

ORAL ARGUMENT NOT SET

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No. 08-1178  
(Consolidated with Nos. 08-1179, 08-1180)

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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State of California by and through Arnold Schwarzenegger,  
Governor of the State of California, the California Air Resources Board,  
and Edmund G. Brown Jr., Attorney General of the State of California,

Petitioner,

v.

United States Environmental Protection Agency,

Respondent.

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On Petition For Review Of The Order Of The  
United States District Court for the District of Columbia

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**BRIEF AMICI CURIAE OF U.S. SENATORS BARBARA BOXER AND DIANNE  
FEINSTEIN AND REPRESENTATIVES HOWARD BERMAN, LOIS CAPPS, DENNIS  
CARDOZA, SUSAN DAVIS, ANNA ESHOO, SAM FARR, BOB FILNER, JANE  
HARMAN, MIKE HONDA, BARBARA LEE, ZOE LOFGREN, DORIS MATSUI, JERRY  
MCNERNEY, GEORGE MILLER, GRACE NAPOLITANO, NANCY PELOSI, LUCILLE  
ROYBAL-ALLARD, LINDA SANCHEZ, LORETTA SANCHEZ, ADAM SCHIFF, BRAD  
SHERMAN, HILDA SOLIS, JACKIE SPEIER, PETE STARK, ELLEN TAUSCHER,  
MIKE THOMPSON, MAXINE WATERS, DIANE WATSON, AND LYNN WOOLSEY IN  
SUPPORT OF PETITIONER STATE OF CALIFORNIA**

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Delegation

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*Committee on State Practices in Setting Mobile Source Emissions Standards,  
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## INTEREST OF AMICI CURIE

U.S. Senators Barbara Boxer and Dianne Feinstein and the listed members of California's Congressional Delegation appear as amici in this case as leaders of a co-equal branch of the federal government, and as sponsors of some of the key federal legislation at issue in the case.

These amici offer the Court their unique perspective on three key issues related to this case: 1) to emphasize that core principles of cooperative federalism are contravened by the federal Administration's decision to deny the State of California's waiver application regarding California's "Pavley" standards; 2) to underscore Congressional intent concerning the principal federal statutes involved in the litigation, the Clean Air Act (CAA) and the Energy Independence and Security Act of 2007 (EISA); and 3) to note Congress' investigation and documentation of the Administration's deeply flawed decision-making process in this case, together with a pattern of political interference with established environmental regulatory protocols generally.

This Court, in a September 12, 2008, Order, granted these amici's motion for leave to participate in this case, pursuant to FRAP 27 and Circuit Rule 27.

## ARGUMENT

### **I. THE CLEAN AIR ACT, CALIFORNIA'S PIONEERING ROLE IN FASHIONING AIR POLLUTION STRATEGIES, AND THE HISTORY OF SECTION 209(b) WAIVERS FROM USEPA ALL REFLECT THE BEST TRADITIONS OF COOPERATIVE FEDERALISM.**

Some 76 years ago, U.S. Supreme Court Justice Louis Brandeis famously observed, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). There is perhaps no better, modern example of the venerable principle of cooperative federalism than the CAA, 42 U.S.C. §§ 7401–7661 (2006), a fact of justifiable pride to these amici and their Congressional colleagues.

By enacting the original CAA in the 1960's, and through a series of significant amendments enacted in 1970, 1977 and 1990, Congress has recognized the State of California's pioneering role in addressing air pollution. It has done so most prominently through the enactment—and later strengthening—of CAA section 209(b). 42 U.S.C. § 7543(b). The statutory provision at the heart of this case, section 209(b) gives California the authority to adopt emission standards for vehicular sources of air pollution more stringent than those promulgated by the federal government.

