ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1080 (consolidated with Nos. 22-1144 and 22-1145)

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

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioners,

CLEAN FUELS DEVELOPMENT COALITION,

Intervenors for Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, ET AL.,

Respondents,

On Petitions for Review of Final Agency Action by the National Highway Traffic Safety Administration

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BRIEF OF *AMICI CURIAE* SENATOR TOM CARPER, CHAIRMAN OF THE U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, AND REPRESENTATIVE FRANK PALLONE, JR., RANKING MEMBER OF THE U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE, IN SUPPORT OF RESPONDENTS

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April 3, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici Curiae*

Except for the following, all parties, intervenors, and *amici curiae* appearing before this Court are listed or referenced in the Initial Brief for Respondents National Highway Traffic Safety Administration (ECF No. 1991134) (filed Mar. 21, 2023): *Amici* Senator Tom Carper and Representative Frank Pallone, Jr. ("*Amici*").

B. Rulings Under Review

References to the rulings at issue appear in the Initial Brief for Respondents National Highway Traffic Safety Administration.

C. Related Cases

Other than the cases consolidated in this case, earlier challenges to actions by the National Highway Traffic Safety Administration and the U.S. Environmental Protection Agency are pending before this Court, consolidated under *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230.

Four other cases before this Court challenge a related action by the U.S. Environmental Protection Agency, rescinding the agency's withdrawal of a Clean Air Act preemption waiver for California's vehicle emission standards,

consolidated under *Ohio v. EPA*, No. 22-1081. Counsel for *Amici* are aware of no other related cases.

D. Corporate Disclosure Statement

Pursuant to Fed. Rs. App. P. 26.1 and 29(a)(4)(A), *Amici* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

/s/ Cara A. Horowitz
CARA A. HOROWITZ
April 3, 2023

RULE 29 STATEMENTS

All parties in the consolidated action have indicated their consent to the filing of this brief. *See* Letter Filed by Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Sierra Club, and Union of Concerned Scientists, ECF No. 1975007 (filed Nov. 23, 2022). Petitioners American Fuel & Petrochemical Manufacturers; Petitioners Texas, Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, South Carolina, and Utah; Respondents National Highway Traffic Safety Administration (NHTSA); Intervenors Clean Fuels Development Coalition, Diamond Alternative Energy, LLC, ICM, Inc., Illinois Corn Growers Association, Kansas Corn Growers Association, Kentucky Corn Growers Association, Michigan Corn Growers Association, Missouri Corn Growers Association, Texas Corn Producers Association, Minnesota Soybean Growers Association, Valero Renewable Fuels Company, LLC, Wisconsin Corn Growers Association; City and County of Denver, City of Los Angeles, City of San Francisco, Massachusetts, Pennsylvania, District of Columbia, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, Washington, and Wisconsin; National Coalition for Advanced Transportation and Zero Emission

Transportation Association; and all other parties have provided their consent directly to counsel for *Amici*.

Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel for *Amici* states that no party or party's counsel authored this brief in whole or in part, and no other person besides *Amici* or their counsel contributed money intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. R. 29(d), undersigned counsel for *Amici* states that a separate brief is necessary due to *Amici*'s distinct expertise and interests. *Amici* are members of Congress with personal experience and expertise regarding legislation that Fuel Intervenors have placed at issue in this case. *Amici* are therefore in a unique capacity to aid the Court in interpreting certain statutory provisions referenced in this case. No other *amici curiae* appearing in this case share these perspectives or expertise, as far as *Amici* are aware. Accordingly, *Amici*, through counsel, certify that filing a joint brief would not be practicable.

/s/ Cara A. Horowitz
CARA A. HOROWITZ
April 3, 2023

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GLOSSARY

§ 209(b) standards	Vehicle emission standards that have received a waiver pursuant to § 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b)
EPCA	The Energy Policy and Conservation Act of 1975
2007 Amendments	The Energy Independence and Security Act of 2007
EPA	The U.S. Environmental Protection Agency
NHTSA	The National Highway Traffic Safety Administration

STATUTES AND REGULATIONS

Pertinent statutes and regulations not reproduced in the parties' briefs are reproduced in the addendum filed with this brief.

SUMMARY OF ARGUMENT AND IDENTITY, INTERESTS, AND SOURCE OF AUTHORITY TO FILE BRIEF OF *AMICI CURIAE*

Intervenors for Petitioners Clean Fuels Development Coalition, et al. ("Fuel Intervenors") raise important questions about the relationship between two longstanding federal statutes: the Clean Air Act, which provides for the protection of public health and air quality through, *inter alia*, the creation of motor vehicle emission standards, and the Energy Policy and Conservation Act of 1975 (EPCA, or "the Act"), which governs, *inter alia*, federal fuel economy standards. Sometimes, standards that regulate pollution from cars also affect fuel economy. Does that mean EPCA preempts such air pollution standards, as Fuel Intervenors argue?[1] For nearly 50 years, including at EPCA's enactment and at every major opportunity since, Congress has been clear that the answer is "No." Motor vehicle air pollution standards—including, explicitly, California's Zero-Emission Vehicles standards—are not preempted by EPCA, even if they affect fuel economy. This brief explains why.

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[1] Like Respondents, we do not concede that these preemption questions are properly before this court; nevertheless, we provide this analysis to respond to Fuel Intervenors' arguments on their merits. *See* Respondents' Br. 59-61.

