No. 13-74019

In the United States Court of Appeals for the Ninth Circuit

DALTON TRUCKING, INC., *ET AL.*,
Petitioners,

AMERICAN ROAD & TRANSPORTATION BUILDERS ASS'N.,
Petitioner-Intervenor,

v.

U.S. ENVIORNMENTAL PROTECTION AGENCY, *ET AL.*,
Respondents,

CALIFORNIA AIR RESOURCES BOARD,
Respondent-Intervenor.

On Appeal from the Environmental Protection Agency
EPA HQ-OAR-2008-0691
78 Fed. Reg. 58,090 (Sept. 20, 2013)

REPLY BRIEF OF PETITIONER-INTERVENOR AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION

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INTRODUCTION

Petitioner-intervenor American Road and Transportation Builders Association ("ARTBA") respectfully replies to the response briefs filed by respondents Environmental Protection Agency and its Administrator (collectively, "EPA") and respondent-intervenor California Air Resources Board ("CARB"), as well as the reply brief by petitioners Dalton Trucking, Inc., *et al.* (collectively, the "California Petitioners"), in this challenge to EPA's final agency action promulgated at 78 Fed. Reg. 58,090 (Sept. 20, 2013), waiving federal preemption pursuant to §209(e)(2) of the Clean Air Act ("CAA"), 42 U.S.C. §7543(e)(2), for CARB's Nonroad Engine Pollution Control Standards – Off-Road Compression Ignition Engines – In-Use Fleets, 13 Cal. Code Regs. §§2449-2449.3 (the "ORD Rule").[1]

SUMMARY OF ARGUMENT

Before addressing the merits, ARTBA first covers three threshold matters: waiver of issues, claims, and arguments vis-à-vis the record

[1] Although ARTBA generally supports the California Petitioners' reply, the fifth and sixth undisputed "central facts," Pets' Reply at 1, are not entirely accurate. Although EPA's approval is not required, *id.*, other states can adopt CARB standards only by adopting standards identical to CARB's standards *with two years' lead-time*. 42 U.S.C. §7543(e)(2)(B). For standards (like these) that change year to year, it may be impossible simultaneously to meet the lead-time and identicality requirements.

before EPA and the briefing of this petition for review (Section I); this Court's jurisdiction over CARB (Section II); and the relevant canons of statutory construction (Section III). After the discussing the merits (Section IV), ARTBA then discusses the appropriate remedy (Section V).

In arguing that ARTBA and the California Petitioners have waived various arguments (*e.g.*, a dirty "sports-Hummer" *reductio ad absurdum* argument), EPA confuses the waiver of *claims* not supported below with the waiver of *arguments* in support of claims properly raised. *See* Section I.A, *infra*. The proper administrative-law construct for EPA's argument is issue exhaustion, not waiver, but the issue-exhaustion analysis is a poor fit for non-adversary proceedings such as §209 waiver proceedings, and – in any event – exhaustion should be excused if it applied because it would have been futile for these purely legal issues. *See* Section I.B, *infra*. For issues in this petition for review, Rules 28(a)(9)(A) and 28(b) require the parties to brief and argue their positions, with citations to the record or relevant authorities, lest those issues be waived. *See* Section I.C, *infra*. Finally, CARB has not asserted its sovereign immunity in this Court, so this Court can ignore that immunity. *See* Section II, *infra*.

With regard to statutory construction, federal courts do not defer to

administrative interpretations until after the court finds the statute ambiguous under traditional tools of statutory construction; because §209 is not ambiguous, EPA is not entitled to deference. *See* Section III.A, *infra*. With respect to the California Petitioners' and ARTBA's claims that deference would be inappropriate for issue of the magnitude presented here, EPA's counterexamples of deference-worthy Circuit precedent are trivial compared to the fundamental reordering of economic expectations raised here. *See* Section III.B, *infra*. With regard to CARB's claim to have set in-use vehicular standards prior to the 1990 amendments, the claim is both false and unsupported by citing either the record or relevant authorities, so CARB's phantom presence in the field cannot compel a presumption against preemption here. *See* Section III.C, *infra*. With regard to the burden of proof, this is an action under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and the burden of proof for the purely legal issues presented here is simply a question of who is right about the law (*i.e.*, there is not "tilt" for or against waivers on legal grounds). *See* Section III.D, *infra*. Finally, this Court should disregard EPA's many pleas to CARB's purportedly exclusive authority to regulate in-use vehicles because CAA standards remain in

place for a vehicle's federally regulated useful life (*i.e.*, vehicles do not become unregulated as soon as they roll off the showroom floor). *See* Section III.E, *infra*.