This Court has repeatedly recognized the significance of CAA section 209(b) and the special role afforded California air quality regulatory initiatives under that provision. *See, e.g., Motor & Equip. Mfrs. Ass'n Inc. v. Env'tl. Prot. Agency*, 627 F.2d 1095, 1109–1111 (D.C. Cir. 1979); *Ford Motor Co. v. Env'tl. Prot. Agency*, 606 F.2d 1293, 1296 (D.C. Cir. 1979).

The larger federalism underpinnings of the CAA, and California's leadership role in pursuing innovative air pollution control strategies, are further underscored by CAA section 177. 42 U.S.C. § 7507. That provision, enacted as part of the CAA Amendments of 1977, allows other states (subject to certain conditions) to "opt into" the California vehicular emission standards.

California has exercised the authority granted it by Congress repeatedly and wisely over the past four decades. Echoing the words of Justice Brandeis, the non-partisan Congressional Research Service recently observed:

"Using Section 209(b) waivers, California has served as a laboratory for the demonstration of cutting edge emission control technologies, which, after being successfully demonstrated there, were adopted in similar form at the national level. Catalytic converters, cleaner fuels, and numerous other advances were introduced in this way."<sup>1</sup>

The National Academy of Sciences has similarly concluded that the CAA's California waiver provision has been an important source of innovation in improving air quality.<sup>2</sup>

Over the history of the CAA, California has sought waivers for new or amended vehicle emission standards on at least 53 occasions; the U.S. Environmental Protection Agency (USEPA) granted *every one* of those requests, in whole or in part, through five Administrations,

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<sup>1</sup> James E. McCarthy & Robert Meltz, Cong. Research Serv., *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act* (2007), available at [http://assets.opencrs.com/rpts/RL34099\\_20070820.pdf](http://assets.opencrs.com/rpts/RL34099_20070820.pdf).

<sup>2</sup> See Committee on State Practices in Setting Mobile Source Emissions Standards, National Research Council, *State and Federal Standards for Mobile-Source Emissions* (2006).

Republican and Democratic alike.<sup>3</sup> This tradition of bipartisanship and intergovernmental comity was interrupted only by USEPA's denial of the section 209(b) waiver in this case.

## **II. NOTHING IN THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007 SUPPORTS USEPA'S DENIAL OF CALIFORNIA'S WAIVER APPLICATION OR OTHERWISE LIMITS CALIFORNIA'S AUTHORITY TO IMPLEMENT ITS PAVLEY REGULATIONS**

In his December 2007 letter to California Governor Schwarzenegger announcing his denial of California's waiver application, the USEPA Administrator suggested, and certain segments of the automotive industry continue to maintain, that EISA, Pub. L. No. 110-140, 121 Stat. 1492 (2007), somehow limits California's authority to implement the Pavley standards and provides support for USEPA's decision to deny California's waiver application. This argument is without merit.

Both the text of EISA and the statute's legislative history confirm that Congress did not intend to preempt California's Pavley standards when it passed EISA. Rather, by enacting EISA Congress was careful to preserve the ability of both USEPA and California to regulate greenhouse gases under the CAA.

### **A. The Text of EISA**

In drafting EISA, Congress was well aware that some might seek to assert that legislation increasing corporate average fuel economy (CAFE) standards would in some way affect or limit USEPA's authority under the CAA. In order to ensure that the text of EISA was as clear as possible, the authors included as the first substantive words of the law—placed immediately

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<sup>3</sup> McCarthy & Meltz, *supra* note 1, at 14. This number does not include minor, "within the scope" determinations by USEPA.

before the section of EISA amending fuel economy standards—a savings clause, section 3. The plain language of section 3 rebuts any serious claim that Congress intended EISA to preempt the Pavley standards. Section 3, titled “Relationship to Other Law,” states as follows:

Except to the extent expressly provided in this Act or an amendment made by this Act, *nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.* (emphasis added)

This section reflects Congress’ unambiguous intent to maintain USEPA’s and California’s authority under CAA section 209 to regulate air pollution, including carbon dioxide and other greenhouse gases. Since Congress has made no additional, specific limitation or restriction on such regulatory power, EISA cannot reasonably be construed to limit that authority. Moreover, section 3 of EISA expressly refers to other environmental laws, including the CAA, thus retaining their full force and effect.

