

ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1081 and consolidated cases

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

STATE OF OHIO, *et al.*

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*

Respondents.

On Petition for Review of a Final Action of the
Environmental Protection Agency

**INITIAL BRIEF FOR RESPONDENT-INTERVENOR
PUBLIC INTEREST ORGANIZATIONS**

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February 13, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies as follows:

A. Parties

1. Except for the following, all parties, intervenors, and amici appearing in these consolidated cases are listed in the Briefs of Petitioners State of Ohio, et al., and Respondent Environmental Protection Agency:

Amici for Respondents: David Dickinson Ackerly, Maximilian Auffhammer, Marshall Burke, Allen Goldstein, John Harte, Michael Mastrandrea, LeRoy Westerling, Senator Tom Carper, Representative Frank Pallone, Jr., American Thoracic Society, American Medical Association, American Association for Respiratory Care, American College of Occupational and Environmental Medicine, American College of Physicians, American College of Chest Physicians, National League for Nursing, American Public Health Association, American Academy of Pediatrics, Academic Pediatric Association, Todd Aagaard, William Boyd, Alejandro E. Camacho, Robin Craig, Robert Glicksman, Bruce Huber, Sanne Knudsen, David Owen, and Leah M. Litman.

2. The Respondent-Intervenor Public Interest Organizations joining this brief are Center for Biological Diversity, Clean Air Council, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center,

National Parks Conservation Association, Natural Resources Defense Council, Public Citizen, Sierra Club, and Union of Concerned Scientists. All are non-profit public interest organizations; none of them has any parent corporation; and no publicly held entity owns 10 percent or more in any of them.

B. Ruling Under Review

The agency action under review is identified in the brief of Respondent Environmental Protection Agency.

C. Related Cases

The case on review has never previously been before this Court or any other. There are no other related cases currently pending in this court or in any other court of which counsel is aware.

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TABLE OF CONTENTS

Certificate as to Parties, Rulings, and Related Cases	i
Table of Contents	iii
Table of Authorities	iv
Glossary.....	v
Statutes and Regulations	1
Summary of Argument.....	1
Argument.....	1
Section 209(b) is Vital and Constitutional	1
Conclusion	4
Certificate of Compliance	
Certificate of Service	

TABLE OF AUTHORITIES

Cases

* <i>Motor & Equip. Mfrs. Ass’n v. EPA</i> , 627 F.2d 1095 (D.C. Cir. 1979)	2,3
<i>New State Ice Co. v. Liebman</i> , 285 U.S. 262 (1932)	3
<i>Sec’y of Ag. v. Central Roig Ref. Co.</i> , 338 U.S. 604 (1950)	3

Statutes

*Clean Air Act, Section 209(b), 42 U.S.C. § 7543(b)	1,2,3
*Inflation Reduction Act, Pub. L. No. 117-169, § 60105(g) (2022)	3

Legislative History

S. Rep. No. 90-403 (1967)	3
https://www.govtrack.us/congress/votes/90-1967/s136	3
https://www.govtrack.us/congress/votes/95-1977/s190	3

Other Authorities

Jenks et al., <i>California Transportation Policy Leadership</i> (2018)	2
National Research Council, STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS (National Academies Press 2006)	2,3

*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

EPA	United States Environmental Protection Agency
JA	Joint Appendix
Section 209(b)	Clean Air Act Section 209(b), 42 U.S.C. § 7543(b)

Respondent-Intervenor Public Interest Organizations are dedicated to protection of public health and the environment for the millions of people across the Nation harmed by air pollution. We adopt the arguments in the briefs of respondent EPA, parts II-IV, and respondent-intervenors California et al., parts II-V, as well as EPA's statement of issues, the case, and the standard of review.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in the addendum to EPA's brief.

SUMMARY OF ARGUMENT

The Court should reject petitioners' perverse call to invalidate, in the name of state sovereignty, one of this country's most successful examples of cooperative federalism. Clean Air Act Section 209(b) has a 55-year track-record of success and congressional reaffirmation. It continues to save lives and drive innovation, and is well within Congress's power.

ARGUMENT

Section 209(b) is Vital and Constitutional

Section 209(b) is a cornerstone of United States environmental law. Congress chose to retain California's "already excellent" motor vehicle emissions program not merely to address that State's chronic air quality problems but also to reap "*the benefits for the Nation* to be derived from permitting California to

continue its experiments in the field of emissions control.” *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1109-10 (D.C. Cir. 1979) (emphasis added).

Experience has repeatedly vindicated the wisdom of Congress’s 1967 decision. *Most* of the Nation’s key advances in motor-vehicle air-pollution control debuted in California, including the first leaded-gasoline phase-out requirements; the first emission standards for hydrocarbons, carbon monoxide, diesel particulates, and greenhouse gases; and essential pollution-control technologies like three-way catalytic converters, onboard diagnostic systems, fuel injection, zero-emission technologies, carbon canisters, exhaust gas recirculation, and oxidation catalysts.¹ “California has used its authority as Congress envisioned: to implement more aggressive measures than the rest of the country and to serve as a laboratory for technological innovation.” NATIONAL ACADEMIES REPORT 4.

Section 209(b) embodies a careful “compromise” between preserving California’s ability to drive health-protective innovation and avoiding the “economic disruption latent in . . . fifty-one separate sets of emissions control requirements.” *Motor & Equip. Mfrs.*, 627 F.2d at 1109. The Constitution leaves it to Congress to decide how to regulate interstate commerce; Congress need not

¹ See Jenks et al., *California Transportation Policy Leadership* (2018), [R-133_AppendixF_MJBradley_1-22] (JA __); National Research Council, STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS 94-95, Table 3-4 (National Academies Press 2006) (“NATIONAL ACADEMIES REPORT”).

choose between uniform preemption of state law or none at all. *See Sec’y of Ag. v. Central Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (Commerce Clause does not require “geographic uniformity,” in contrast to Article I, § 8, clauses 1 and 4).

The Framers’ design—particularly equal Senate representation—guards against “politically powerful states” (Ohio Br. 22) hijacking federal lawmaking. No such abuse marks Section 209(b). Californians, rather than the “general consumer of the nation,” S. Rep. No. 90-403, at 33 (1967), assumed the risks of “increased costs,” *id.*, or regulatory failure, while making successful policy experiments available to the whole Nation. *Cf. New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). California’s sibling states overwhelmingly favored this arrangement: The Senate voted 88-0 for the 1967 waiver provision, and 73-7 for its 1977 expansion.² Recent acts of Congress have specifically endorsed California’s standards, including the Inflation Reduction Act, Pub. L. No. 117-169, § 60105(g) (2022), which explicitly directed EPA to support states’ implementation of California’s zero-emission-vehicle and greenhouse-gas standards. *See also* EPA Br. 74-77 (discussing 1990 and 2007 legislation relying on California zero-emission-vehicle and greenhouse-gas standards, respectively).

² *See* <https://www.govtrack.us/congress/votes/90-1967/s136>;
<https://www.govtrack.us/congress/votes/95-1977/s190>.

CONCLUSION

If it reaches the merits, the Court should deny the petitions.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 598 words and employs 14-point Times New Roman font.

/s/ Sean H. Donahue

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023, I served the foregoing brief on all counsel of record via the Court's electronic case filing system.

/s/ Sean H. Donahue

DATED: February 13, 2023