STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

MIKE HILGERS
ATTORNEY GENERAL

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Michael S. Regan, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Submitted electronically via Regulations.gov

Re: Comments of the States of Nebraska, Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming on the notice of opportunity for public hearing and comment on *California State Motor Vehicle Pollution Control Standards; Advanced Clean Fleets Regulation; Request for Waiver of Preemption and Authorization* [EPA–HQ–OAR–2023–0589; FRL–12042–01–OAR], 89 Fed. Reg. 57,151 (July 12, 2024).

Dear Administrator Regan:

You recently issued a notice of opportunity for public comment on California's request for a preemption waiver for a package of administrative rules called Advanced Clean Fleets. Advanced Clean Fleets is a comprehensive overhaul of California's regulation of new medium- and heavy-duty trucks whose stated "goal" is that "100 percent of medium- and heavy-duty vehicles in [California] be zero-emission by 2045 for all operations where feasible and by 2035 for drayage trucks." Cal. Exec. Order N-79-20, at 2 (Sept. 23, 2020). The Clean Air Act preempts States from enacting standards that regulate emissions from new motor vehicles. California seeks a waiver under Section 209(b) of the Clean Air Act, which allows California, and no other State, to avoid the Act's preemption provision.

Nebraska and 23 other States oppose California's request for a preemption waiver. Through Advanced Clean Fleets, California is attempting to export its radical climate agenda to our States, using its large population, market share, and access to international ports on the West Coast to force nationwide compliance with its ban on internal-combustion trucks. Our States oppose this unprecedented overreach. Our States' economies depend on the logistics, farming, and biofuels sectors, and Advanced Clean Fleets threatens all three (and more). Our States are also connected

to California via the interstate system. An electric-truck mandate in California means more battery-electric trucks traveling in our States—a mandate our States did not ask for and do not support.

Not only is Advanced Clean Fleets bad policy—it is also illegal, and no waiver granted by the Environmental Protection Agency (EPA) can change that. We submit this comment to explain the five reasons that granting the waiver California requests would be unlawful. *First*, Section 209(b), which singles out California for special treatment, violates the States' equal sovereignty and is unconstitutional. No waiver can be granted under that statute. *Second*, given Advanced Clean Fleets' novel electric-vehicle mandate and implications for EPA's own statutory authority to set emissions standards, granting a waiver would violate the major-questions doctrine. *Third*, granting a waiver would be unlawful because Advanced Clean Fleets violates two more federal laws: the Federal Aviation Administration Authorization Act of 1994 and the dormant Commerce Clause. *Fourth*, California has failed to carry its burden under each of the three statutory factors that EPA must consider in deciding whether to grant a waiver. *Finally*, if EPA grants a waiver, it should not grant a waiver that would allow California to enforce Advanced Clean Fleets retrospectively, as California requests. Just one of these legal impediments is sufficient to deny California's request for a waiver. Advanced Clean Fleets suffers from all five.

I. California Needs a Waiver for the High-Priority Fleets and Drayage Rules.

In its waiver request, California initially claims that it does not need a waiver for the high-priority fleets and drayage rules. Cal. Air Res. Bd., *Clean Air Act § 209(B) Waiver and § 209(E) Authorization Request Support Document* at 19–21 (Nov. 15, 2023) (hereinafter, "Supp. Doc."). But that same request refutes California's incredible claim. The high-priority fleets rule requires qualifying fleets to retire internal-combustion trucks and replace them with battery-electric trucks over the next 18 years, and by 2042, no qualifying fleet may operate a medium- or heavy-duty internal-combustion truck in California. *See* Cal. Code Regs., tit., 13, § 2015.2(a), Table A. Similarly, the drayage rule forbids the registration of new internal-combustion drayage trucks as of January 1, 2024. *See id.* § 2014.1(a)(1).

California attempts to argue that these rules fall outside the Clean Air Act's preemption provision, which does not allow States to "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). The Act clarifies that States retain the authority to "control, regulate, or restrict the use, operation, or movement of registered or licensed [i.e., non-new] motor vehicles." *Id.* § 7543(d). But California claims that these rules—which on their face require trucking fleets to add new battery-electric trucks to their fleets—are not rules that "require fleet owners/operators to purchase particular *new* motor vehicles." Supp. Doc. 20. Instead, California suggests that it is theoretically possible to comply with the high-priority and drayage rules by "purchasing used [battery-electric trucks] from other fleet operators." *Id.*

The problem is that California's alleged theoretical possibility is a real-world impossibility. Not only are there not enough used battery-electric trucks for fleets to comply by purchasing only used trucks; there are not even enough new battery-electric trucks available for purchase for all qualifying fleets to comply with the high-priority and drayage rules. California, of course, knows this. That is why the high-priority and drayage rules themselves both include compliance

exemptions for fleets that are unable to obtain battery-electric trucks within the rules' onerous compliance deadlines. *See* Cal. Code Regs., tit., 13, § 2015.3(d), (e) (high-priority exemptions); *id.* § 2014.2(a), (b) (drayage extensions). If there were an abundance of new battery-electric trucks available for purchase, then no exemptions would be necessary. Instead, given that the supply of *new* battery-electric trucks will not satisfy the demand manufactured by the high-priority and drayage rules, it is impossible for there to be enough *used* battery-electric trucks in circulation for all fleets to comply with the rules by purchasing only used vehicles.

California appears to understand how fanciful its preemption-avoidance claim is. In documentation supporting its request for a preemption waiver, California admits:

> [I]t is unlikely that there will be sufficient numbers of either used [battery-electric trucks] or engine or vehicle conversion kits to enable drayage and [high-priority] fleets to comply with applicable fleet requirements solely by utilizing post-new vehicle sales, or by shifting vehicles within fleets, especially in the first few years of the ACF regulation's implementation.

Supp. Doc. 20. "Unlikely" is an understatement. The whole point of Advanced Clean Fleets is to "[a]ccelerat[e] zero-emissions truck markets" by "focusing on zero-emissions medium- and heavy-duty vehicles." *Advanced Clean Fleets Regulation Overview*, Cal. Air Res. Bd. (July 3, 2024), https://perma.cc/ZH8K-6ZN2. The large-scale transition to battery-electric trucks cannot happen solely through used-vehicle purchases. Indeed, Advanced Clean Fleets was prompted by an executive order that made it a goal to eradicate internal-combustion medium- and heavy-duty trucks from its roads. *See* p. 1, *supra*. If a regulation prompted by that goal does not mandate the production and sale of "new motor vehicles or new motor vehicle engines," then no emissions regulations will ever be preempted. 42 U.S.C. § 7543(a).