Through this provision of EISA, Congress has expressly manifested its intent that EISA not diminish or otherwise affect existing air pollution regulation or precedents, including California’s regulation of greenhouse gases under section 209(b) of the CAA.

**B. Legislative History of EISA**

Given the explicit text of EISA set forth above, no analysis of the legislative history of EISA is required to ascertain Congress’ intent. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Nevertheless, the legislative history of EISA further underscores Congressional intent to maintain USEPA’s and California’s authority to regulate greenhouse gases under the CAA.

During consideration of EISA, the President of the United States, through a Statement of Administration Policy, called on Congress to modify EISA to limit USEPA's authority.<sup>4</sup>

Senators Feinstein and Boxer, responding to the President's Statement, wrote to the President on December 6, 2007, to explain that, as authors of this legislation, they disagreed with the President that the legislation should preempt California's authority under the CAA.<sup>5</sup> This correspondence demonstrates that as of December 2007 both the President and the lead authors of the legislation recognized that EISA did not affect USEPA's authority under the CAA. The relevant provisions of EISA were not altered before enactment.

In the Senate debate over EISA, Senator Levin stated on the record that:

We simply want to make clear that it is Congressional intent in this bill that, with respect to regulation of greenhouse gas emissions, any future regulations issued by the Environmental Protection Agency to regulate greenhouse gas emissions from vehicles be consistent with the Department of Transportation's new fuel economy regulations that will reach an industry fleet wide level by 35 miles per gallon by 2020.<sup>6</sup>

Senator Levin prefaced these remarks by denying any intent to interfere with the U.S. Supreme Court's landmark decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), confirming USEPA's existing authority under the CAA to regulate greenhouse gases, and ability to delegate that authority to California, "as it deems appropriate."<sup>7</sup> Senator Feinstein, who was the lead author along with Senator Stowe of the CAFE provision in EISA and Senate

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<sup>4</sup> Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy, H.R. 6—Energy Independence and Security Act of 2007 (Dec. 6, 2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/index-date.html>; SAP of December 6 to HR 6.

<sup>5</sup> Letter from Barbara Boxer and Dianne Feinstein, U.S. Senators, to George W. Bush, U.S. President (Dec. 6, 2007).

<sup>6</sup> 153 Cong. Rec. S15, 385 (December 17, 2007) (statement of Sen. Levin).

<sup>7</sup> *Id.*

Commerce Committee Chair Inouye, whose committee produced the CAFE provision, emphasized that “consistency” does not mean the CAFE standards’ authority would in any way affect USEPA’s authority under the Clean Air Act:<sup>8</sup>

The legislation increasing the fuel economy standards of vehicles by 10 miles per gallon over 10 years does not impact the authority to regulate tailpipe emissions of the EPA, California, or other States, under the Clean Air Act. The intent was to give NHTSA the ability to regulate fuel efficiency standards of vehicles, and increase the fleetwide average to at least 35 miles per gallon by 2020. There was no intent in any way, shape, or form to negatively affect, or otherwise restrain, California or any other State's existing or future tailpipe emissions laws, or any future EPA authority on tailpipe emissions. The two issues are separate and distinct.<sup>9</sup>

Senator Feinstein also referred to the Supreme Court’s decision in *Massachusetts v. Environmental Protection Agency* to emphasize that USEPA and DOT can execute their distinct regulatory missions consistently. She referenced the U.S. District Court’s holding in *Central Valley Chrysler-Jeep v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007), to further underscore that California’s Pavley standards are not preempted by other federal statutes.<sup>10</sup> Critically, Senator Feinstein referred explicitly to EISA Section 3, which she noted “plainly” addresses the “relationship of [EISA] to other laws” as reaffirming the ability of USEPA and California to regulate greenhouse gas emissions under the CAA.<sup>11</sup>

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<sup>8</sup> 153 Cong. Rec. S15, 385 (December 17, 2007) (statements of Sens. Feinstein and Inouye).