The Clean Air Act creates a dual system for regulating motor vehicle emissions. One set of regulations applies nationwide and is issued by the U.S. Environmental Protection Agency (EPA). 42 U.S.C. § 7521. States sometimes have the option to adopt an alternative set of regulations (here called "§ 209(b) standards" after the authorizing provision in the Clean Air Act). *Id.* §§ 7507, 7543(b). Congress left the authority to craft these alternative regulations to California—the state that had pioneered vehicle-emissions regulations—and required EPA to approve these regulations except under narrow circumstances. *Id.* § 7543(a)-(b) (preempting state regulation of new-vehicle emissions, but allowing the "State which has adopted [such] standards . . . prior to March 30, 1966," i.e., California, to apply for a preemption waiver, which EPA must approve unless any of three limited exceptions applies).

For over fifty years, California has exercised this authority to create § 209(b) standards, and since 1990 those standards have included production targets for vehicles that emit no pollutants during operation, known as zero-emission vehicles. In 2013, EPA granted the § 209(b) waiver at issue here, requiring automakers to acquire or generate credits for zero-emission vehicles sold in California (the "Zero-Emission Vehicles standards"), which Fuel Intervenors now claim are preempted. *See* Notice of Decision Granting a Waiver of Clean Air Act Preemption for

California's Advanced Clean Car Program, 78 Fed. Reg. 2,114 (Jan. 9, 2013).[2] Collectively, California's suite of § 209(b) standards has successfully reduced emissions of both traditional air pollutants and greenhouse gases and galvanized innovation in zero-emission vehicle technology. 87 Fed. Reg. 14,367 (Mar. 14, 2022) ("California's [zero-emission vehicle] mandates have so far supported development of technologies such as battery electric and fuel cell vehicles that embody the pioneering efforts Congress envisaged"). Consequently, California's § 209(b) standards have played a significant role in shaping federal vehicle-emission policy. *See* 78 Fed. Reg. 2,129 (Jan. 9, 2013) (acknowledging "the numerous times that EPA has followed California's lead—blazing a new trail as a laboratory for innovation—by catching up to or harmonizing with California's standards.").

In crafting and enacting EPCA in 1975, Congress was clear that it was not displacing EPA's authority to approve § 209(b) standards, even when such standards would directly affect fuel economy. Indeed, Congress took the opposite approach, tasking the National Highway Traffic Safety Administration (NHTSA) with designing fuel-economy standards to *accommodate* (not displace) all emission

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[2] Over 50 years, EPA has approved California's § 209(b) standards nearly universally, denying California's application only once, and in that case reversing itself almost immediately. *See* Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009) (reversing 2008 waiver denial).

standards authorized by the Clean Air Act, including those adopted under § 209(b). See *infra* Section I.A. Later amendments to both EPCA and the Clean Air Act have recognized the continued vitality of § 209(b) standards, specifically including those requiring the production and sale of zero-emission vehicles. See *infra* Part I.B.

Fuel Intervenors now argue, however, that EPCA preempts California's Zero-Emission Vehicles standards and that NHTSA's incorporation of these standards into its baseline is therefore unlawful. Fuel Intervenors' Br. 14-19, 21-22, ECF No. 1976944 (filed Dec. 8, 2022). In the alternative, Fuel Intervenors claim that the Zero-Emission Vehicles standards were so plainly vulnerable to a preemption challenge that NHTSA's failure to take a position on their validity was arbitrary and capricious. *Id.* at 22-26.

Both arguments are without merit. Under either formulation, Fuel Intervenors' overbroad arguments strike not only at California's Zero-Emission Vehicles standards, but at the heart of § 209(b) emission standards more generally. *Id.* at 14-19, 22-26 (characterizing properly adopted § 209(b) standards as mere "preempted state laws" and raising arguments about the validity of all greenhouse gas § 209(b) standards).

Amici—Senator Tom Carper, Chairman of the U.S. Senate Committee on Environment and Public Works, and Representative Frank Pallone, Jr., Ranking Member of the U.S. House Committee on Energy and Commerce—are leaders of

the House and Senate Committees with relevant expertise. They offer their insight into EPCA, the Clean Air Act, and related legislation as an aid to the Court and submit this brief pursuant to Fed. R. App. P. 29(a)(2), making the following arguments:

First, EPCA does not preempt the Zero-Emission Vehicles standards. Nothing in EPCA indicates an intent to invalidate or inhibit any element of the Clean Air Act. Congress understood that the fuel-economy improvements it sought through EPCA could be affected by the vehicle-emissions standards created under the Clean Air Act, either because emissions-reducing technology might directly impact fuel economy or because some manufacturers might not be able to improve on both fronts simultaneously. But Congress struck the balance between these two aims in favor of public health and air-quality goals: it took steps in EPCA to prioritize Clean Air Act emissions reductions over fuel-economy improvements, not the other way around. In doing so, Congress explicitly required NHTSA to consider the effect of § 209(b) standards on fuel economy in setting fuel-economy requirements under EPCA. Thus, reading the Act to preempt § 209(b) standards that affect fuel economy both contradicts Congressional intent and makes the Act nonsensical.

Nothing about the particular standards at issue here changes this analysis. Subsequent federal legislation has consistently reaffirmed Congress's intent to

broadly preserve § 209(b) standards, specifically including the Zero-Emission Vehicles standards. Indeed, the Clean Air Act Amendments of 1990 and the Inflation Reduction Act of 2022 both explicitly recognize and incorporate § 209(b) zero-emission vehicles standards—regulation that would be preempted if Fuel Intervenors' reading of EPCA was correct. Moreover, the Energy Independence and Security Act of 2007, which amended EPCA (the "2007 Amendments"), ratified two federal district court opinions holding that § 209(b) standards approved by EPA have the same stature as emissions regulations adopted by EPA and therefore are not preempted by EPCA, regardless of effects on fuel economy.