Advanced Clean Fleets is not about old vehicles. It is self-evidently a regulation of "new motor vehicles," as California recognizes. Therefore, Advanced Clean Fleets—including the high-priority and drayage rules—is preempted unless and until California receives a preemption waiver.

II. Clean Air Act Section 209(b) Violates the States' Equal Sovereignty and Is Unconstitutional.

Advanced Clean Fleets, in its entirety, is preempted by the Clean Air Act because it sets emissions standards for new motor vehicles. But the analysis does not end there. California—and only California—can avoid preemption for Advanced Clean Fleets by seeking a preemption waiver from the EPA under § 209(b) of the Clean Air Act. *See* 42 U.S.C. § 7543(b). If California receives a preemption waiver for Advanced Clean Fleets, the Act allows other States to adopt an emissions standard "identical to the California standard." 42 U.S.C. §7507(1); *see also id.* § 7543(e)(2)(B)(i) (similar exception for non-road engines). Thus, "the 49 other states" may depart from the federal standard if and only if they adopt "a standard identical to an existing California standard." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 201 (2d Cir. 1998).

The Clean Air Act's California exception is unconstitutional because it violates the equal sovereignty of the States. Because § 209(b) is unconstitutional, granting a preemption waiver for

Advanced Clean Fleets would be an agency action "not in accordance with law," in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

The constitutional text, history, tradition, structure, and precedent all show that § 209(b) is unconstitutional because "the whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900). "The idea that one state is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had power to make such discrimination." *Id.* Granting California a preemption waiver under § 209(b) would run headlong into the equal sovereignty of the States protected by the Constitution.

A. Text and History

Many provisions of the Constitution assume that the States are equal sovereigns. The Full Faith and Credit Clause, for example, requires each State to give effect to judgments rendered in other States. U.S. Const. art. IV, § 1. States are equally represented in the Senate. *Id.* art. I, § 3, cl. 1. States have an equal role in amending the Constitution. *Id.* art. V. And what "powers" are "reserved to the States" under the Tenth Amendment are reserved equally to all the States. *Id.* amend. X.

The Constitution's use of the word "States" itself signifies the equality of each State in the Union. "By using the term 'States,' the Constitution recognized the traditional sovereign rights of the States minus only those rights that they expressly surrendered in the document." Anthony J. Bellia & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 938 (2020). At the Founding, one of the rights enjoyed by all States under the "law of nations" was the right of "equal sovereignty." *Id.* at 935. At that time, the law of nations indisputably established that "'Free and Independent States' were entitled to the 'perfect equality and absolute independence of sovereigns.'" *Id*. at 937 (quoting *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812)). "The notion of a 'State' with fewer sovereign rights than another 'State' was unknown to the law of nations." *Id.* at 937–38. By declaring independence from Britain, the States would have understood that they then possessed "the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all . . . Acts and Things which Independent States may of right do.'" *N.J. Thoroughbred Horsemen's Ass'n v. NCAA*, 584 U.S. 453, 470 (2018) (quoting Declaration of Independence para. 32). Independent nation-states claimed and received equal sovereignty. The sovereign members of the newly formed United States did too.

Nothing in the original Constitution forfeited the equal sovereignty the States enjoyed prior joining the Union. Nor did the Reconstruction Amendments. Those Amendments empowered Congress to enforce their guarantees by "appropriate" legislation. U.S. Const., amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2. True, appropriate legislation might include a congressionally imposed limitation on the sovereign lawmaking authority of a particular State that violates one of the Amendments. In adopting the Thirteen, Fourteenth, and Fifteenth Amendments, "the States expressly . . . compromised their right to equal sovereignty with regard to enforcement of the prohibitions set forth in the Amendments." Bellia & Clark, *supra*, at 938. So, any unequal

treatment of the States by Congress would need to be tied to congressional enforcement of the Reconstruction Amendments.

Outside the minor exception for "appropriate" legislation authorized by the Reconstruction Amendments, nothing in the Constitution gives Congress power to limit the sovereignty of some but not all States. Under the Supremacy Clause, States are bound by federal limitations on their sovereign lawmaking authority. *See* U.S. Const. art. VI. The equal-sovereignty principle ensures that any such limitations are uniform across all States. In other words, the Union "was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

B. Constitutional Structure

Beyond the text and history, the Constitution's overall design points to the equal sovereignty of the States. At its core, "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Keller v. United States*, 213 U.S. 138, 149 (1909) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868)). If the States' inherent sovereignty could be limited in unequal ways, then the separate States could not be considered "indestructible." Either Congress through unequal regulations or the States themselves through extraterritorial legislation could severely diminish the authority of any one State. At a minimum, such an arrangement would place the Union's continued viability on a thin reed. That is why the "constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle*, 221 U.S. at 580.

One key feature of the constitutional structure—federalism—lends further support to the structural basis of the States' equal sovereignty. Equal sovereignty "rests on concepts of federalism." Sonia Sotomayor de Noonan, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 835 (1979). Through the "diffusion of sovereign power" between the federal and state governments, liberty is preserved and abuses of government power are more easily checked and avoided. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)); *see Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). Practically, the sovereign States "create centers of political opposition that [can] control the excesses of the national government." Clarence Thomas, *Why Federalism Matters*, 48 Drake L. Rev. 231, 237 (2000). If the benefits of a split-sovereign arrangement are to be realized, then the sovereignty retained by the States must be an equal sovereignty. Unequally situated States would serve as poor checks on the federal government because it would allow the federal government to pick and choose which States should have political power and which ones should not. In fact, such a self-defeating arrangement describes the California exception in § 209(b) of the Clean Air Act to a tee. Congress purported to allow California to regulate new vehicle emissions while simultaneously barring the other 49 States from doing so. That is an affront to the inherent equality that the States retained in our federalist structure.

C. Precedent

Supreme Court precedent affirms what the text, history, and structure illustrate: "[A] State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900); *see also, e.g.*, *Franchise Tax Bd. v. Hyatt*, 578 U.S. 171, 179 (2016) (quoting *Coyle*, 221 U.S. at 580) (recognizing the "'constitutional equality' among the States"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980) (explaining that the States' "status as coequal sovereigns" is "implicit in . . . the original scheme of the Constitution"). Each State, in other words, has the right, "under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government." *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889).