<sup>9</sup> *Id.* (statement of Sen. Feinstein).

<sup>10</sup> 153 Cong. Rec. S15, 386 (December 17, 2007) (statement of Sen. Feinstein).

<sup>11</sup> *Id.*

In the House debate over the EISA, Representative Dingell, a co-sponsor of the legislation and Chairman of the House Energy and Commerce Committee that produced the bill, also focused upon the distinction between fuel economy standards mandated under EISA, and the regulation of air pollution from vehicular sources—including greenhouse gases—under the CAA. Chairman Dingell observed that “[n]othing in this title shall be construed to conflict with the authority provided by sections 202 and 209 of the Clean Air Act (42 U.S.C. 7521 and 7543, respectively).”<sup>12</sup>

This legislative history, like the express provisions of EISA itself, confirms that EISA did not disturb USEPA’s—or California’s—continuing authority to regulate greenhouse gases under the CAA.

### **III. USEPA’S UNLAWFUL DECISION-MAKING PROCESS CULMINATING IN ITS DENIAL OF CALIFORNIA’S WAIVER APPLICATION REFLECTS A BROADER PATTERN OF EQUALLY FLAWED REGULATORY ACTIONS BY USEPA.**

Congress, in exercising its oversight role, has thoroughly investigated and documented USEPA’s unlawful decision-making process regarding California’s application for a waiver for the Pavley standards under the CAA.<sup>13</sup> Related congressional hearings document USEPA’s

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<sup>12</sup> 153 Cong. Rec. E2665 (December 28, 2007) (statement of Rep. Dingell).

<sup>13</sup> Over the past year, Congress has held several oversight hearings on this subject. Some are identified below, together with links to the evidentiary record adduced in each:

1. *Bush Administration Environmental Record at Department of Interior and Environmental Protection Agency Before the Sen. Committee on Environment and Public Works*, 110th Cong. (2008), available at [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=724c7b97-802a-23ad-464e-0e960de2af74](http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=724c7b97-802a-23ad-464e-0e960de2af74) [hereinafter *Senate Bush Environmental Record Hearing*].
2. *Regulation of Greenhouse Gases under the Clean Air Act Before the Sen. Committee on Environment and Public Works*, 110th Cong. (2008), available at [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=6da87a8d-802a-23ad-4dc9-289c2f6b7e5a](http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6da87a8d-802a-23ad-4dc9-289c2f6b7e5a) [hereinafter *Senate Greenhouse Gas Regulations Hearing*].

(CONTINUED...)

pattern of resistance to greenhouse gas regulation, and the related, overall pattern of Executive Branch interference with climate science. They also document USEPA's unlawful failure to set other standards under the CAA.

In many of these cases, USEPA's neglect of its statutory responsibilities and the Executive Branch's interference in the regulatory process have been documented not only by Congress, but by the federal courts and respected authorities outside the government, like the Union of Concerned Scientists.<sup>14</sup>

A. USEPA's Unlawful Denial of California's Waiver Application

Committees in both the U.S. Senate and the U.S. House of Representatives have developed an extensive record of the Administration's interference with USEPA's deliberations and decision regarding the waiver for California's greenhouse gas regulations. According to a