On the merits, EPA's attempt to find ambiguity in CAA's use of the plural "standards" over the singular "standard" is frivolous because CAA requires even a one-pollutant standard to have a corresponding useful-life standard (*i.e.*, x emissions for y miles or z years), which means there is literally no such thing as a single-standard "standard" under §209. *See* Section IV.A, *infra*. More fundamentally, EPA's program-as-a-whole view of the "Needs Test" is ahistorical because Congress added the relevant language to the "Protectiveness Test" *in 1977*, without any indication that Congress was changing the Needs Test enacted *in 1967*, thus implicating the canon against repeals by implication, which easily beats the weak last-antecedent rule that EPA cites. *See* Section III.B, *infra*. EPA's and CARB's citations to a history of EPA's interpreting a program-as-a-whole Needs Test are essentially *dicta* because nothing hinged on the analysis and courts never resolved it. *See* Section IV.C, *infra*. The sports-Hummer analogy shows that EPA's interpretation would allow CARB to approve dirtier-then-federal vehicles across all pollutants based on

CARB's prior history of regulating other vehicles more stringently – *i.e.*, not overregulating some pollutants in a waiver package, but relaxing others – which Congress never authorized. *See* Section IV.D, *infra*. Finally, EPA never provided notice to the public generally or ARTBA specifically that EPA would consider an alternate means of analyzing "need" under the Needs Test, contrary to EPA's claims. *See* Section IV.E, *infra*.

With regard to remedy, neither EPA nor CARB disputes that remand without *vacatur* would irreparably injure ARTBA's members, so the respondents have conceded that issue. *See* Section V.A, *infra*. While ARTBA does not ask this Court to issue injunctive relief against CARB's ORD Rule itself, ARTBA respectfully submits that remand to EPA without *vacatur* would not allow the revisiting of the underlying ORD Rule, which needs to happen in order for CARB and the affected public to consider what California actually *needs* to attain air-quality standard; instead, if this Court vacates EPA's waiver of preemption, then EPA or the affected public could compel CARB to reconsider the needs of the two dirtiest areas – the South Coast and Central Valley – vis-à-vis the rest of California. *See* Section V.B, *infra*.

ARGUMENT

I. THIS COURT SHOULD CLARIFY AND APPLY THE PROPER RULES OF ISSUE AND CLAIM WAIVER.

The response briefs both claim that the California Petitioners and ARTBA waived arguments by failing to raise them before EPA, and both fail to respond to arguments that the California Petitioners and ARTBA raise in their opening briefs. This section sets forth the proper "waiver" test for these types of omission.

Citing a decision under the National Environmental Policy Act ("NEPA"), EPA claims that parties here cannot raise "a distinct legal challenge" unless it was raised administratively. EPA Br. at 42 (*citing Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1081 (9th Cir. 2011). As a NEPA case, *Northern Plains* relies on NEPA authority for the cited proposition. *Northern Plains*, 668 F.3d at 1081 (*citing Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-65 (2004)). As accurately as these decisions outline NEPA, ARTBA respectfully submits that they do not control §209 proceedings under the APA and CAA.[2]

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[2] CAA actions are expressly exempt from NEPA. 15 U.S.C. §793(c)(1) ("No action taken under [CAA] … shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]").

A. Claims – but not arguments in support of claims – are waived when a party fails to raise them below.

In several instances, EPA claims that the California Petitioners or ARTBA waived an issue by failing to raise it before the agency. EPA Br. at 42, 45, 58-59. EPA's waiver arguments confuse claims with arguments.

As to waiver, the "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim.'" *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995) (*quoting Yee v. Escondido,* 503 U.S. 519, 534 (1992)); *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 678 n.27 (2001). Thus, "parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534. In asserting waiver, EPA confuses *claims* with *arguments*:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. at 534-35 (emphasis in original); *cf.* 42 U.S.C. §7607(d)(7)(B) ("[o]nly an objection to a rule … raised with reasonable specificity during the

period for public comment … may be raised during judicial review").[3] The various issues that EPA deems waived are simply arguments made in support of the Needs-Test claim that commenters unambiguously raised during the administrative process.

B. Issue exhaustion is not required in §209 waiver proceedings.

ARTBA respectfully submits that EPA's waiver argument actually is an issue-exhaustion argument. Because CAA's 307(d) procedures do not apply to §209 proceedings, 42 U.S.C. §7607(d)(1), CAA's issue-exhaustion rules do not apply, either. To the extent that issue exhaustion applies here, it applies under judicially created general principles of administrative law. The leading authority is *Sims v. Apfel,* 530 U.S. 103 (2000), which ties the question to the adversarial nature of the agency proceedings:

> [C]ourts require administrative issue exhaustion "as a general rule" because it is usually "appropriate under [an agency's] practice" for "contestants in an adversary proceeding" before it

[3] Section 307(d) does not govern §209 proceedings, 42 U.S.C. §7607(d)(1), so §307(d)(7)(B) does not apply here. But even with that stringent issue-exhaustion standard, parties can dispute the level of granularity needed for a comment to preserve an issue for appeal. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602-03 (2014).

> to develop fully all issues there. … But, as *Hormel* and *L. A. Tucker Truck Lines* suggest, the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. *Hormel, L. A. Tucker Truck Lines,* and *Aragon* each involved an adversarial proceeding. … Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.