The equal sovereignty of the States was recently reaffirmed in *Shelby County. v. Holder*, 570 U.S. 529 (2013). There, the Supreme Court held that Section 4 of the Voting Rights Act is unconstitutional because its formula for determining which States required federal preclearance before changing their election laws was not appropriate legislation under the Fifteenth Amendment. *Id.* at 545, 550–57. The preclearance formula violated the background constitutional principle of the equal sovereignty of the States and the formula's disparate treatment of the States was not reasonably justified. *See id.* at 545–46, 556–57. *Shelby County* thus proves how robust the equal-sovereignty principle is. In the one context where Congress actually is allowed to treat States differently, i.e., in enforcing the Reconstruction Amendments, Congress still did not have a good enough reason to overcome the States' equal sovereignty that is baked into the Constitution.

If Section 4 of the Voting Rights Act, passed under the Fifteenth Amendment, violated the equal-sovereignty principle, then granting a waiver for Advanced Clean Fleets would surely violate that principle as well. Congress has authority over the instrumentalities of interstate commerce under the Commerce Clause and enacted the Clean Air Act's preemption provision under that power. But as we have shown, nothing in the Commerce Clause purports to allow Congress—or the EPA by delegation—to diminish the sovereign law-making capacity all but one State. Section 209(b) of the Clean Air Act does just that and is unconstitutional. Granting a preemption waiver under § 209(b) would therefore be an agency action "not in accordance with law" in violation of the Constitution and the Administrative Procedure Act.[1]

III. Forced Fleet Electrification Violates the Major-Questions Doctrine.

Granting a waiver for Advanced Clean Fleets would violate the major-questions doctrine too. The doctrine applies when an agency makes a regulatory decision of vast "economic and

[1] The U.S. Court of Appeals for the D.C. Circuit recently considered and rejected an equal-sovereignty challenge to § 209(b) of the Clean Air Act. *See Ohio v. EPA*, 98 F.4th 288 (2024). As this comment has made clear, however, that decision was wrong. The decision is also not final. The petitioners in *Ohio* have petitioned the U.S. Supreme Court to grant a writ of certiorari to review the D.C. Circuit's erroneous holding. That petition is still pending. *See* Petition for Writ of Certiorari, *Ohio v. EPA*, No. 24-13 (U.S.).

political significance." *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)). To lawfully make such a decision, the agency must point to "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609. A "merely plausible textual basis" is not enough. *Id.*

Whether to grant a waiver for Advanced Clean Fleets is a major question. Advanced Clean Fleets is a first-of-its-kind ban on the production and fleet operation of internal-combustion trucks. It is, simply put, an electric-vehicle mandate. And California's only textual hook that purportedly gives EPA license to approve the regulation is a half-a-century-old statute that was enacted to reduce smog on California's seaports. What is more, under that same statute, if California can lawfully ban internal-combustion trucks in California, then EPA can lawfully do the same nationwide. Nothing in the Clean Air Act allows EPA—either on its own or acting in concert with California—to ban internal-combustion trucks. Such a consequential and unprecedented shift in the American economy must be made—if at all—by Congress.

A. Forced Fleet Electrification is Economically Significant.

Banning internal-combustion trucks from our Nation's roads would exercise control over "a significant portion of the American economy." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). "Practically every" American consumes goods that are delivered via an internal-combustion truck. *Nebraska*, 143 S. Ct. at 2373. The U.S. Department of Transportation reports that, "[i]n 2021, the U.S. transportation system moved a daily average of about 53.6 million tons of freight valued at more than $54 billion." *Moving Goods in the United States*, U.S. Dep't of Transp., https://perma.cc/8U3R-T2JZ (Sept. 4, 2024). And truck transportation made up the vast majority of that freight movement. *See id.* The economic ripple effects of forcing the transportation industry to adopt a new and untested technology in an extremely compressed timeframe would be "staggering by any measure." *Nebraska*, 143 S. Ct. at 2373.

The economic significance of a forced shift to battery-electric heavy-duty trucks is comparable in scope to the policies at issue in *West Virginia* and *Nebraska*. In *West Virginia*, EPA enacted a rule that would have shifted the Nation's energy production from coal to natural-gas-fired power plants. 142 S. Ct. at 697–98. The Supreme Court held that the rule's economic significance triggered the major-questions doctrine because it would have "substantially restructure[d] the American energy market." 142 S. Ct. at 2610. Likewise, forced fleet electrification would "substantially restructure" the American transportation market, and with it, the entire logistics and trucking sectors that drive the American economy. In *Nebraska*, the Secretary of Education established a student loan forgiveness program, which canceled $430 billion in federal student loan balances and lowered or eliminated the debts of 43 million borrowers. 143 S. Ct. at 2362. The Court found the cancellation economically significant because of its price tag and because it would allow the Secretary to "unilaterally define every aspect of federal student financial aid." *Id.* at 2373. Similarly, a battery-electric vehicle mandate would allow a government actor to "unilaterally define" the powertrain technology that trucking fleets must use, up to and including a complete ban on producing and operating internal-combustion trucks.

B. Forced Fleet Electrification Is Politically Significant.

In addition to its economic significance, an electric-vehicle mandate is a question of vast political significance. Whether fleet electrification is even something to strive for is "the subject of an earnest and profound debate across the country." *West Virginia*, 142 S. Ct. at 2614. This comment is proof. California may wish to ban internal-combustion trucks from its roads, but our States do not. *E.g.*, *Nebraska v. Cliff*, No. 2:24-cv-01364 (E.D. Cal.) (filed May 13, 2024) (17-State challenge to Advanced Clean Fleets); *Nebraska v. EPA*, No. 24-1129 (D.C. Cir.) (filed May 13, 2024) (24-State challenge to federal heavy-duty tailpipe emissions standards).