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3. *Science Under Siege: Scientific Integrity at the Environmental Protection Agency Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 110th Cong. (2008), available at [http://energycommerce.house.gov/cmte\\_mtg/110-oi-hrg.091808.ScientificIntegrityEPA.shtml](http://energycommerce.house.gov/cmte_mtg/110-oi-hrg.091808.ScientificIntegrityEPA.shtml)
4. *An Update on the Science of Global Warming and its Implications Before the Sen. Committee on Environment and Public Works*, 110th Cong. (2008), available at [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=293c8d18-802a-23ad-455b-f1a30a77ae24](http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=293c8d18-802a-23ad-455b-f1a30a77ae24) [hereinafter *Senate Global Warming Science Hearing*].
5. *EPA's New Ozone Standards Before the House Committee on Oversight and Government Reform*, 110th Cong. (2008), available at <http://oversight.house.gov/story.asp?ID=1957> [hereinafter *House Ozone Standards Hearing*]. A summary of this hearing is available at <http://oversight.house.gov/story.asp?ID=1979>.
6. *Oversight Hearing on Science and Environmental Regulatory Decisions Before the Subcomm. on Public Sector Solutions to Global Warming, Oversight, and Children's Health Protection of the Sen. Committee on Environment and Public Works*, 110th Cong. (2008), available at [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=a1954f70-802a-23ad-4192-fc2995dda7f4](http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=a1954f70-802a-23ad-4192-fc2995dda7f4)
7. *Oversight of EPA's Decision to Deny the California Waiver Before the Sen. Committee on Environment and Public Works*, 110th Cong. (2008), available at [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=8a7a0a80-802a-23ad-44b4-a1d4f1b4cc15](http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=8a7a0a80-802a-23ad-44b4-a1d4f1b4cc15) [hereinafter *Senate California Waiver Hearing*].

<sup>14</sup> *Union of Concerned Scientists, Abuses of Science, Scientific Integrity*, [http://ucsusa.org/scientific\\_integrity/abuses\\_of\\_science/a-to-z-alphabetical.html](http://ucsusa.org/scientific_integrity/abuses_of_science/a-to-z-alphabetical.html) (last visited October 24, 2008).

memorandum from the Majority Staff of the House Committee on Oversight and Government Reform,

[t]he record before the Committee shows: (1) the career staff at EPA unanimously supported granting California's petition; (2) Stephen Johnson, the Administrator of EPA, also supported granting California's petition at least in part; and (3) Administrator Johnson reversed his position after communications with officials in the White House.<sup>15</sup>

Several hearings by the Senate Committee on Environment and Public Works document the same troublesome pattern of White House interference with the waiver decision process.<sup>16</sup>

B. USEPA's Failure to Regulate Greenhouse Gases and the Pattern of Executive Interference with Climate Science

In *Massachusetts v. Environmental Protection Agency*, the U.S. Supreme Court rebuked USEPA for failing to consider regulation of greenhouse gases under the CAA, rejecting as meritless the Agency's contrary interpretation that it lacked authority to do so under the CAA. 549 U.S. 497, 127 S. Ct. 1438, 1460 (2007).

In spite of this direct mandate from the Supreme Court, USEPA has been extraordinarily slow in its response. More than a year after *Massachusetts* was decided, in July 2008, the Agency issued an Advanced Notice of Proposed Rulemaking (ANPR) and requested public

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<sup>15</sup> Memorandum from the Maj. Staff of the H. Comm. on Oversight and Government Reform, 110th Cong., to Members of the H. Comm. on Oversight and Government Reform, 110th Cong. (May 19, 2008), at 1, available at <http://reform.democrats.house.gov/documents/20080519131253.pdf> [hereinafter *House Memo Re: Waiver*].