Sims, 530 U.S. at 110 (second alteration in original, citations omitted). As used in *Sims* and its earlier cited precedents, an "adversarial administrative proceeding" entails elements of due process – *e.g.,* the ability to cross examine witnesses – that are wholly absent from EPA's hearings on waivers of preemption.[4] Specifically, an "adversary proceeding [includes] the attendant rights to counsel, confrontation, cross-examination, and compulsory process." *Ellis v. District of*

[4] An administrative "hearing" need not be "adversarial." *See, e.g., Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Mendez,* 857 F. Supp. 85, 89-90 (D.D.C. 1994); *Norwegian Nitrogen Prod. Co. v. U.S.,* 288 U.S. 294, 317 (1933) (because "the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning," "[a]ll depends upon the context").

Columbia, 84 F.3d 1413, 1422 (D.C. Cir. 1996); *Barker v. Estelle*, 913 F.2d 1433, 1441 (9th Cir. 1990) ("due process requires, *inter alia*, the right of confrontation and cross-examination"); *see also U.S. v. Boney,* 68 F.3d 497, 502 (D.C. Cir. 1995); *Communications Satellite Corp. v. Fed'l Communications Comn'n,* 611 F.2d 883, 887 (D.C. Cir. 1977); *Delta Found. v. U.S.,* 303 F.3d 551, 561-62 (5th Cir. 2002); *Coalition for Gov't Procurement v. Fed. Prison Indus.,* 365 F.3d 435, 465-66 (6th Cir. 2004); *Gambill v. Shinseki,* 576 F.3d 1307, 1326 (Fed. Cir. 2009) (Bryson, J., concurring) (collecting cases); *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970). Because EPA's proceedings under §209 are not adversarial proceedings, the case for judicially imposing issue exhaustion is "much weaker" under *Sims*. In any event, the issues that EPA would have this Court reject all are purely legal arguments in support of claims made before EPA.

Finally, "[a]dministrative law … contains well established exceptions to exhaustion." *Woodford v. Ngo,* 548 U.S. 81, 103 (2006) (Breyer, J., concurring in the judgment); *McKart v. U.S.,* 395 U.S. 185, 197-201 (1969) (hardship and futility); *McCarthy v. Madigan,* 503 U.S. 140, 147-48 (1992) (futility). Here, EPA clearly has taken – and took before the §209 proceeding – fixed views on these issues, making issue

exhaustion futile.

C. Arguments are waived when a party fails to respond or to otherwise to support its views under Rule 28.

Taken together, Rules 28(a)(9)(A) and (b) require petitioners and respondents to argue their "contentions and the reasons for them, with citations to the authorities and parts of the record on which [they] rel[y]." FED. R. APP. P. 28(a)(9)(A), (b). Issues not so developed and supported are waived because "Rule 28(b)… requires that appellees state their contentions and the reasons for them at the risk of abandonment of an argument not presented," *Mironescu v. Costner,* 480 F.3d 664, 677 (4th Cir. 2007) (citing *Hillman v. IRS,* 263 F.3d 338, 343 n.6 (4th Cir.2001)) (interior quotations omitted), and "[e]ven appellees waive arguments by failing to brief them." *Id.* (quoting *U.S. v. Ford,* 184 F.3d 566, 578 n.3 (6th Cir. 1999)); *accord*, *e.g.*, *U.S. v. Belgarde*, 300 F.3d 1177, 1181 n.1 (9th Cir. 2002); *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988).

II. THIS COURT HAS JURISDICTION OVER ARTBA'S CLAIMS.

While quibbling over ARTBA's citations for the proposition that a state intervenor into federal-court litigation waives sovereign immunity from that court's authority, CARB Br. at 29, CARB nonetheless fails to assert immunity. As such, this Court "can ignore it." *Katz v. Regents of*

the Univ. of Cal., 229 F.3d 831, 834 (9th Cir. 2000) (interior quotations omitted). Should this Court hold that the ORD Rule fails the Needs Test, that holding will be a holding against both EPA and CARB.

III. CANONS OF STATUTORY CONSTRUCTION FAVOR A NARROW READING OF EPA'S AND CARB'S AUTHORITY

The relevant canons of statutory construction argue for a narrow and non-deferential view of EPA's and CARB's actions. ARTBA Br. at 16-24. The response briefs offer no compelling rebuttal.

A. *Chevron* does not replace this Court's duty to apply traditional tools of statutory construction.

Neither EPA nor CARB seriously disputes that this Court should resolve statutory questions – if possible – using "traditional tools of statutory construction" under "*Chevron* step one," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984), but EPA argues this "Court must affirm EPA's construction [barring] 'clear and convincing evidence' that [EPA's] construction is unreasonable." EPA Br. at 21 (*quoting Motor & Equipment Mfrs. Ass'n, Inc. v. EPA,* 627 F.2d 1095, 1106 (D.C. Cir. 1979) ("*MEMA*")). While ARTBA respectfully submits that extra-circuit, pre-*Chevron* evidentiary formulations should have no bearing on the purely legal questions posed by *Chevron* step one, the relevant "evidence" is the "traditional tools of statutory construction"

on which courts are "the final authority." *Chevron,* 467 U.S. at 843 n.9. To the extent that *MEMA* held otherwise, *Chevron* abrogated *MEMA*, which should be obvious even to EPA.

