to shift to reliance on battery-electric vehicles. *Id.* Yet as multiple commenters observed, including Private Petitioner AFPM, "there are technical obstacles as well as significant

costs that make these vehicles impractical," particularly for the traditional trucking sector. *Id.*; *see* AFPM Comment at 10–11. These obstacles include the high cost and uncertain availability of the critical minerals needed to produce the "extraordinarily heavy, voluminous, and expensive" batteries required to meet these standards.[13] Valero Comment at 5, *see* AFPM Comment at 8–9. Commenters also pointed to data concerning safety issues presented by battery technology for medium- and heavy-duty vehicles, including driver safety during lengthy recharging stops, which would likely further exacerbate the ongoing

[13] Although critical minerals are essential to many key products manufactured in the United States, our Nation depends heavily on imported minerals. In 2022, of the 50 USGS-designated critical minerals, the United States was "100% net import reliant" for 12 of them and was "more than 50% net import reliant" for 31 more. U.S. Geological Survey, Mineral Commodity Summaries 20 (Jan. 31, 2023), https://on.doi.gov/3XXX2Pb. The batteries that power electric vehicles "depend on five *critical minerals* whose domestic supply is potentially at risk for disruption: lithium, cobalt, manganese, nickel, and graphite," and the U.S. "is heavily dependent on imports for these minerals for use in EV batteries." Cong. Res. Serv., *Critical Minerals in Electric Vehicle Batteries* i (Aug. 29, 2022), https://bit.ly/3Oriedd. Notably, China controls the refining of the raw materials necessary to produce electric vehicles and dominates the production of the components themselves," AFPM Comment Letter at 9 n.34 (citing Jane Nakano, Ctr. for Strategic & Int'l Studies, *The Geopolitics of Critical Minerals Supply Chains* (Mar. 2021), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210311_Nakano_Critical_Minerals.pdf?DR03x5jIrwLnNjmPDD3SZjEkGEZFEcgt); Cong. Res. Serv., *Critical Minerals in Electric Vehicle Batteries*, at 12.

labor shortage in the trucking industry. AFPM Comment at 4, 12; Valero Comment at 5–6.

California's standards fail to provide the mandatory four-year lead time and three-year stability requirements established in Section 202(a)(3)(c) of the CAA. *See* 42 U.S.C. § 7521(a)(3)(c); *MEMA II*, 142 F.3d at 463; State Pet'rs Br. 29; *see generally* WSPA Comment at 1; ATA Comment at 3; Truck and Engine Manufacturers Association, Comments Regarding California State Motor Vehicle Control Standards (Aug. 1, 2022);[14] Truck and Engine Manufacturers Association, Comments in Response to the Supplemental Filings of the California Air Resources Board (Aug. 19, 2022).[15] Here, as commenters described in detail, the ACT Regulation goes into effect at the start of the 2024 model year, which begins on January 1, 2024, *see* Cal. Code Regs. tit. 13, §§ 1963.1, 1963.2—well short of the four years Congress found necessary to provide for the research, development and production programs required to develop the new motor vehicle technology, *see Am. Motors Corp.*, 603 F.2d at 981.

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[14] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0071.

[15] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0331-0132.

Moreover, commenters including multiple Petitioners demonstrated that California's ACT Regulation is technologically infeasible because CARB did not "present[ ] an electric infrastructure plan to support a rapid increase in predominantly electric vehicles—for electric grid generation, transmission, and distribution system needs and for the equitable deployment of electric vehicle charges statewide," of particular concern to a State that repeatedly "suffer[s] from rolling blackouts." WSPA Comment at 1. And this lack of infrastructure to support widespread deployment of medium- and heavy-duty zero-emissions vehicles is of extreme concern for regional and interstate trucking operators, since heavy-duty, zero-emission electronic vehicles are "significantly constrained by a range of roughly 150 miles or less," far less than the nearly 600 miles that a typical long-haul driver would cover in a day, and require recharging times in excess of three hours. Clean Energy Comment at 2; *see* AFPM Comment at 10–11; Valero Comment at 4.

The extensive permitting processes to develop sufficient charging infrastructure to support a shift to zero-emissions electric trucks exacerbates the problems caused by California's lack of lead time. The

current environmental permitting processes that are a prerequisite for building much of the charging infrastructure, grid interconnections, and other related infrastructure take significant time to complete. U.S. Chamber of Commerce, Comment Letter Regarding EPA's Proposed Rule on Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles, at 3 (June 16, 2023).[16] It takes an average of 4.5 years to complete an environmental impact statement under the National Environmental Policy Act, while some environmental reviews take longer, not only delaying but sometimes blocking these infrastructure projects altogether. *See id.*; U.S. Chamber of Commerce Led Business Community Comments on the Council on Environmental Quality's Proposed Rule, "National Environmental Policy Act Implementing Regulations Revisions Phase 2," at 3, 5–6, 17, 20 (Sept. 29, 2023).[17] Furthermore, manufacturers' ability to comply with California's ACT Regulation will be further hampered by the "anarchic patchwork," *Engine Mfrs. Ass'n*, 88 F.3d at 1079, of state and local regulations that inform the timing, location, and availability of

[16] Available at https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0985-1583.