"Congress is not unaware of" the possibility of forced fleet electrification either. *Nebraska*, 143 S. Ct. at 2373. It has thus far simply chosen to reject bans on internal-combustion trucks every time the policy has been proposed. As early as 1978 and as recently as 2019, bills were introduced that would have required vehicle manufacturers to produce battery-electric vehicles. None came close to passing. *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); 116 Cong. Rec. 19237–40 (1970) (proposed amendment to Title II that would have given EPA power to ban internal-combustion vehicles by 1978). Even more recently, Congress has commissioned three reports from several agencies—but not from EPA—on the implications of electrifying the Nation's vehicle fleet. *See* Pub. L. No. 117-58, §§ 25006, 40435, 40436, 135 Stat. 429, 845–49, 1050 (2021) (requiring reports on "the cradle to grave environmental impact of electric vehicles" and "the impact of forced labor in China on the electric vehicle supply chain," among other things). Congress is studying the issue, but it has not yet supported an electric-vehicle mandate. Given Congress's seeming disinterest in banning internal-combustion vehicles, EPA's authority to sanction an electric-vehicle mandate is "all the more suspect." *West Virginia*, 142 S. Ct. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

The political significance of allowing either California or EPA (or both) to mandate battery-electric trucks goes well beyond even Advanced Clean Fleets. In both *West Virginia* and *Nebraska*, the Supreme Court considered whether interpreting the underlying statute to sanction the asserted power would allow the EPA and Secretary of Education, respectively, to exercise even more significant authority in the future. *See West Virginia*, 142 S. Ct. 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."); *Nebraska*, 143 S. Ct. at 2373 ("Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act."). If the Clean Air Act allows California and EPA to force trucking fleets of a certain size to electrify, nothing would prohibit them from later banning the production or operation of all internal-combustion vehicles. That unheralded claim of power, combined with the economic significance of an electric-vehicle mandate, undoubtedly makes this "a major questions case." *West Virginia*, 142 S. Ct. at 2610.

C. The Clean Air Act Does Not Clearly Authorize Forced Fleet Electrification—for California or EPA.

Forced fleet electrification is a major question. Thus, neither California via a preemption waiver nor EPA itself can sanction a battery-electric vehicle mandate without "clear congressional

authorization." *West Virginia*, 142 S. Ct. at 2609. Such authorization—clear or otherwise, for California or EPA—is not found in the Clean Air Act.

EPA can grant a Clean Air Act preemption waiver for California emissions standards only if three statutory criteria are met. *See* 42 U.S.C. § 7543(b). One of those criteria prohibits EPA from granting a waiver if the California standards are "not consistent with section 7521(a) of this title." *Id.* § 7543(b)(1)(C). Stated positively, before EPA can grant a preemption waiver, it must ensure that the California standards are consistent with Section 7521(a). Section 7521(a) empowers EPA to set federal emissions standards. *Id.* § 7521(a)(1). Therefore, California can mandate battery-electric trucks only if EPA under its own statutory authority can mandate battery-electric trucks too.

Section 7521(a) does not give EPA the authority to ban internal-combustion trucks in favor of battery-electric trucks. That section empowers 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 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). That is it. The statute does not mention "electric vehicles," "zero-emission vehicles," or anything else of the sort. On its face, Section 7521(a) lacks the "clear congressional authorization" needed to "substantially restructure" the American transportation industry through an electric-vehicle mandate. *West Virginia*, 142 S. Ct. at 2609, 2610.

Not only does the statute fall short of clearly authorizing an electric-vehicle mandate; it fails to provide even a "merely plausible textual basis" for one. *Id.* at 2609. Section 7521(a) allows EPA to set standards for vehicles that "emi[t]" a "pollutant" and "cause, or contribute, to air pollution." 42 U.S.C. § 7521(a)(1). By definition, the "zero-emissions vehicles" required by Advanced Clean Fleets do not do that. *See* Cal. Code Regs., tit., 13, § 2015(b) (defining "[z]ero-emissions vehicle" to mean "a vehicle with a zero-emissions powertrain that produces zero exhaust emission of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions"). Because the trucks required by Advanced Clean Fleets do not emit any kind of pollutants, EPA could not enact a regulation setting standards for those vehicles. *See Truck Trailer Mfrs. Ass'n, Inc v. EPA*, 17 F.4th 1198, 1201 (D.C. Cir. 2021) ("[S]ection [7521(a)(1)] requires the EPA to set emissions standards for new motor vehicles and their engines *if they emit harmful air pollutants*.") (emphasis added).

EPA cannot waive the Clean Air Act's preemption provision for a California emissions standard unless the standard is "consistent with" Section 7521(a). 42 U.S.C. § 7543(b)(1)(C). In other words, EPA cannot allow California to enact a regulation that EPA itself could not enact under Section 7521(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 7521(a)). Because EPA lacks the clear statutory authority to mandate electric vehicles, the major-questions doctrine prohibits EPA from granting a preemption waiver that would allow California to do just that.

IV. Granting a Waiver for Advanced Clean Fleets Would Be Unlawful Because Advanced Clean Fleets Violates Other Federal Laws.

Advanced Clean Fleets' legal infirmities do not stop with violating the States' equal sovereignty and major-questions doctrine. The regulation is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") and violates the dormant Commerce Clause as well. Under the Administrative Procedure Act, courts must "hold unlawful and set aside" an agency action that is "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because Advanced Clean Fleets cannot be lawfully implemented given the FAAAA and dormant Commerce Clause, no preemption waiver should issue. To issue a waiver would be to bless California's enforcement of a regulation that violates federal law—that is, to take an action "not in accordance with law."

A. Federal Aviation Administration Authorization Act

National, uniform standards for motor carriers are essential to fostering a cost-effective, economical transportation industry in the United States. Unfortunately, by the mid-twentieth century, a patchwork of state and federal regulations of the trucking industry threatened to raise costs and, ultimately, the cost of everyday goods. Against this regulatory backdrop, Congress attempted to deregulate the motor-carrier industry in 1980. *See* Motor Carrier Act of 1980, 94 Stat. 793. Despite that effort, States continued to heavily regulate the trucking industry. Congress found that the States' regulation of the industry "cause[d] significant inefficiencies," "increased costs," "curtail[ed] the expansion of markets," and "inhibit[ed] . . . innovation and technology." H.R. Conf. Rep. No. 103-677, at 87 (1994). To combat these inefficiencies, Congress determined that "preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." *Id.*

Congress went on to enact the Federal Aviation Administration Authorization Act of 1994. The law broadly preempted state regulation of the trucking industry, ensuring that "national and regional [motor] carriers attempting to conduct a standard way of doing business" are protected from "[t]he sheer diversity of [State] regulatory schemes." *Id.* The FAAAA provides that a State "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

This far-reaching preemption provision is phrased in the disjunctive. A state regulation that affects a price *or* route *or* service of any motor carrier is preempted and unenforceable. And not much is needed to trigger preemption. Any state regulation "related to" motor carrier prices, routes, or services is preempted. *Id.* The U.S. Supreme Court determined that the preemption provision thus prohibits "'[s]tate enforcement actions *having a connection with, or reference to*,' [motor] carrier 'rates, routes, or services.'" *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). The Court even acknowledged that the statutory language "express[es] a broad pre-emptive purpose." *Morales*, 504 U.S. at 383.