B. Courts do not defer to unelected administrators on issues of "deep economic or political significance."

Citing *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015), and *Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2444 (2014), the California Petitioners and ARTBA argue that *Chevron* deference does not apply to "question[s] of deep economic and political significance," Pet. Br. 49 (interior quotations omitted); ARTBA Br. at 17-19, including when EPA purports to find a vast new authority in an old statute such as CAA. ARTBA Br. at 17-19. Despite EPA's claim to be "merely applying the plain language of section 7543(e)(2) in a manner consistent with both the section's language and relevant legislative history," EPA Br. at 29, this waiver proceeding indeed involves a "previously unheralded or unrecognized power." *Id.* (internal quotations omitted).

As the D.C. Circuit recognized with the advent of new-vehicle standards, these issues "may be the biggest industrial judgment that has been made in the United States in this century." *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 633 (1973) (interior quotations omitted). The

new type of regulation sought here – basically, regulating CAA-regulated vehicles to require retrofits, even during their CAA-regulated useful life – is every bit as big a step, albeit one confined here to one industry. But the regulatory authority claimed here would apply equally to California's telling every citizen that their new car, bought yesterday, must undergo expensive retrofits to remain on the road. Even worse, because CAA requires states to make continuing showings of progress toward attaining air-quality standards, other states could be *compelled* to adopt the ORD Rule, even if in those states that do not adopt the ORD Rule voluntarily.

Against the enormity of what EPA and CARB propose here, EPA risibly offers four CAA decisions of this Court on state implementation plan ("SIP") approvals. *See* EPA Br. at 30 (collecting cases). None of these cases involve radical departures from past practices and most of them concern local government's resolving local issues, as the SIP-approval process envisions. Deference was appropriate there; it is not appropriate here.

C. There is no presumption against preemption.

Without claiming that a presumption against preemption applies here, CARB claims implicitly to have been setting in-use nonroad

vehicular-emission standards in 1990. *See* CARB Br. at 4 ("Congress also expressly reserved to California the right to continue to control pollution from *in-use* nonroad engines") (emphasis in original). This implicit claim suffers from two fatal problems: it is both false and unsupported.

First, as ARTBA explained (ARTBA Br. at 21-22 n.6), California was contemplating regulating nonroad vehicles in 1988, but it had not yet done so. For purposes of the presumption against preemption – and its federal respect for state sovereigns – it is presence in the field that matters: "The presumption thus accounts for the *historic presence of state law* but does not rely on the absence of federal regulation." *Wyeth v. Levine*, 555 U.S. 555, 565-66 & n.3 (2009) (emphasis added). As to nonroad vehicular standards – both new and in-use – California in 1990 was just like the other states: a "Johnn[y]-come-lately to the field." *MEMA*, 627 F.2d at 1109.[5] California's plan to study the field, circa the 1990s, announced in a 1988 bill, 1988 Cal. Stat. c. 1568, is insufficient to

[5] For example, New Jersey, New York, and Connecticut sought to enter the vehicular-emission-standard field before Congress enacted §209's predecessor in 1967, 1966 N.J. Laws 16 (dated Apr. 7, 1966); 1966 N.Y. Laws 856, 902 (dated July 28, and Aug. 1, 1966); 1967 Conn. Pub. Acts 676, but those attempts did not suffice.

offset the presumption against preemption.

Second, and even if California had had a valid argument, California waived it by failing to support its argument with citations to the record or supporting authorities in accordance with FED. R. APP. P. 28(a)(9)(A) and 28(b). *See* Section I.C, *supra*. Thus, whether California had or had not regulated in the field – and it had not – there is no presumption against preemption here.

D. This Court should follow the APA burden of proof for this APA action.

EPA argues that this Court should follow extra-circuit decisions that place "the burden of proof [on] the parties favoring denial of the waiver," which derives in part from EPA's mandatory ("shall") duty to grant a waiver if the conditions are met. EPA Br. at 37 (*citing MEMA*, 627 F.2d at 1121). This is an APA case, and the Court must apply the APA burden of proof unless CAA provides otherwise. *Cf.* 5 U.S.C. §556(d). For the purely legal issues presented here, the burden of proof is simply not relevant in the evidentiary sense.

ARTBA respectfully submits that this Court can ignore the "vast" differences that EPA infers from the shall-versus-may nature of EPA's duty to grant waivers. EPA Br. at 37-38. As EPA's cited authority on the

shall-may divide recognizes, the mandatory-versus-permissive meanings apply "usually" and "normally." *Kingdomware Techs., Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016) (interior quotations omitted); *cf. Conrad v. Ace Prop. & Cas. Ins. Co.*, 532 F.3d 1000, 1005-06 (9th Cir. 2008) ("courts have held may to be synonymous with shall or must, [usually] in an effort to effectuate legislative intent") (interior quotations omitted). Simply put, however, ARTBA has no quarrel with a mandatory duty to grant waivers *if the waiver conditions are met*. Here, however, the question is not one of evidence but one of what the waiver conditions mean as a matter of law.