Second, the Zero-Emission Vehicles standards are firmly established, not "legally dubious." Fuel Intervenors' Br. 23. Fuel Intervenors rely on the same incorrect preemption theories in asserting that NHTSA's treatment of the Zero-Emission Vehicles standards is arbitrary and capricious, arguing that those standards are so precarious that NHTSA was required to take a formal position on whether EPCA preempts them. But NHTSA has no obligation—or authority—to ignore the existing Zero-Emission Vehicles standards based on the remote possibility that a court may later invalidate them. *See* Respondents' Br. 50-55 ("[t]he potential for changed circumstances does not render a rule unlawful"). More fundamentally, Congress's manifest intent to preserve § 209(b) standards regardless of effects on fuel-economy, along with California's thirty-year history

of adopting and enforcing zero-emission vehicle standards, proves that the Zero-Emission Vehicles standards are legally sound.

ARGUMENT

I. EPCA Does Not Preempt the Zero-Emission Vehicles Standards at Issue in This Case.

In designing the fuel-economy portions of EPCA, Congress took care not to interfere with public health protections, including vehicle-emissions standards. Congress rejected several proposals to remove or delay emissions standards in favor of improved fuel economy, explicitly endorsed prioritizing environmental regulation in committee reports, and incorporated § 209(b) standards into the Act's regulatory structure. *See generally* Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, 32 Geo. Env't L. Rev. 625, 631-42 (2020).

Given EPCA's manifest intent, it would be surprising to discover in the same Act a provision that *prevents* states from adopting the § 209(b) standards at issue in this case, as Fuel Intervenors claim to have done. *See* Fuel Intervenors' Br. 14-19. Indeed, the text and history of EPCA, as well as that of relevant subsequent legislation, confirm that Fuel Intervenors' interpretation is incorrect: Congress did not preempt such standards when it passed EPCA, and the Act cannot now be read to do so.

A. EPCA Does Not Preempt Vehicle-Emissions Standards, It Prioritizes Them.

The text and legislative history of EPCA indicate Congress's intent to prioritize vehicle-emissions standards, and particularly § 209(b) standards, over the new fuel-economy standards created by EPCA. EPCA's preemption provision does not affect vehicle-emissions standards; rather, it applies to state "law[s] or regulation[s] related to fuel economy standards," 49 U.S.C. § 32919(a); *see also* 15 U.S.C. § 2009(a) (1976) (original language).[3] Further, Congress explicitly subordinated fuel economy requirements to "Federal [air pollution] standards," which were defined to include state regulations authorized by § 209(b) of the Clean Air Act. 15 U.S.C. § 2002(d)(1)(D) (1976). The history of EPCA cements this reading: the enacting Congress was legislating to manage the nation's oil resources, but where conflict arose between achieving fuel economy and controlling vehicle emissions, it prioritized the latter. *See generally* Dotson, *supra*, at 631-42.

1. On a Plain Reading, EPCA Shows No Intent to Preempt § 209(b) Standards.

[3] The fuel-economy provisions of EPCA are all contained in a single, undifferentiated section. Pub. L. No. 94-163, § 301, 89 Stat. 871, 901-16 (1975). For readability and precision, *Amici* cite to these provisions as codified in the 1976 U.S. Code rather than the session law.

On its face, EPCA's preemption provision does not address vehicle-emissions standards. The Act preempts state regulations "related to fuel economy standards or average fuel economy standards," with no suggestion that it preempts vehicle-emissions regulations, such as § 209(b) standards. 15 U.S.C. § 2009(a) (1976). To the contrary, EPCA specifically incorporated § 209(b) standards as one of the "Federal standards" that NHTSA must consider in setting fuel-economy standards, given those federal standards' effects on fuel economy. *Id.* § 2002(d)(2)(A) (directing NHTSA to consider impact of "Federal standards" when setting fuel economy standards); *id.* § 2002(d)(3)(D)(i) (listing "emissions standards applicable by reason of section 209(b) of [the Clean Air] Act" as "a category of Federal standards").

Thus, reading the Act to preempt § 209(b) standards (like California's Zero-Emission Vehicles standards) simply because of their effects on fuel economy—which Congress anticipated and EPCA accommodated—would lead to a "statutory contradiction" that Congress would not have intended. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 37 (D.C. Cir. 2019) ("interpretations needed to avert 'statutory contradiction' (really, self-contradiction) ipso facto have a leg up on reasonableness.").

Fuel Intervenors acknowledge that EPCA "treated California [§ 209(b)] standards as federal standards" when it was passed, but they argue it "no longer

does." Fuel Intervenors' Br. 19.[4] They note that EPCA used the phrase "Federal standards" in allowing NHTSA to modify the fuel-economy standards set by statute for vehicles with model years from 1978 through 1980. 15 U.S.C. § 2002(d) (1976) (giving NHTSA the authority to relax fuel-economy requirements if manufacturers demonstrated that the applicable emissions regulations—the "Federal standards"—were impacting their fuel economy). Fuel Intervenors suggest that, since the 1980 model year is long gone, EPCA no longer recognizes § 209(b) standards as federal standards, so the Act's preemption provision may now eliminate them. Fuel Intervenors' Br. 19.