In giving the text its plain, broad meaning, the Court also understood that the reason Congress used such expansive preemptive language was that a "state regulatory patchwork" was "inconsistent with Congress' major legislative effort" to allow "the competitive marketplace" to shape the trucking industry, rather than individual States. *Rowe*, 552 U.S. at 373. Yet California ignored the FAAAA's preemption provision in enacting Advanced Clean Fleets. The regulation is quite obviously preempted by the FAAAA because it "relate[s] to" motor carrier prices and routes and services.

First, Advanced Clean Fleets is "related to" motor carrier "price[s]." 49 U.S.C. § 14501(c)(1). Battery-electric trucks are significantly more expensive than internal-combustion trucks. The cost of a new heavy-duty battery-electric truck is more than twice the cost of a new internal-combustion truck. Beia Spiller et al., *Medium- and Heavy-Duty Vehicle Electrification: Challenges, Policy Solutions, and Open Research Questions* at 8, Report 23-03, Resources for the Future (May 2023), https://perma.cc/7GCT-C7D4. In addition to increased capital costs, the costs of maintaining and recharging a battery-electric truck are substantially higher than maintaining and refueling a truck with an internal-combustion engine. *See* Chad Hunter et al., *Spatial and Temporal Analysis of the Total Cost of Ownership for Class 8 Tractors and Class 4 Parcel Delivery Trucks*, National Renewable Entergy Laboratory (Sept. 2021), https://perma.cc/6RFB-V4VQ. Fleet owners and operators will not simply absorb these increased costs. Instead, Advanced Clean Fleets will cause fleet owners and operators to pass along to consumers the increased costs of operation by increasing their prices. Advanced Clean Fleets thus has "a connection with" prices of motor carriers. *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384).

Second, Advanced Clean Fleets is "related to" motor carrier "route[s]." 49 U.S.C. § 14501(c)(1). The regulation forces fleets to use less efficient trucks. Standard internal-combustion heavy-duty trucks with two 150-gallon tanks can travel up to 2,000 miles before refueling. Shreya Agrawal, *Fact Sheet | The Future of the Trucking Industry: Electric Semi-Trucks* (May 11, 2023), https://perma.cc/U7T5-C5AM. And gasoline- and diesel-refueling facilities are abundant. Conversely, even the most efficient battery-electric trucks can travel no more than 500 miles on a single charge. *Id.* And in many places, electric-charging stations capable of recharging a heavy-duty truck are virtually nonexistent. *See id.* (noting there exists only 6700 public direct-current fast-charging stations in the United States, and of those, "most only serve passenger vehicles"). Even if public and private investment in electric-vehicle charging stations increases in the next decade, electric-vehicle charging stations will be severely outnumbered by conventional fueling stations. Given the extreme lack of public charging stations capable of recharging battery-electric trucks, Advanced Clean Fleets will restrict fleet operators to routes that have sufficient recharging facilities, forcing them to abandon routes that are currently and would remain well-travelled so long as the ability to refuel were not at risk. Advanced Clean Fleets thus has "a connection with" routes of motor carriers. *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384).

Third, Advanced Clean Fleets is "related to" motor carrier "services." 49 U.S.C. § 14501(c)(1). Given the paucity of electric-charging infrastructure and unrealistic transition to battery-electric trucks caused by the regulation, fleet owners and operators will be forced to abandon some of the services they presently offer. Battery-electric trucks need to be recharged more frequently than internal-combustion trucks need to be refueled, and recharging battery-

electric trucks takes much longer than refueling trucks with internal-combustion engines. These differences will make it impossible for fleet owners subject to Advanced Clean Fleets to offer the same services they could when using internal-combustion trucks. For example, fleets operating battery-electric trucks will no longer be able to offer a time-sensitive shipper the option to transport a load 400 miles in eight hours. An internal-combustion truck could easily complete that delivery, but a battery-electric truck would have to stop once, if not twice, to recharge, with each stop taking much longer than a comparable stop to refuel with diesel or gasoline. Advanced Clean Fleets thus has "a connection with" services of motor carriers. *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384).

Advanced Clean Fleets is therefore preempted by the FAAAA. Unlike the Clean Air Act's preemption provision, Congress has not given EPA the power to waive the FAAAA as applied to California. Because granting a waiver would condone the enforcement of a federally preempted regulation, granting a waiver would be "not in accordance with law" and "unlawful." 5 U.S.C. § 706(2).

B. Dormant Commerce Clause

Granting a waiver would be unlawful for the additional reason that Advanced Clean Fleets directly targets one of the key instrumentalities of interstate commerce in direct violation of the dormant Commerce Clause. The Commerce Clause of the United States Constitution gives Congress the power "[t]o regulate Commerce among the several States." U.S. Const. art. I, § 8, cl. 3. This affirmative grant of power also supplies a "dormant" limitation on States' ability to affect interstate commerce. *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989). The dormant Commerce Clause prohibits States from enforcing two kinds of administrative rules: (1) rules that target the instrumentalities of interstate transportation and burden interstate commerce, and (2) rules that economically protect a State's citizens and industries from competition by citizens and industries of other States. Advance Clean Fleets fails both tests.

First, the dormant Commerce Clause precludes the enforcement of "certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like"—that burden interstate commerce. *Nat'l Pork Prod. Council v. Ross*, 598 U.S. 356, 380 n.2 (2023). When a "lack of national uniformity" on such instrumentalities "would impede the flow of interstate goods," "the Commerce Clause itself pre-empts [the] entire field from state regulation." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978). So, for example, Illinois could not require that trucks use a certain type of mudguard because the regulation "severely burden[ed] interstate commerce" for trucks wishing to drive through Illinois. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528 (1959). Nor could Arizona prescribe a maximum length of 70 cars for freight trains moving through the State due to the "serious impediment to the free flow of commerce" the regulation caused and the "practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945).

Like the Illinois and Arizona regulations, Advanced Clean Fleets targets a paradigmatic instrumentality of interstate commerce: trucks. Like the Illinois and Arizona regulations, Advanced Clean Fleets is "out of line with the requirements of almost all the other States" and

thus "place[s] a great burden of delay and inconvenience on those interstate motor carriers entering or crossing [California's] territory." *Bibb*, 359 U.S. at 529–30. Like the Illinois and Arizona regulations, the immense interstate burdens caused by Advanced Clean Fleets are not justified by any safety or environmental interests. Fleets that drive even one truck for even one day in California must comply with Advance Clean Fleets' drastic vehicle-specification and reporting requirements. If a state requirement that trucks use certain mudflaps violates the dormant Commerce Clause, then California's attempt to regulate the very design of the truck's propulsion system must violate the doctrine as well. Like the Illinois and Arizona regulations, Advanced Clean Fleets violates the dormant Commerce Clause because it enacts an undue burden on the instrumentalities of interstate commerce.