The California Petitioners and ARTBA argue that EPA's program-as-a-whole Needs Test violates §209 and that EPA needed to re-issue its notice under §209 to request comments under a new Needs Test. Both issues are purely legal: "because this issue involves a purely legal determination (rather than a factual determination…), its resolution is unaffected by which party bears the burden of proof." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2016). As to *MEMA*'s placing a burden of proof on parties favoring waiver denials, that is preposterous. EPA could deny a waiver on the Needs Test, even if no-one submitted comments, and the reviewing court should use precisely the same

standard of APA review in that case that it would use if EPA granted the waiver. In any event, this is an easy case: the only relevant burden-of-proof issue is which party is right about the law.

E. CARB's purportedly exclusive authority to regulate in-use vehicles does not support EPA's waiver.

On several occasions, EPA emphasizes that federal standards govern only new vehicles, whereas only CARB can regulate in-use vehicles. *See* EPA Br. at 12, 44, 46, 65. Although ARTBA respectfully submits that – *if true* – that situation would be irrelevant to whether this CARB waiver package satisfies §209's approval criteria, it is even more important to note that EPA is simply wrong.

Specifically, although EPA defines "new" for purposes of its new-vehicle regulations to mean "showroom new," *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1084 (D.C. Cir. 1996); 40 C.F.R. §1074.5, vehicles that EPA regulates as "new" must continue to meet their certification emission levels throughout CAA-defined useful lives under 42 U.S.C. §§7521(a)(1), (d), 7541. Thus, it is simply false to claim that only CARB regulates non-new vehicles.

IV. THIS COURT SHOULD REVERSE EPA'S WAIVER.

This section responds to response briefs' merits arguments, as well

as their failure to respond to – and thus waiver of, *see* Section I.C, *supra* – arguments in the opening briefs.

A. EPA's single-standard argument is a frivolous *non sequitur*.

As ARTBA explained, even if a particular CARB submission set a standard for only one pollutant, CAA would nonetheless require a related useful-life standard for that one pollutant's emission level (*i.e.*, the time or mileage within which the vehicle must continue to meet the emission standard). ARTBA Br. at 24 (*citing* 42 U.S.C. §§7521(a)(1), (d), 7541). In short, "[t]here is literally no such thing as a singular-standard standard in Title II." *Id.* Neither EPA nor CARB responds to this argument, and those parties thus waive any pretense that §209's use of the plural "standards" has any bearing here.

B. The "in the aggregate clause" unambiguously applies to §209's 1977 Protectiveness Test, and not to the 1967 Needs Test.

Mere "linguistic ambiguity" does not suffice to get EPA deference under *Chevron* step two because a federal "court … [first] *employ[s] traditional tools of statutory construction* … [to] ascertain[]" whether "Congress had an intention on the precise question at issue" in *Chevron* step one, and "that intention is the law and must be given effect." *U.S. v.*

Home Concrete & Supply, LLC, 132 S.Ct. 1836, 1844 (2012) (emphasis in original). The response briefs do not get past *Chevron* step one.

1. The program-as-a-whole reading of the Needs Test is ahistorical and violates the canon against repeals by implication.

In adopting §209(e) for nonroad preemption, the 1990 amendments adopted for nonroad vehicles the same preemption standards that had evolved from 1967 through 1977 for onroad vehicles. The evolution of the onroad-waiver process makes clear that 1977's "in-the-aggregate" test applies to the "Protectiveness Test" and not to the "Needs Test" at issue here. EPA's contrary claims are thus ahistorical and violate the canon against repeals by implication.

The original Needs Test applied to the waiver package before EPA's predecessor, requiring a waiver of preemption "unless [the agency] finds that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions, or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title." Pub. L. No. 90-148, §208(b), 81 Stat. 485, 501 (1967). Congress adopted this California waiver process because "'compelling and extraordinary

circumstances' in California were sufficient 'to justify standards on automobile emissions which may, *from time to time*, need to be more stringent than national standards.'" *Ford Motor Co. v. Envt'l Protection Agency*, 606 F.2d 1293, 1295 (D.C. Cir. 1979) (*quoting* H.R. Rep. No. 90-728, 90th Cong., 1st Sess. 21 (1967)) (emphasis added).[6] Thus, in 1967, both the Needs Test and the Protectiveness Test focused on the waiver package before the agency.