This argument is incorrect for two reasons. First, it does not address the underlying issue: even if the § 209(b) standards were incorporated into EPCA only for a limited purpose, interpreting EPCA as both incorporating and eliminating them still creates a contradiction. For the Act to have made sense at the time it was passed, the Act's preemption provision must not have prohibited § 209(b) standards notwithstanding any effects on fuel economy (which, again, Congress understood and accommodated). And since Congress has not expanded EPCA's

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[4] Fuel Intervenors incorporate by reference arguments from another case before this Court. Fuel Intervenors' Br. 19 (citing State Pet'rs' Br. 39-41, *Ohio v. EPA*, No. 22-1081, ECF No. 1969895 (filed Nov. 2, 2022)). To reply to these arguments more completely, this brief responds to the conclusions included in Fuel Intervenors' brief, as well as the reasoning included in the State Petitioners' brief to which Fuel Intervenors cite.

preemption provision since, it should not now be read to prohibit those standards. *See, e.g.*, *Wisc. Ctrl. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (since "Congress alone has the . . . authority to revise statutes," the "original meaning of the written law" remains in effect until that law is changed).

Second, despite Fuel Intervenors' assertion to the contrary, § 209(b) standards are still incorporated into EPCA as a criterion for setting several types of fuel-economy standards. *See* Fuel Intervenors' Br. 19. Specifically, EPCA requires NHTSA to use "Federal motor vehicle standards"—together with "technological feasibility," "economic practicability," and "the need for the Nation to conserve energy"—to determine the "maximum feasible average fuel economy level" achievable for a given sector or manufacturer. 15 U.S.C. § 2002(e) (1976).[5] NHTSA must use the "maximum feasible" level in setting several fuel-economy standards, including for non-passenger vehicles such as light-duty trucks or recreational vehicles; manufacturers producing fewer than 10,000 passenger vehicles a year; and passenger vehicles after model year 1980. *Id.* § 2002(a)(3)-(4), (b)-(c).

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[5] A 1994 recodification changed this language to "motor vehicle standards of the Government." Revision of Title 49, Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1060 (codified at 49 U.S.C. § 32902(f)). The change is not substantive. *Id.* § 6(a), 108 Stat. at 1378.

While "Federal motor vehicle standards" were not defined in EPCA, it is clear from the Act's structure that they must include § 209(b) standards. "Federal motor vehicle standards" were used in the same section as the "Federal standards" that explicitly incorporated § 209(b) standards. There is no semantic difference between "Federal standards" applied to motor vehicles and "Federal motor vehicle standards," and the two phrases are used for the same purpose: determining the fuel-economy level achievable given existing emissions (and other) standards. *Compare id.* § 2002(d), *with id.* § 2002(a)-(c), (e).

Furthermore, excluding § 209(b) standards from "Federal motor vehicle standards," despite their explicit inclusion in "Federal standards," would lead to incongruous results. As discussed, EPCA allowed passenger-vehicle manufacturers to request individualized adjustments to the statutory fuel-economy standards applicable to the 1978 through 1980 model years, which would relax those manufacturers' statutory requirements to account for the effect of "Federal standards" on their fuel economy. 15 U.S.C. § 2002(d) (1976). By contrast, NHTSA set standards for those same model years for non-passenger vehicles and for small manufacturers, accounting for the impact of "Federal motor vehicle standards." *Id.* § 2002(e). Accordingly, excluding § 209(b) standards from the set of "Federal motor vehicle standards" would have created an illogical discrepancy as to model years 1978-1980: one means of setting fuel-economy requirements—

the one used for passenger vehicles—would account for the effects of § 209(b) standards, while those for small manufacturers and non-passenger vehicles would not.

Such a distinction would have made no sense. It is particularly perverse as to small manufacturers, which receive special consideration under EPCA: if the national fuel-economy standard is too onerous, they can petition NHTSA for a separate "maximum feasible average fuel economy" standard designed to fit their particular circumstances, accounting for the impact of "Federal motor vehicle standards." *Id.* § 2002(c), (e)(3). If § 209(b) standards were excluded from "Federal motor vehicle standards" but included in "Federal standards," the small-manufacturer option could be *more stringent* than the adjustment generally available to passenger-vehicle manufacturers because it would not account for the impact of § 209(b) standards that reduce fuel economy.

Including § 209(b) standards in the category of "Federal standards" while excluding them from "Federal motor vehicle standards" would have created perverse and unintended results. The more natural reading of the statute—in which "Federal motor vehicle standards" includes § 209(b) standards—provides "'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose," and is therefore correct. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (citation omitted).

It is not surprising, therefore, that both NHTSA and federal courts have read EPCA as incorporating § 209(b) standards into "Federal motor vehicle standards." In setting the first non-passenger fuel-economy standards under EPCA, NHTSA explicitly considered the "[e]ffect of California emissions standards," Average Fuel Economy Standards for Nonpassenger Automobiles, 42 Fed. Reg. 13,807, 13,814-15 (Mar. 14, 1977), and NHTSA has continued to do so across the decades. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 347 n.54 (D. Vt. 2007) (collecting examples). The two federal courts that have issued final opinions on this issue have agreed. *See id.* at 346-47 (finding "beyond serious dispute" that § 209(b) standards have "the same stature as a federal regulation with regard" to EPCA); *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1173 (E.D. Cal. 2007) (once "a California regulation is granted waiver of preemption pursuant to section 209 of the Clean Air Act . . . the Secretary of Transportation must consider [it] in formulating maximum feasible average fuel economy standards under" EPCA). Additionally, Congress itself ratified these interpretations in amendments passed immediately after *Green Mountain* and *Central Valley*. *See infra*, Part I.B.2.