Absurd consequences would follow were Advanced Clean Fleets not barred by the dormant Commerce Clause. If the regulation does not violate the dormant Commerce Clause, then our States or any other State could prevent interstate trade by trucks by imposing similar regulations. Consider, for example, the result if Nebraska (or all our States) imposed fleet regulations barring battery-electric trucks from our roads. Combined with a California ban on internal-combustion trucks, the battery-electric vehicle bans of other States—especially those connected to California via the interstate system—would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951). Advanced Clean Fleets thus falls squarely within the kinds of state regulations the dormant Commerce Clause does not allow.

Second, Advanced Clean Fleets violates the dormant Commerce Clause because it is a protectionist regulation that benefits California-based trucking companies at the expense of trucking companies based in other States. Advanced Clean Fleets' vehicle-specification and reporting requirements are so burdensome that motor carriers with only limited activities in California will choose to forgo the California market altogether rather than comply with the regulations. California-based trucking companies with a substantial portion of their fleets operating in California, on the other hand, will have no choice but to comply with Advanced Clean Fleets. When out-of-state trucking companies refuse to do business in California, California-based trucking companies benefit. Advanced Clean Fleets thus guarantees that California-based trucking companies' share of the California goods-transportation market will increase at the expense of out-of-state trucking companies. Advanced Clean Fleets is a classic economic protectionist measure that the dormant Commerce Clause forbids. *See Ross*, 598 U.S. at 368–69.

It is no response that the dormant Commerce Clause does not apply because Congress has carved out a special status for California under the Clean Air Act. True, no dormant Commerce Clause violation occurs when Congress addresses a particular issue under its Commerce Clause authority. But Advanced Clean Fleets falls well outside "the scope of the congressional authorization" of Clean Air Act § 209(b)'s preemption waiver provision. *W. & S. Life Ins. Co. v. State Bd. of Equal. of Cal.*, 451 U.S. 648, 652–53 (1981); *see also Ross*, 598 U.S. at 369 (observing that "state laws offend the Commerce Clause when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States,' regardless of whether Congress has spoken") (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). Even if § 209(b) is constitutional (it is not), nothing in that section purports to allow California to regulate *interstate* commerce, which is exactly what Advanced Clean Fleets does. *See* pp. 11–12, *supra*. At best,

§ 209(b) allows California to enact stringent emissions standards to address "peculiar local conditions" like California-specific smog. *Motor & Equip. Mfrs. Ass'n, Inc. v. Env't Prot. Agency*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (quoting S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967)).

Congress has not empowered EPA to grant Clean Air Act preemption waivers for California regulations that disrupt the interstate transportation industry and substantially affect interstate commerce. Yet Advanced Clean Fleets would do just that. And it goes without saying that EPA does not have the power to waive the requirements of the dormant Commerce Clause. Since Advanced Clean Fleets violates the dormant Commerce Clause, granting a waiver would be "not in accordance with law" and "unlawful." 5 U.S.C. § 706(2).

V. Advanced Clean Fleets Does Not Meet Any of the Waiver Criteria in Clean Air Act Section 209(b)(1).

Even if EPA can lawfully grant a waiver under Clean Air Act § 209(b), California has still failed to carry its burden under the statute. Before EPA can issue a waiver, California must prove (A) that its determination that Advanced Clean Fleets "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards" is not arbitrary and capricious; (B) that it has "compelling and extraordinary conditions" that justify the regulation; and (C) that the regulation is consistent with EPA's authority to set federal emissions standards. 42 U.S.C. § 7543(b)(1). "No [preemption] waiver shall be granted" if California cannot prove that Advanced Clean Fleets fails even one of these elements. *Id.* Because the regulation fails all three, EPA must not issue a waiver.

A. California Bears the Burden of Proving the Section 209(b) Criteria Are Met.

California argues that EPA must "presume[]" that it has "satisfied the criteria for granting a waiver" and that those opposing the waiver bear "the burden to show otherwise." Supp. Doc. 17; *see Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1121 (D.C. Cir. 1979). That position is belied by the text of the Clean Air Act. Section 209(b) does not place the EPA Administrator in a passive role; it makes his "task . . . something more than ministerial." *Motor & Equip. Mfrs. Ass'n, Inc.*, 627 F.2d at 1121. For one, no preemption waiver can be granted "if the Administrator finds" that California has not proved one of the three statutory criteria. 42 U.S.C. § 7543(b)(1). A "finding" implies that disputed questions of fact need resolution. And, typically, the entity who makes the assertion bears the burden of proving its truth. *See Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877) ("the general rule is that the burden of proof . . . lies on the party who substantially asserts the affirmative of the issue"). That the EPA Administrator must make "findings" at all shows that California's determinations enjoy no presumption of correctness. *Cf. NRDC v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015) ("EPA has an independent duty under the CWA to ensure compliance with state and federal water quality standards[.]").

Contrary to California's assertion otherwise, California itself bears the burden of proving that it has met all three statutory criteria in Section 209(b). That the waiver must be granted "*unless* the EPA *finds* that any of the waiver denial criteria are met" does not shift the burden to the challengers. *Ohio*, 98 F.4th at 296 (emphasis added). It merely spells out the consequences of the Administrator's findings.

B. California's Determination on Public Health and Welfare Is Arbitrary and Capricious.

To satisfy the first element, California must prove that Advanced Clean Fleets "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). EPA cannot issue a waiver if California's determination is "arbitrary and capricious." *Id.* § 7543(b)(1)(A).

This element required California to make two independent determinations: that Advanced Clean Fleets is at least as protective of "public health" and that the regulation is at least as protective of "welfare" as the federal standards. The phrase "public health and welfare" is separated by the word "and," which means "along with or together with." Webster's Third New International Dictionary 80 (1993). The Supreme Court recently explained that "and" can be used to connect multiple "necessary conditions," each of which must be independently satisfied. *Pulsifer v. United States*, 144 S. Ct. 718, 729–30 (2024). Applying the definition of "and" and the Supreme Court's gloss on how that word operates, to satisfy the first element, California must prove that Advanced Clean Fleets is at least as protective of "public health" as the federal standards and is also at least as protective of "welfare" as the federal standards.