In 1977, Congress amended §209 to relax the Protectiveness Test to allow California to overregulate on some pollutants while being less stringent on others, "if the State determines that the State standards will be, *in the aggregate*, at least as protective of public health and welfare as *applicable Federal standards*." 42 U.S.C. §7543(b)(1) (emphasis added).[7]

> The Administrator shall, after notice and opportunity for public hearing, waive application of this section to [California] if the State

[6] The 1970 amendments simply moved this preemption provision from §208 to §209 and inserted EPA in lieu of EPA's predecessor. *Ford Motor Co.*, 606 F.2d at 1296.

[7] "A key purpose of the amendment … was to allow California to require manufacturers to reduce … nitrogen oxides ("NOx") to a point that probably could not be reached for technological reasons if full compliance with the federal carbon monoxide ("CO") standard were insisted upon." *Ford Motor Co.*, 606 F.2d at 1294 n.5 (*citing* H.R.Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977)).

> determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—
>
> (A) the [aggregate protectiveness] determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

42 U.S.C. §7543(b)(1)(A)-(C). In moving from "such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions" in 1967 to "such State does not need such State standards to meet compelling and extraordinary conditions" in 1977, Congress substituted the word "need" for "require" and substituted the phrase "such State standards" for "standards more stringent than applicable Federal standards." The first change is mere editing; but both before and after the second change, the standards in question clearly refer back to the "standards" that are the subject of the waiver application.

Even if EPA's reading of the statute *in 1977* (and now) were both

linguistically feasible and consistent with CAA, that would not resolve the issue because implied repeals require "clear and manifest" legislative intent. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("*NAHB*"). Thus, in order to shift from a waiver-package-based Needs Test in 1967 to a program-as-a-whole Needs Test in 1977, there must be clear and manifest evidence of that shift: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957). As explained below, *Fourco Glass* and its progeny are instructive here.

In *Fourco Glass*, Congress has modernized language in the district courts' jurisdiction and venue statutes in Title 28, replacing language such as suits "in law or in equity" with merely "civil" actions, *id.* at 225-26, but Congress did not – without any stated intent – eliminate the statutes' prior meaning. For example, although "civil action" shows no intent to exclude family-law cases, the prior diversity-jurisdiction statute's law-or-equity focus excluded family law according to the arcane structure of English courts at the time of this nation's founding. *See Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992). In sum, the canon

against repeals by implication can retain an amended statute's original meaning, even if that original meaning is invisible on the current face of the statute, as amended.

ARTBA respectfully submits that EPA's analysis of §209's *current* language – while fatally flawed as an interpretation of the current language – is outright doomed when one widens the scope to consider the best-available history of §209's (namely, the course of statutory amendments over time). *See* Pet. Br. at 23-30. As the next two subsections explain, EPA's ahistorical reading cannot survive the canon against repeals by implication.

2. The program-as-a-whole reading of the Needs Test is illogical.

Although EPA declares the waiver-specific reading of the Needs Test – *i.e.*, ARTBA's position – illogical, EPA Br. at 24-26, 35-37, EPA does not do a good job either explaining why ARTBA's position is illogical or rebutting ARTBA's arguments that EPA's program-as-a-whole reading is illogical. *See* Section IV.D, *infra* (EPA position leads to absurd results). According to EPA, ARTBA's and the California Petitioners' alternate view provides California with less than the broad discretion that the 1977 amendments intended, *id.*, but – as explained – that intent

went to the Protectiveness Test, not the Needs Test.

Indeed, the legislative history that CARB cites bears this point out: the broad authority conferred by the 1977 in-the-aggregate amendment means that EPA is not "to substitute [its] judgment for that of the State." CARB Br. at 22 (*quoting* H.Rep. No. 95-294 at 301-302, reprinted in 1977 U.S.C.C.A.N. 1077, 1380-81). The plain language of §209 shows that EPA defers to California on the Protectiveness Test under the arbitrary-and-capricious standard of review, but decides the Needs Test itself. *Compare* 42 U.S.C. §7543(b)(1)(A) *and* 7543(e)(2)(A)(i) *with id.* §7543(b)(1)(B) *and* 7543(e)(2)(A)(ii). The broad-deference argument is nonsense because that broad deference does not apply to the Needs Test.

An example may help demonstrates the reason to interpret the Needs Test on a waiver-specific basis. Although California and the rest of the country have attained air-quality standards for lead ("Pb"), there are still trace amounts of Pb in automobile exhaust, notwithstanding the phase out of leaded gasoline.[8] Under EPA's program-as-a-whole reading

[8] *See, e.g.*, Xudong Huang, Ilhan Olmez, Namik K. Aras, *Emissions of trace elements from motor vehicles: Potential marker elements and source composition profile*, 28-8 ATMOSPHERIC ENVIRONMENT 1385-1391 (May 1994).

of the Needs Test, CARB could adopt a Pb-only emission standard to control Pb in its status as a criteria pollutant, based only on the past work that CARB's program has done historically, with no current need to control vehicular Pb emissions. The same thought experiment would work for a future when California has attained all air-quality standards, but requires its past program to maintain that attainment. *See* EPA Br. at 41 (discussing maintenance plans). Under EPA's reading of the Needs Test, California could continue to regulate subsequent model years, even after attaining air-quality standards (*i.e.*, even when no further reductions are needed) because the past program as a whole still was needed. That exceeds the exception that Congress allowed in 1967.