2. The History of EPCA Demonstrates that Congress Had No Intent to Preempt Emissions Regulations Impacting Fuel Economy.

Congress's manifest objectives in passing EPCA confirm that it intended emissions standards—including § 209(b) standards—to survive preemption, even

where they affect fuel economy. In drafting EPCA, Congress closely considered the question of whether it should limit vehicle-emissions regulation to maximize fuel-economy reductions. The two goals were feared to be incompatible, as new emissions-reduction technologies could reduce vehicle mileage, and manufacturers might not have the resources to advance in both fields simultaneously. Dotson, *supra*, at 631-33; *see also* S. Rep. No. 94-516, at 202-03 (1975) (Conf. Rep.). The White House and some members of Congress pushed to favor fuel economy: President Ford twice proposed language that would have weakened vehicle-emissions standards, and members of Congress raised concerns that California's emissions standards would prevent any gains in fuel economy. *See* Dotson, *supra*, at 636-41 (collecting sources); S. Rep. No. 94-179, at 65 (1975) (separate statement of Sens. Robert P. Griffin and James L. Buckley) (citing EPA report that California's emissions standards for the 1977 model year could reduce fuel economy by 8-24 percent).

But Congress instead prioritized protecting air quality and public health. EPCA excused manufacturers from full compliance with its fuel-economy requirements if emissions-reductions standards—explicitly including California's § 209(b) standards—impacted their fleets' mileage. 15 U.S.C. § 2002(d) (1976). The Act also required NHTSA to incorporate any impact of emissions standards on fuel economy into future fuel-economy standards. *Id.* § 2002(e)(3).

Congress made this choice deliberately, as the legislative record demonstrates. *See, e.g.*, S. Rep. No. 94-179, at 6 (1975) (noting intent to create "the most fuel-efficient new car fleets compatible with safety, damageability, and emission standards"); H.R. Rep. No. 94-340, at 90 (1975) (noting the need for fuel economy standards to "take account of" possible future fuel-economy effects from emissions standards); S. Rep. No. 93-526, at 76-77 (1973) (acknowledging that Clean Air Act standards may have delayed fuel-economy improvements, but arguing that "this fact should certainly not be interpreted as an indictment of the standards"). Congress particularly favored § 209(b) standards, and even proposals to weaken other vehicle-emissions standards would have preserved § 209(b). *See, e.g.*, S. Rep. No. 93-793, at 98 (1974) (Conf. Rep.) (noting that under the Emergency Energy Act, an early bill which would have, *inter alia*, loosened vehicle-emissions standards, "California retains the right under section 209 of the Clean Air Act to seek a waiver for a more stringent standard"); Dotson, *supra*, at 638 (under President Ford's initial proposal, "authority would be retained allowing California to establish more stringent emission standards") (quoting letter from President Gerald Ford to Sen. Nelson Rockefeller, Jan. 30, 1975).

Thus, the text of EPCA and its legislative record demonstrate Congress's intent to preserve emissions-reduction regulations, and particularly the § 209(b) standards. This clear intent is further reason to favor a reading of the Act's

preemption provisions that broadly preserves § 209(b) standards. *Cf. Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016) (considering, in the context of an express preemption provision, "the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive").

B. Subsequent Legislation Demonstrates a Consistent Understanding that EPCA Does Not Preempt the Zero Emission Vehicles Standards at Issue.

Fuel Intervenors argue that EPCA preempts the Zero-Emission Vehicles standards because those standards limit carbon dioxide emissions from vehicles, and carbon dioxide emissions have a "direct correlation" with fuel economy. Fuel Intervenors' Br. 15. Thus, the logic goes, the Zero-Emission Vehicles standard must be preempted by EPCA. If accepted, Fuel Intervenors' argument would invalidate not only all zero-emission vehicle standards adopted under § 209(b), but all such greenhouse gas standards as well.

However, nearly fifty years of consistent congressional action since the passage of EPCA affirms the validity under § 209(b) of both greenhouse gas standards and zero-emission vehicle standards. Through amendments to the Clean Air Act in 1990, the 2007 Amendments to EPCA, and the Inflation Reduction Act of 2022, Congress has reaffirmed that these standards are not—and never were—preempted. This understanding aligns with contemporary interpretations from NHTSA, *see Green Mountain*, 508 F. Supp. 2d at 347 n.54 (collecting examples of

NHTSA regulations treating § 209(b) standards as incorporated into the Act), and federal courts. *See id.* at 346-47; *Cent. Valley*, 529 F. Supp. 2d at 1173. By repeatedly enacting legislation premised on this clear understanding, Congress has "effectively ratified" NHTSA's and the courts' interpretation that these standards are in no way limited by EPCA. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (finding Congressional ratification of an agency statutory interpretation where Congress had demonstrated an awareness of that interpretation, and enacted legislation premised on that understanding).

1. The 1990 Amendments to the Clean Air Act Explicitly Incorporated § 209(b) Standards Similar to the Zero-Emission Vehicles Standards.