California did not do that. Nowhere in its waiver request does California separately evaluate the effect of Advanced Clean Fleets on welfare. *See* Supp. Doc. 21–24. A regulation is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (interpreting "arbitrary" and "capricious" in 5 U.S.C. § 706(2)(A)). "Welfare" is "[w]ell-being in any respect; prosperity." *Welfare*, Black's Law Dictionary (12th ed. 2024); *see also id.* (defining "public welfare" as "society's well-being in matters of health, safety, order, morality, *economics*, and politics" (emphasis added)). California does not consider that heavy-duty trucks are more expensive, heavier, less available, and carry less of a payload than their internal-combustion counterparts. All these factors will decrease prosperity by increasing operation costs for logistics companies—costs that will ultimately be borne by consumers paying for food, toiletries, and life's other necessities, and by logistics industry workers in the form of lower wages. The failure to consider these basic socio-economic tenets of "welfare" makes California's passage of Advanced Clean Fleets arbitrary and capricious.

C. California Does Not "Need" Advanced Clean Fleets to Meet "Compelling and Extraordinary Conditions."

1. To satisfy the second element, California must prove that it "need[s]" Advanced Clean Fleets to meet "compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). Under the "traditional" interpretation of this element, California must show that it "needs a separate motor vehicle program as a whole in order to address environmental problems caused by conditions specific to California and/or effects unique to California." 89 Fed. Reg. at 57,153. We disagree that the traditional interpretation is correct. *See* pp. 16–17, *infra*. But even if it were, California's attempt to set itself apart from "the 49 other states" fails. *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 201 (2d Cir. 1998).

California points to its air quality to show that it has "unique" "environmental problems" that justify Advanced Clean Fleets. But by relying on state and federal ambient air quality standards, California proves only that its "severe air pollution conditions" are shared by much of the country. Supp. Doc. 25. EPA's website illustrates that counties across the Nation are below the national ambient air quality standards set by the Clean Air Act. *Counties Designated "Nonattainment,"* EPA (July 31, 2024), https://perma.cc/D9L5-PJ4L. California cannot justify its special statutory permission to adopt Advanced Clean Fleets based on conditions shared by other States, including many of our States. Its attempt to do so proves that the air conditions in California are far more "ordinary" than "extraordinary" and that California has failed to carry its burden under Section 209(b)(1)(B). *Cf. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310, 51,331 (Sept. 27, 2019) ("[T]he emissions of motor vehicles in California do not affect California's air pollution problem in any way that is different from how emissions from vehicles and other pollution sources all around the U.S. (and, for that matter, the world) do.").

2. California's waiver request suffers from a second flaw too. California asks EPA to apply its "traditional" interpretation of the phrase "compelling and extraordinary conditions." Supp. Doc. 24. The notice of opportunity for public comments signals EPA's "inten[t] to use th[e] traditional interpretation" as well. 89 Fed. Reg. at 57,153. Under that interpretation, the "compelling and extraordinary conditions" test is met if California can show that it "needs a separate motor vehicle program *as a whole* in order to address environmental problems caused by conditions specific to California and/or effects unique to California." *Id.* (emphasis added).

The traditional interpretation is inconsistent with the plain text of Section 209(b)(1)(B), as EPA has recognized before. *See* 84 Fed. Reg. at 51,341–45. Section 209(b)(1)(C) provides that EPA may not grant a waiver if California "does not need such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). The "such State standards" in this element refers to the emissions standards submitted to EPA for review—i.e., to Section 209(a). On the traditional interpretation, "such State standards" refers to the "standards" referenced in Section 209(b)(1). But if that were right, then "once EPA determines that California needed its very first set of submitted standards to meet extraordinary and compelling conditions, EPA would never have the discretion to determine that California did not need any subsequent standards for which it sought a successive waiver." 84 Fed. Reg. at 51,342. On the traditional view, once California proved that it needed its first set of emissions standards in the 1970s, California was given *carte blanche* to enact future regulations, regardless of their connection to California's relative environmental conditions. That view essentially renders Section 209(b)(1)(C) meaningless.

The better interpretation, and the one EPA should employ, is to consider whether the specific emissions standards for which a waiver is sought are necessary "to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). There must be a connection between California's local conditions and California's proposed regulatory fix. Any other interpretation would allow California to justify all kinds of emissions standards unconnected to its local conditions so long as it could show that it has peculiar local conditions. The legislative history of Section 209(b) lends further support to the idea that the specific emissions standards for which a waiver is sought must be tied to any California-specific air quality issues. *See Ford Motor Co. v.*

EPA, 606 F.2d 1293, 1303 (D.C. Cir. 1979) ("It was clearly the intent of the Act that that determination focus on local air quality problems . . . that may differ substantially from those in other parts of the nation."); *see also* 84 Fed. Reg. at 51,343 (summarizing legislative history on California's peculiar local conditions). EPA must ensure that each component of Advanced Clean Fleets "is linked to local conditions that giv[e] rise to the air pollution problem, that the air pollution problem is serious and of a local nature, and that the State standards at issue will meaningfully redress that local problem." 84 Fed. Reg. at 51,345.

California purports to have engaged in this "alternative" analysis, but it simply repackaged the arguments it made under the "traditional" approach. *See* Supp. Doc. 26–30. Nowhere does California separately evaluate whether its purportedly "compelling and extraordinary conditions" separately justify the high-priority fleets rule, the drayage rule, and the 2036 internal-combustion sales ban. Each rule targets a different entity, and the scope and timing of each rule varies considerably. Any one of those rules requires a preemption waiver before it may be lawfully enacted or enforced. California cannot avoid the "alternative" analysis required by the plain text of the Clean Air Act by cobbling together these tangentially related rules and evaluating their effects on California's local conditions "as whole." 89 Fed. Reg. at 57,153. If California could satisfy Section 209(b)(1)(B) by grouping together disparate rules, even if unconnected to local air quality, any emissions standard may qualify for a waiver so long as EPA could find an air quality issue anywhere in the State. Because California did not separately evaluate the high-priority fleets rule, the drayage rule, and the 2036 internal-combustion sales ban, it failed to prove that each component of Advanced Clean Fleets is necessary to address its "compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B).