3. Neither the last-antecedent rule nor the word "such" support a program-as-a-whole reading of the Needs Test.

EPA also relies on the last-antecedent rule and the use of the word "such" to modify "standards" to tie the Needs Test to the Protectiveness Test's in-the-aggregate nature. EPA Br. at 32-34. Quoting *U.S. v. Bowen*, 100 U.S. 508, 512-13 (1879), EPA argues that "'no sound canon of construction will authorize us to disregard [the term], when to do so changes very materially the meaning[.]'" EPA Br. at 33-34 (alterations in

original). As explained in Section IV.B.1, *supra*, however, the canon against repeals by implication answers *Bowen* as applied here: to honor the last-antecedent rule would require rejecting the canon against repeals by implication. Unfortunately for EPA and CARB, that is not even a close contest.

As this Court recently recognized, relying on also-recent Supreme Court decisions, "[t]he rule of the last antecedent … is not an absolute and can assuredly be overcome by other indicia of meaning," and "the doctrine of last antecedent ... must yield to the most logical meaning of a statute that emerges from its plain language and legislative history." *James v. City of Costa Mesa*, 700 F.3d 394, 399 n.7 (9th Cir. 2012) (internal quotations omitted, alterations in original). Indeed, the canon against repeals by implication probably always beats the last-antecedent rule because the clear-and-manifest formulation of the former is one where courts adopt the no-repeal interpretation if at all possible: "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting*

Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)).[9] Simply put, the canon against repeals by implication is infinitely stronger than the last-antecedent rule.

C. There is no meaningful history of EPA's interpreting the "Needs Test" on a whole-program basis.

ARTBA's opening brief explained that – other than the greenhouse-gas flip-flop, which was not litigated – the distinction between a program-as-a-whole versus waiver-package-as-a-whole interpretation of §209 had not previously mattered and certainly was not litigated. ARTBA Br. at 26-29. Notwithstanding their cited examples of administrative *dicta* on the program-as-a-whole Needs Test when that test was not a contested issue, EPA and CARB do not dispute – and thus concede – ARTBA's point.

The response briefs – disingenuously – cite *MEMA* as supporting the program-as-a-whole interpretation. EPA Br. at 18; CARB Br. at 14. As ARTBA explained, however, *MEMA* concerned whether enforcement provisions for a particular standard could be considered as part of the

[9] *NAHB* adopted the clear-and-manifest standard from preemption cases to repeal-by-implication cases. *Compare NAHB*, 551 U.S. at 662 *with Altria Group*, 555 U.S. at 77.

waiver package, along with the corresponding emission standards. *See* ARTBA Br. at 28-29 n.7 ("the 'question for decision is whether section 209 empowers the Administrator to consider a waiver of federal preemption for California's in-use maintenance regulations'") (*quoting MEMA*, 627 F.2d at 1106). *MEMA* had nothing to do with considering California standards outside a waiver package to justify the need for the waiver package in a §209 proceeding. EPA's and CARB's suggestion otherwise is frivolous.

D. EPA's interpretation would lead to absurd results.

In addition to the California Petitioners' absurd-results arguments, EPA's interpretation of the Needs Test allows waiver of preemption for vehicles that are dirtier than federal standards for all pollutants – *i.e.*, not a NOx-versus-CO tradeoff as envisioned in the 1977 amendment, *MEMA*, 627 F.2d at 1110 n.32. ARTBA cited the example of a "sports Hummer" as a dirtier-than-federal vehicle that CARB could get approved under a Needs Test that looked to the whole California program, rather than merely to the waiver package before EPA. *See* ARTBA Br. at 30. EPA's responses do not rebut the absurdity of EPA's interpretation.

EPA also argues that Congress *allowed* the dirty-Hummer scenario:

"Congress specifically contemplated that some California standards may be adopted even if they are less protective than their federal counterpart." EPA Br. at 43. What the 1977 in-the-aggregate amendment allowed was a tradeoff to suit California's needs (*e.g.*, reducing NOx by increasing CO). Nothing in the 1977 or subsequent amendments suggests that CARB can adopt new standards – such as the sports Hummer – that are dirtier than federal standards on all pollutants (*i.e.*, not a tradeoff, but a sellout). While the environmentally conscious CARB may never do such a thing, EPA's program-as-a-whole reading would *allow it*, which is reason to reject EPA's reading: "If it will not take the absurd, then its literalism is no alternative to our reading of the statute." *Corley v. U.S.*, 556 U.S. 303, 317 n.6 (2009). To paraphrase EPA, whether or not EPA and CARB support Congress' policy judgments, those judgments must be honored. EPA Br. at 44 (*citing Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 872 (9th Cir. 1981)). In short, it is EPA and CARB, not ARTBA that seeks to overturn the congressional resolution of the Needs-Test issue.[10]