[17] Available at https://www.globalenergyinstitute.org/sites/default/files/2023-10/USChamberCommerce%20Business%20Community%20Cmts%20-%20NEPA%20Phase%202%20Rule%20-%209_29_2023.pdf.

the infrastructure to support a mobile zero-emission fleet, Valero Comment at 2.

Relatedly, EPA's analysis failed to consider compliance costs appropriately. *See* State Pet'rs Br. 36–37. As this Court has explained, with Section 202(a), Congress sought "to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers. It therefore requires that emission regulations be technologically feasible within economic parameters." *MEMA I*, 627 F.2d at 1118. Here, opponents of the preemption waiver presented EPA with robust evidence showing that the current and near-term limitations in battery technology and infrastructure development will impose prohibitive compliance costs on truck manufacturers and purchasers, with powerful ripple effects throughout the traditional trucking sector and beyond.

These costs flow, in large part, from the extraordinary yet difficult-to-predict expenses associated with reliance on battery power. A medium- or heavy-duty truck requires far more power to operate than light-duty vehicles, to accommodate both their greater weight and, in the long-haul sector especially, the lengthy distances traveled per day. *See* Valero

Comment at 4–5. The costs of providing this power exceeds even the significant upfront cost of the battery itself, including costs arising from the need to reduce cargo to accommodate heavy batteries, to increase travel times to accommodate frequent and lengthy charging stops, and excess wear and tear due to the added weight of the batteries. *See, e.g.*, AFPM Comment 11 n.45; Valero Comment at 4–5.

California's failure to provide adequate lead time and ensure the technological feasibility of its ACT Regulation will have disastrous, wide-ranging effects. While the ACT Regulation facially targets manufacturers selling medium- and heavy-duty trucks in California, the inherently mobile and interconnected nature of the traditional trucking sector defies any attempt to cabin its impact locally. Rather, EPA's waiver will create untenable costs that can be contained neither within California nor within the trucking industry, escalating costs for shippers that will be felt throughout the entire supply chain. Valero Comment at 7. America's national economy depends on a well-functioning trucking sector. Trucking moves nearly 73 percent of goods in America, carrying more than 11 billion tons of freight in 2022 alone, over hundreds of billions of

miles. Am. Trucking Ass'n, *Economics and Industry Data*.[18] Trucks cross state borders not just "readily," *Engine Mfrs. Ass'n*, 88 F.3d at 1079, but routinely and by necessity—notably including the trucks that carry goods from California's active ports to consumers throughout the rest of the country, *see* Valero Comment at 6. Indeed, trucks originating in California play a critical role in our national economy. To give one concrete illustration, the Ports of Los Angeles and Long Beach alone handle nearly 30 percent of all containerized international waterborne trade in the United States. The Port of Los Angeles, *Facts and Figures* (cited by Valero Comment at 6).[19] Put another way, one out of every three items imported to or exported from the United States in containers comes through these California ports, before then being conveyed to the rest of the country by the trucking industry. *Id.* California's action will further escalate costs for shippers carrying these goods from California, which will be passed on to consumers and communities nationwide. Valero Comment at 7.

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[18] Available at https://www.trucking.org/economics-and-industry-data.

[19] Available at https://www.portoflosangeles.org/business/statistics/facts-and-figures.

Long-haul trucking is especially unconstrained by state borders—and overwhelmingly comprises small businesses that are disproportionately vulnerable to changing economic circumstances. Indeed, roughly 96 percent of U.S. fleet owners are small businesses operating 20 or fewer commercial vehicles. *See* ATA Comment at 2; Am. Trucking Ass'n, *supra*, n.19. These small businesses operate on tight margins and typically do not have the financial resources necessary to absorb significant cost increases arising from regulatory compliance. ATA Comment at 2. Thus, California's ACT Regulation, which provides these small businesses little-to-no time to plan for and adjust to the new zero-emissions requirements, threatens to undercut America's critical trucking industry significantly.