In the comprehensive Clean Air Act Amendments of 1990, Congress specifically incorporated and relied on § 209(b) zero-emission standards to create a federal clean-fleet program. These amendments require operators of certain vehicle fleets to add more low-emission vehicles to their fleets and award transferable credits for adding zero-emission vehicles. Pub. L. No. 101-549, § 229(a), 104 Stat. 2399, 2520-23 (1990) (adding § 246 to the Clean Air Act). In setting the standards for zero-emission vehicles, the amendments require EPA to "conform as closely as possible to standards which are established by the State of California for . . . ZEVs [i.e., zero-emission vehicles] in the same class." *Id.*, 104 Stat. at 2523 (adding § 246(f)(4)). By enacting amendments explicitly premised on the existence of

California's § 209(b) zero-emission standards, Congress endorsed these standards. Congress plainly would not have incorporated these standards into its legislative scheme if it considered them preempted by EPCA.

2. The 2007 Amendments to EPCA Affirmed the Validity of § 209(b) Standards As Against Preemption Challenges.

Fuel Intervenors' preemption arguments are similarly at odds with the Energy Independence and Security Act of 2007, which amended the fuel-economy provisions of EPCA. Here, Congress endorsed an interpretation of EPCA that preserves § 209(b) standards as "Federal standards" that NHTSA must consider when adopting fuel-economy regulations. *See supra* Part I.A.1. Congress passed the 2007 Amendments in the wake of several important judicial decisions, including two explicitly holding that § 209(b) standards regulating greenhouse gases are not preempted by EPCA—and, going even further, holding that no § 209(b) standards are preempted by EPCA. *Green Mountain*, 508 F. Supp. 2d at 347, 350 (holding that the Clean Air Act affords § 209(b) standards "the same stature as a federal regulation" and that "the preemption doctrines do not apply to the interplay between [§ 209(b)] and EPCA"); *Cent. Valley*, 529 F. Supp. 2d at 1173 ("[t]he court can discern no legal basis for the proposition that an EPA-promulgated regulation or standard functions any differently than a California-promulgated and EPA-approved standard or regulation."). Congress not only declined the opportunity to rework EPCA to reverse the courts' actions, it

incorporated § 209(b) greenhouse-gas standards into the amendments, while favorably noting the "greenhouse gas emissions standards . . . adopted by California and other states." H.R. Rep. No. 110-297, at 17 (2007).

In the first of these judicial decisions, the Supreme Court's landmark opinion in *Massachusetts v. EPA* held that EPCA's fuel-economy standards do not alter EPA's regulatory obligations under the Clean Air Act. 549 U.S. 497, 532 (2007) ("[t]he two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency"). Shortly afterward, two district courts published opinions specifically addressing whether EPCA preempts § 209(b) standards that regulate greenhouse-gas emissions. Much like Fuel Intervenors do here, Plaintiffs in those cases argued that the challenged § 209(b) standards were related to fuel economy standards, and were therefore preempted; both courts rejected those arguments. *Green Mountain*, 508 F. Supp. 2d at 356-57, 369 (upholding § 209(b) standards establishing greenhouse-gas emissions standards against preemption challenge); *Cent. Valley*, 529 F. Supp. 2d at 1165-67.

The relevance of these cases was not lost on Congress. Several proposals were introduced to eliminate federal greenhouse-gas emissions standards for vehicles, including those adopted through § 209(b). *See generally* Dotson, *supra*, at 652-58 (recounting proposals and collecting sources); Letter from Sens. Tom

Carper, Dianne Feinstein & Edward J. Markey to Sec'y Elaine L. Chao & Acting Adm'r Andrew Wheeler (Oct. 25, 2018) (referencing lobbyists' proposals to subordinate greenhouse-gas regulation under the Clean Air Act to EPCA's fuel-economy standards).[6]

But Congress rejected these proposals and did the opposite: it incorporated California's greenhouse-gas motor vehicle regulations into the legislation, ratifying those regulations and the recent cases upholding them. The 2007 Amendments include a requirement that federal agencies purchase only "low greenhouse gas emitting vehicles." Pub. L. No. 110-140, § 141, 121 Stat. 1492, 1517 (2007) (codified at 42 U.S.C. § 13212(f)(2)(A)). The law tasked EPA with identifying "low greenhouse gas emitting vehicles," taking into account "the *most stringent standards* for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers *for vehicles sold anywhere in the United States*." *Id.*, 121 Stat. at 1518 (codified at 42 U.S.C. § 13212(f)(2)(B)) (emphasis added).

Congress's reference to enforceable greenhouse-gas standards "for vehicles sold anywhere in the United States" was necessarily a reference to § 209(b)

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[6] *Available at* https://www.carper.senate.gov/wp-content/uploads/archives/GHG%20Tailpipe%20standards.pdf; https://www.carper.senate.gov/wp-content/uploads/archives/CAFEdocumentsFINAL.pdf.

standards. As explained in the committee report on H.R. 2635, the bill where the language originated, "[c]urrently, the only applicable greenhouse gas emissions standards are those adopted by California and other states. Those standards will be enforceable if and when EPA grants the waiver requested by the state of California under the Clean Air Act." H.R. Rep. No. 110-297, at 17.