[10] EPA's final dirty-Hummer argument is even more problematic in arguing that the dirty-Hummer hypothetical could not arise because EPA

E. EPA's in-the-alternative consideration of the "Needs Test" on a waiver-package basis is procedurally flawed.

In response to ARTBA's and the California Petitioners' arguments that EPA should have re-issued its waiver notice to request comments under a waiver-specific version of the Needs Test, EPA makes two arguments: (1) the waiver notice was generic in its framing of the Needs Test (*i.e.*, commenters could address whatever test they wished because "EPA's public comment notice did not specify or confine the criteria it would use to evaluate the 'need' for CARB's Fleet Requirements"), and (2) ARTBA's and the California Petitioners *did* comment on the waiver-specific version of the Needs Test (*i.e.*, "EPA can hardly be faulted for considering the evidence Petitioners and ARTBA provided under the test they preferred"). EPA Br. at 56-62. The first argument is inconsistent with EPA's arguments for deference to the EPA Needs-Test methodology, and the second argument is inconsistent with the record as to ARTBA

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does not set in-use standards. *Compare* EPA Br. at 44 *with* Section III.E, *supra* (EPA standards govern in-use emissions during useful life).

specifically and the public generally.[11]

Taking these two issues in reverse order, ARTBA did not comment on the Needs-Test, and EPA's suggestion to the contrary is simply false. EPA Br. at 57 (citing Decision docket 0691-0310 (ARTBA) (ER000525)). The Needs-Test issue was raised by the California Petitioners' counsel, and the rest of the public – including ARTBA – had no idea that EPA would offer even feigned open-mindedness to analyzing need on a waiver-specific basis. Because comments are submitted at the same time, with no access to other commenters' comments and no opportunity to respond to other commenters, the public generally lacked both notice and an opportunity to respond to the new needs analysis.

Moreover, EPA's suggestion that its presentation of the Needs Test was neutral flies in the face of EPA's claim to a consistent history of EPA interpretation of a program-as-a-whole Needs Test. Far from being on notice of EPA's open-mindedness on this issue, the public had every right to expect that EPA would not change its consistent – at least since the

[11] EPA and CARB do not dispute – and thus concede – that the APA logical-outgrowth test applies equally to rulemaking and non-rulemaking actions. *See* ARTBA Br. at 33-34 (collecting cases).

definitive greenhouse-gas flip-flop – interpretation of the Needs Test. EPA cannot have it both ways: either its position was not set – and gets no deference – or it was set and required re-issuing the notice to solicit comments under the new test.

V. *VACATUR* IS THE APPROPRIATE REMEDY.

If the Court finds for the California Petitioners and ARTBA on the merits, *vacatur* is the appropriate remedy. The contrary arguments in the response briefs are misplaced.

A. Remand without *vacatur* would irreparably injure ARTBA's non-California members.

The response briefs do not dispute ARTBA's arguments that a remand to EPA, without *vacatur*, would irreparably harm ARTBA's non-California members. *See* ARTBA Br. at 35-37. Accordingly, EPA and CARB have waived this issue. *See* Section I.C, *supra*.

B. Only *vacatur* would compel EPA to remand the ORD Rule to CARB to consider less-onerous rules.

In support of a *vacatur* remedy over a mere remand to EPA, ARTBA argued that only *vacatur* would trigger "a remand *to CARB* – not to EPA – [to] fix the ORD Rule." ARTBA Br. at 37. Contrary to the heading and placement of ARTBA's argument, EPA and CARB misconstrue the argument to request *this Court* to remand the ORD Rule to CARB. EPA

Br. at 64-65 & n.15; CARB Br. at 28-29. As they point out, the question of whether to remand this case to CARB is not before this Court; only EPA's waiver is before this Court.[12] Consistent with the heading of this section, however, ARTBA respectfully submits that – if this Court invalidates EPA's action on the basis of the Needs Test – EPA could request CARB and the public to address whether an ORD Rule geographically limited to the South Coast and Central Valley would fit better under a properly interpreted Needs Test. In other words, ARTBA does not ask this Court to remand the ORD Rule to CARB. Instead, ARTBA argues for *vacatur* over a mere remand because *vacatur* would better and more expeditiously ensure a rethinking by CARB of the ORD Rule consistent with §209's Needs Test.

CONCLUSION

This Court should vacate EPA's waiver of preemption.

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[12] ARTBA thus agrees that this Court is the "wrong court" for challenging the ORD Rule directly, CARB Br. at 12; EPA Br. at 65 n.15, either under a *conflict-preemption* or Commerce-Clause theory, *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1106 (9th Cir. 2013), or on state-law grounds. As this Court recognized in *Corey*, CAA waiver proceedings concern only the waiver of CAA's *express preemption*.

Dated: January 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the foregoing brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 6,906 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, the Statement of Related Cases, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2013, and I have relied on that software's word-count feature to calculate the word count.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that none of the participants in the case were unregistered for CM/ECF use.

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