Moreover, California's go-it-alone action risks progress that the agency is making to decarbonize the on-road freight sector using a national fifty-state approach. In 2011 and 2016, the American Trucking Associations worked closely with EPA and supported two separate EPA/National Highway Traffic Safety Administration regulations establishing first-ever standards for truck engine and vehicle GHG emissions and fuel consumption standards (known as Phase 1 and Phase

2 respectively) to promote a new generation of cleaner, more fuel-efficient trucks. ATA Comment at 6. The next round of GHG emission regulations will address a national zero-emission vehicle pathway. President Biden's August 2021 Executive Order requires EPA to complete a Phase 3 Rule by the Summer of 2024. *Id.* As proposed, new stringent carbon metrics for new heavy-duty vehicles would take effect beginning in 2027 and beyond. Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3, 88 Fed. Reg. 25,926 (Apr. 27, 2023). California's decision to plow ahead with its own contrary set of standards—and EPA's arbitrary and capricious approval of its waiver request—leaves industry caught between these competing standards. This untenable position is precisely the "nightmare[ ] for [ ] manufacturers" that Congress hoped to avoid in crafting the CAA. *MEMA I*, 627 F.2d at 1109.

A harmonized national strategy is needed to ensure both a thriving U.S. economy and sustainable solutions to environmental challenges.

2. EPA ignored these arguments and the accompanying evidence demonstrating that the ACT Regulation is inconsistent with 42 U.S.C. § 7521(a), contrary to EPA's statutory mandate to consider all such evidence, as State Petitioners discuss at length. *See MEMA I*, 627 F.2d

at 1122. EPA noted but failed to respond meaningfully to commenters' concerns about the high cost and uncertain availability of the minerals necessary to produce the batteries needed to create the zero-emission vehicles, asserting only that such "claims regarding various battery issues" did not demonstrate that the "compliance costs are so excessive to make the standards infeasible." EPA ACT Waiver, 88 Fed. Reg. at 20,711. Similarly, EPA made only glancing reference to commenters' infrastructure concerns, *id.*, 88 Fed. Reg. at 20,710, noting that CARB "performed a market segment analysis" and submitted information supporting its "assessment of battery technology—including safety, the suitability of the grid and charging infrastructure" without addressing the *merits* of California's analysis. *Id.*, 88 Fed. Reg. at 20,711. Rather than address these claims and evidence, EPA offered a detailed exegesis of its powerlessness to rein in California's regulatory efforts, underscoring its belief that "it is beyond the scope of EPA's review to examine the feasibility of CARB's standards outside of California." *Id.*, 88 Fed. Reg. at 20,710 n.198, 20,711; *see* State Pet'rs Br. at 30–37. EPA's deference to California's policy judgments does not—indeed, cannot—extend so far as to permit the agency to "ignore evidence demonstrating

that the waiver should not be granted." *MEMA I*, 627 F.2d at 1123 (citation omitted). EPA's waiver was thus arbitrary and capricious.

No better was EPA's response to commenters' argument that the ACT Regulation is inconsistent with the leadtime and stability requirements set forth in 42 U.S.C. § 7521(a)(3)(C). Notwithstanding 42 U.S.C. § 7543(b)(1)(C)'s command that California's standards must be "consistent with section 7521(a) of this title," without limitation or exclusion, EPA asserted that "[42 U.S.C. § 7521](a)(3)(C) does not apply to California and thus EPA cannot deny CARB's waiver requests on this basis." EPA ACT Waiver, 88 Fed. Reg. at 20,723. As State Petitioners forcefully contend, this conclusion is contradicted by the decisions of this Court, which have evaluated whether California's standards are consistent with 42 U.S.C. § 7521(a). *See MEMA I*, 627 F.2d at 1026 n.64; *MEMA II*, 142 F.3d at 462; *Am. Motors Corp.*, 603 F.2d at 981; *see* State Pet'rs Br. at 30–37. Ignoring this precedent, EPA resorts to legislative history to argue that Congress could not have intended Section 7521(a)(2)(C) to apply to California and cherry-picks its own prior rulings to conclude that Section 7521(a)(3)(C) cannot apply to California because EPA cannot assess or apply this criterion without exceeding the scope of

its deferential review. EPA ACT Waiver, 88 Fed. Reg. at 20,714 n.232, 20,715 n.242, 20,722–23. Yet where, as here, the terms of a statute are unambiguous, the "language of the statute itself 'must ordinarily be regarded as conclusive.'" *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 462 (1987) (citation omitted). EPA's circular reasoning is plainly unreasonable, rendering its waiver arbitrary and capricious.

CONCLUSION

This Court should grant the Petition.

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Respectfully Submitted,

/s/ Misha Tseytlin
MISHA TSEYTLIN
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Counsel for Amici Curiae

Of Counsel:
ANDREW R. VARCOE
STEPHANIE A. MALONEY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

RICHARD PIANKA
ATA LITIGATION CENTER
80 M Street, SE
Washington, DC 20003
(703) 838-1889

Counsel for Amicus Curiae American Trucking Associations

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), and this Court's June 6, 2023, briefing order, *see* Case No. 23-1143, Doc. 2002459, because this brief contains 5,812 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and D.C. Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

Dated: November 13, 2023

/s/ Misha Tseytlin
MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2023, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: November 13, 2023

/s/ Misha Tseytlin
MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com