D. Advanced Clean Fleets Is Already in Effect, So It Necessarily Leaves Inadequate Lead Time.

Finally, EPA may not issue a waiver if Advanced Clean Fleets is "not consistent with section 7521(a) of this title." 42 U.S.C. § 7543(b)(1)(C). As we explained above, Section 7521(a) empowers EPA to set federal emissions standards. *See* p. 9, *supra*. Historically, the "not inconsistent with section 7521(a)" element has homed in on one of the limitations on EPA's rulemaking authority: adequate lead time. *E.g.*, *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998). The notice of opportunity for comment explained that "consistency with section 202(a) requires that California's standards must be technologically feasible within the lead time provided, giving due consideration to costs[.]" 89 Fed. Reg. at 57,153; *see* Supp. Doc. 30.

Advanced Clean Fleets does not come close to providing adequate lead time. For one, the regulation *is already in effect*. *See* Supp. Doc. 41; Cal. Code Regs., tit., 13, §§ 2014.1(a)(1), 2015.1(a). And further fleet electrification requirements are not far behind. The high-priority fleets rule requires fleets with box trucks, vans, buses, yard tracks, and light-duty package delivery vehicles to ensure that 10 percent of those vehicles within their fleets are battery-electric by January 1, 2025—just over three months away. Cal. Code Regs., tit., 13, § 2015.2(a), Table A. The next mandate kicks in on January 1, 2027, and applies to heavy-duty trucks as well, including work trucks, day cab tractors, pickup trucks, and larger busses. *Id.* Not only is the 2027 date

unreasonable; it is also blatantly inconsistent with Section 7521(a)'s four-year lead time requirement for heavy-duty trucks. 42 U.S.C. § 7521(a)(3)(C).

California could have avoided this problem. It could have sought a preemption waiver before Advanced Clean Fleets was enacted, or at least sooner than one month before the regulation took effect. California also could have set more realistic lead time requirements for manufacturers and fleets alike. Advanced Clean Fleets could have set its first compliance date for 2030 (or later). It did not. Advanced Clean Fleets will not (and cannot) be adjusted to account for California's delay in seeking a waiver for a regulation that is already in effect. Indeed, California acknowledges that it seeks a waiver for the "whole program," not simply for the compliance dates that are further in the future. Supp. Doc. 30. If EPA grants a waiver, Advanced Clean Fleets will not be phased in. Its compliance dates are etched into the regulation itself. Because California chose to set its electrification mandate dates in stone—and in the past or very near future—Advanced Clean Fleets violates Section 7543(b)(1)(C)'s requirement that California emissions standards leave adequate lead time for compliance.

VI. EPA Cannot Grant a Retroactive Waiver.

Advanced Clean Fleets took effect on January 1, 2024. *See* Cal. Code Regs., tit., 13, §§ 2014.1(a)(1), 2015(a)(1), (d), (m). Recognizing that the Clean Air Act preempts the regulation until a preemption waiver is granted, California published an "enforcement notice" in December 2023, just before Advanced Clean Fleets took effect. *Advanced Clean Fleets Regulation: Enforcement Notice*, Cal. Air Res. Bd. (Dec. 28, 2023), https://perma.cc/CU6R-X29X. That notice announced that California "has decided to exercise its enforcement discretion" not to enforce the regulation "until U.S. EPA grants a preemption waiver." *Id.* at 1. In the meantime, even though California does not have a waiver, it

> encourages fleets to voluntarily report and comply while the waiver request is pending and reserves all of its rights to enforce the ACF regulation in full for any period for which a waiver is granted or for which a waiver is determined to be unnecessary, including (but not limited to) the right to remove non-compliant vehicles added to fleets while the waiver request is pending.

Id. In other words, California has warned fleets that if they choose to ignore Advanced Clean Fleets before this agency grants a waiver, those fleets risk enforcement actions even though the regulation was preempted by the Clean Air Act at the time. Regulated entities would be forced to comply with California regulations that are obviously preempted by Section 209(a) *before* EPA acts on a waiver request. That is plainly inconsistent with the design of Section 209, which preempts *all* state emissions regulations unless and until EPA waives preemption for California regulations.

Consistent with its plan for retroactive enforcement, California's request for a waiver does not ask for a waiver of Advanced Clean Fleets so that the regulation can be prospectively enforced. It asks for a waiver of the regulation as written, January 2024 effective date and all. EPA should not countenance California's plan for ex post facto enforcement. Clean Air Act Section 209(a) preempts all state regulations "relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). That preemption provision can be waived as applied to California under Section 209(b). 42 U.S.C. § 7543(b). But until EPA grants a waiver for a California emissions standard

under Section 209(b), the California standards are preempted under Section 209(a). The D.C. Circuit has explained that "California may only adopt and enforce its own emission standards *after* receiving a waiver of preemption from the EPA." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998) (emphasis added). And the Ninth Circuit stated that the Clean Air Act "requires California to obtain EPA authorization *prior to* enforc[ing]" a preempted regulation. *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1115 (9th Cir. 2008) (emphasis added). EPA cannot grant a retroactive preemption waiver under the Clean Air Act. If EPA waives Section 209(a) as applied to Advanced Clean Fleets, the waiver should clarify that the regulation may be enforced only from the date the waiver is granted.

VII. Conclusion

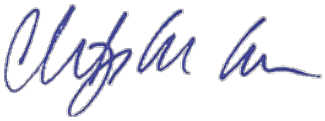
For all these reasons, EPA should deny California's request for a preemption waiver.

Sincerely,

Mike Hilgers
Nebraska Attorney General

Steve Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General



Chris Carr
Georgia Attorney General

Raúl Labrador
Idaho Attorney General

Todd Rokita
Indiana Attorney General

Brenna Bird
Iowa Attorney General

Kris Kobach
Kansas Attorney General

Russell Coleman
Kentucky Attorney General

Liz Murrill
Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General

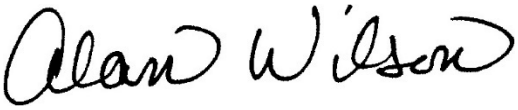
Andrew Bailey
Missouri Attorney General

Austin Knudsen
Montana Attorney General

Drew Wrigley
North Dakota Attorney General

Dave Yost
Ohio Attorney General

Gentner Drummond
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Marty Jackley
South Dakota Attorney General

Jonathan Skrmetti
Tennessee Attorney General and Reporter

Ken Paxton
Texas Attorney General

Sean Reyes
Utah Attorney General

Jason S. Miyares
Virginia Attorney General

Patrick Morrisey
West Virginia Attorney General

Bridget Hill
Wyoming Attorney General