To avoid any doubt about its intent, Congress enacted a savings clause preserving, *inter alia*, existing state authority and showing Congress's approval of the *Green Mountain* and *Central Valley* decisions. Pub. L. No. 110-140, § 3, 121 Stat. 1492, 1498 (2007) (codified at 42 U.S.C. § 17002) ("Except to the extent expressly provided," nothing in the amendments to EPCA "supersedes [or] limits the authority provided . . . by . . . any provision of law (including a regulation)"); *see also* 153 Cong. Rec. 35,833, 35,927-28 (statement of Rep. Markey, lead author of the legislation) ("It is the intent of Congress to fully preserve existing federal and State authority under the Clean Air Act," including "the authority affirmed . . . in *Green Mountain* . . . [and] *Central Valley*"); *see also id.* at 34,178 (statement of Sen. Dianne Feinstein, co-sponsor of the legislation) (explaining that the amendments "do[] not impact the authority to regulate tailpipe emissions of the EPA, California, or other States under the Clean Air Act," and citing *Central Valley*).

The 2007 Amendments to EPCA thus directly contradict Fuel Intervenors' strained reading of EPCA's preemption provision, under which § 209(b) standards are treated no differently than ordinary state laws and under which vehicle emissions standards that regulate carbon dioxide emissions are preempted, including the Zero-Emission Vehicles standards. To the contrary, the 2007 Amendments affirm and ratify the holdings of multiple courts that § 209(b) standards are not—and cannot be—preempted by EPCA, even when those standards affect fuel economy.

3. The Inflation Reduction Act of 2022 Again Incorporated And Ratified State Zero-Emission Vehicles Regulations.

In the Inflation Reduction Act of 2022, Congress again confirmed that state zero-emission vehicle standards adopted via § 209(b) are both legal and in the public interest. Where Congress appropriates funding for an agency to engage in a specific action, that appropriation acts as a ratification from Congress when it "plainly show[s] a purpose to bestow the precise authority which is claimed." *Ex parte Endo*, 323 U.S. 283, 303 n. 24 (1944).

It is particularly telling that Congress adopted § 60105(g) of the Inflation Reduction Act, which allocates $5 million to EPA to help "States to adopt and implement greenhouse gas *and zero-emission standards* for mobile sources pursuant to section 177 of the Clean Air Act," which is the provision that allows states other than California to adopt § 209(b) standards. Pub. L. No. 117-169, 136

Stat. 1818, 2068-69 (emphasis added). Congress thus has again ratified the understanding that state zero-emission-vehicle standards are not preempted by "affirmatively act[ing]" to "create[] a distinct scheme . . . premised on th[at] belief." *Brown & Williamson*, 529 U.S. at 156; *see also* Greg Dotson & Dustin J. Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 Env't L. Rep. 10,017, 10,030-32 (2023) (noting Congressional ratification of the validity of both greenhouse-gas and zero-emission § 209(b) standards via this provision of the Inflation Reduction Act).

Amici are in the best possible position to understand the origin and purpose of this provision. As the Chairs of the Senate and House Committees with jurisdiction over the Clean Air Act, *Amici* collaborated to conceive and draft the language of § 60105(g), which *Amici* included in the bill that was reported from the U.S. House Committee on Energy and Commerce. *Amici* continued to protect that provision as they shepherded the bill through the negotiation process, and—alongside a majority of their colleagues—voted to enact it. *Amici* and the enacting Congress intended this provision to provide funding to support state adoption of § 209(b) greenhouse-gas and zero-emission standards, including the particular Zero-Emission Vehicles standards that Fuel Intervenors now claim are preempted. Indeed, the provision allows for no other use of these funds. Congress understood this, and its intent could only be fulfilled if the standards were not preempted by

EPCA, as legal scholars have recognized. *See* Dotson & Maghamfar, *supra*, at 10,031-32 (noting that Congress has incorporated measures into the Inflation Reduction Act "that necessarily depend upon and approve existing regulatory understandings that . . . California may control emissions of GHGs and other pollutants by reliance on zero emissions technologies"). By enacting § 60105(g) to fund activities that could only occur if NHTSA was correct in withdrawing its determination that § 209(b) standards are preempted, Congress knowingly and deliberately ratified NHTSA's action and reaffirmed the validity of California's Zero-Emission Vehicles standards under § 209(b).

C. Intervenors' Additional Arguments for Preemption of Zero-Emission Vehicles Standards All Fail.

The text and history of EPCA, together with Congress's subsequent legislative enactments, all indicate an unwavering Congressional understanding that the Act does not preempt the § 209(b) standards at issue in this case. None of Fuel Intervenors' additional arguments concerning the nature of zero-emission vehicle standards succeeds in suggesting otherwise.

Fuel Intervenors first argue that the Zero-Emission Vehicles standards are preempted because they regulate carbon-dioxide emissions and therefore have a "direct correlation" with fuel economy. Fuel Intervenors' Br. 15. But even if compliance with the Zero-Emission Vehicles standards affects fuel economy, that fact cannot be determinative here. EPCA anticipates and accommodates effects on

fuel economy from compliance with emissions standards and is neutral about whether those effects might improve or hinder fuel economy. Further, as Congress recognized when it drafted EPCA, regulation of traditional pollutants in gas-powered vehicles has a correlation with fuel economy, too. If this logic applies to preempt carbon-dioxide regulations, then it must, as a corollary, also preempt the hydrocarbon, carbon-monoxide, and nitrogen-oxides regulations in place when EPCA was passed. *See, e.g.*, 13 Cal. Code Regs. § 1955.1(a). In any case, Congress's legislative enactments make clear that § 209(b) standards that promote zero-emission vehicles or regulate greenhouse gases are no more subject to preemption than other § 209(b) standards. *See supra* Parts I.B.2-4.

Next, Fuel Intervenors argue that producing vehicles that conform to the Zero-Emission Vehicles standards will affect the average fuel economy of a manufacturer's fleet, and therefore the standards "relate to" the fuel economy of that fleet and are preempted. Fuel Intervenors' Br. 18-19. But even if the Zero-Emission Vehicle standards were "related to" fuel economy, that alone would not render them "related to . . . fuel economy *standards*," 49 U.S.C. § 32919(a) (emphasis added). If accepted, Fuel Intervenors' overbroad reading would preempt nearly all standards that have an incidental effect on fuel economy, potentially including, for example, speed limits and vehicle weight limits. *See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995)

("if 'relate to' were taken to the furthest reach of its indeterminacy, then for all practical purposes pre-emption would never run its course"). In any case, Fuel Intervenors' argument proves too much. As discussed in detail above, *supra* Part I.A.2, Congress assumed that § 209(b) standards would have a significant effect on fuel economy, yet preserved them. Thus, concluding that standards are preempted simply because they have a significant effect on fleetwide fuel economy leads to a contradiction in the statute, and that reading should be rejected.

In sum, EPCA's text, structure, and history, together with subsequent interpretations that Congress has ratified, demonstrate that EPCA cannot be read to preempt the Zero-Emission Vehicles standards. Such a reading would not only be incompatible with the text, it would be contrary to Congress's manifest intent in crafting and maintaining a regulatory structure that has consistently relied on the validity of § 209(b) standards, including those that require the adoption of zero-emission vehicles.

II. Fuel Intervenors' Argument That NHTSA's Rule Is Arbitrary and Capricious Relies on Its Misreading of EPCA Preemption.

Fuel Intervenors also argue that NHTSA's rulemaking was arbitrary and capricious because the agency declined to take a position on whether the Zero-Emission Vehicles standards are preempted. Fuel Intervenors' Br. 22. In Fuel Intervenors' view, these standards are so legally vulnerable as to make the scope of EPCA's preemption provision an "important aspect" of NHTSA's rulemaking that

NHTSA neglected to consider. Fuel Intervenors' Br. 22 (quoting *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020)). This argument necessarily depends on Fuel Intervenors' characterization of the Zero-Emission Vehicles standards as "legally dubious state laws." *Id.* at 23.

This argument fails for many of the same reasons as Fuel Intervenors' outright preemption argument. California's thirty-year-old ZEV standards are firmly established, not "legally dubious." As provided for by § 209 and as repeatedly approved by EPA, California has successfully required the adoption of zero-emission vehicles since 1990 as means of controlling both greenhouse gases and smog-forming pollutants. 87 Fed. Reg. 25,762 (May 2, 2022). EPCA and subsequent legislation explicitly favor and incorporate § 209(b) standards, including zero-emission vehicles standards and others that affect fuel economy. Moreover, two federal courts have considered whether EPCA may preempt EPA-approved § 209(b) standards, and both held that the Act could not. *See Green Mountain*, 508 F. Supp. 2d at 350; *Cent. Valley*, 529 F. Supp. 2d at 1173. Congress later codified these decisions through the 2007 Amendments to EPCA, and Congress affirmatively endorsed and approved § 209(b) zero-emission vehicle standards in the Inflation Reduction Act. *See supra* Part I.B.3.

The mere fact that Fuel Intervenors raised their incorrect preemption theories during NHTSA's rulemaking does not unsettle this law, nor does it create

a duty for NHTSA to conduct a substantive preemption analysis in this rulemaking. *See Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (an agency enjoys broad discretion in determining the scope of its own rulemaking). This is especially true because Fuel Intervenors do not dispute that NHTSA cannot make a determination on the scope of EPCA's preemption provision with the force of law. Fuel Intervenors' Br. 25. Moreover, a preemption determination would have been irrelevant to NHTSA's goal in setting its baseline, which was "to understand[] the state of the world absent any further regulatory action by NHTSA." 87 Fed. Reg. 25,983 (May 2, 2022).

Auto manufacturers also understand the well-settled nature of the Zero-Emission Vehicles standards. In a brief submitted in a related case, a coalition of automakers regulated under California's § 209(b) standards voiced their support for these standards—including the Zero-Emission Vehicles standards—calling them "an incremental step in a multi-decade regulatory effort to reduce vehicle emissions, improve California's air quality, and mitigate the state's contribution to climate change." Br. of Ford Motor Co., et al. 39-41, *Ohio v. EPA*, No. 22-1081, ECF No. 1985804 (filed Feb. 13, 2023). These automakers have relied on the Zero-Emission Vehicles standards to plan multi-billion-dollar investments, *id.* at 6, and even voluntarily entered into a framework agreement committing to achieve agreed-upon emissions reductions during the period when EPA temporarily

withdrew California's waiver. *Id.* at 9-10. Automakers would not have placed such substantial reliance on merely "legally dubious" standards.

CONCLUSION

Amici urge the Court to reject Fuel Intervenors' argument that EPCA preempts California's Zero-Emission Vehicles standards.

Respectfully submitted,

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April 3, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set forth in D.C. Cir. R. 32(e)(3), Fed. R. App. P. 29(a)(5), and the Court's Scheduling Order, ECF No. 1965625 (filed Sept. 22, 2022), because this brief contains 6480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Cara A. Horowitz
CARA A. HOROWITZ
April 3, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of April, 2023, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which constitutes service on all parties and parties' counsel who are registered ECF filers.

/s/ Cara A. Horowitz
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