<sup>16</sup> See *Senate Bush Environmental Record Hearing*, *supra* note 13; *Senate Greenhouse Gas Regulations Hearing*, *supra* note 13; *Senate Global Warming Science Hearing*, *supra* note 13; *Senate California Waiver Hearing*, *supra* note 13.

comments by November 28, 2008.<sup>17</sup> But in the more than 500-page ANPR, instead of making a statutory endangerment finding, USEPA instead examined its own authority under the CAA and analyzed options and barriers to its regulation of greenhouse gas emissions. The USEPA Administrator concluded that the CAA is “ill-suited for the task of regulating global greenhouse gases,” and requested feedback from the public.<sup>18</sup>

USEPA’s failure to follow the mandate of the Supreme Court’s landmark decision in *Massachusetts* is part of an unfortunate pattern of the Executive Branch to ignore the law and suppress information about climate change.<sup>19</sup>

C. USEPA’s Failure to Regulate Other Air Pollutants under the Clean Air Act

Congress has documented USEPA’s failure to regulate other pollutants, in addition to greenhouse gases, according to its statutory mandate under the CAA.<sup>20</sup> Federal courts, including this Court, have rebuked the agency for this statutory neglect.

Recently, this Court struck down USEPA mercury regulations in *New Jersey v. Environmental Protection Agency*, 517 F.3d 574, 577–78 (D.C. Cir. 2008). The Court observed that USEPA’s “explanation [for its regulations] deploys the logic of the Queen of Hearts, substituting EPA’s desires for the plain text of section 112(c)(9)” of the CAA. *Id.* at 582.

Similarly, in *South Coast Air Quality Management District v. Environmental Protection Agency*, 472 F.3d 882, 886 (D.C. Cir. 2006), this Court again found that USEPA unlawfully

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<sup>17</sup> 73 Fed. Reg. 44,354 (July 30, 2008), available at <http://www.epa.gov/climatechange/emissions/downloads/ANPRPreamble.pdf>.

<sup>18</sup> *Id.* at 44,355.

<sup>19</sup> See Juliet Eilperin, *Sen. Boxer Seeks Answers On Redacted Testimony: White House Cut Climate Warnings*, Washington Post, October 25, 2007, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/23/AR2007102302056.html>; see also, *Allegations of Political Interference with the Work of Government Climate Change Scientists Before the House Committee on Oversight and Government Reform*, 110th Cong. (2007), available at <http://oversight.house.gov/story.asp?ID=1162>; *Allegations of Political Interference with Government Climate Change Science Before the House Committee on Oversight and Government Reform*, 110th Cong. (2007), available at <http://oversight.house.gov/story.asp?ID=1214>

<sup>20</sup> See, e.g., *House Ozone Standards Hearing*, *supra* note 13.

evaded its statutory responsibilities, this time neglecting to set more protective limits on ground-level ozone as mandated by Congress.<sup>21</sup>

Finally, in *Sierra Club v. Environmental Protection Agency*, this Court vacated USEPA's promulgated air pollution standards for brick and ceramic kilns because the Agency failed to meet the CAA's minimum stringency requirement as explicitly articulated in the statute. 479 F.3d 875, 876–77 (D.C. Cir. 2007).

### CONCLUSION

For the foregoing reasons, Congressional amici request that the Court grant California's petition.

Dated: November 24, 2008

Respectfully submitted,

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<sup>21</sup> See also *State of North Carolina v. Envtl. Prot. Agency*, 531 F.3d 896, 929–30 (D.C. Cir. 2008) (invalidating USEPA's Clean Air Interstate Rule (CAIR) for failure to comply with plain text of CAA).

<sup>22</sup> The research assistance of Erica Schroeder (Berkeley Law '10) is gratefully acknowledged.

## CERTIFICATE OF COMPLIANCE

I certify that the attached **BRIEF AMICI CURIAE OF U.S. SENATORS BARBARA BOXER AND DIANNE FEINSTEIN AND REPRESENTATIVES HOWARD BERMAN, LOIS CAPPS, DENNIS CARDOZA, SUSAN DAVIS, ANNA ESHOO, SAM FARR, BOB FILNER, JANE HARMAN, MIKE HONDA, BARBARA LEE, ZOE LOFGREN, DORIS MATSUI, JERRY MCNERNEY, GEORGE MILLER, GRACE NAPOLITANO, NANCY PELOSI, LUCILLE ROYBAL-ALLARD, LINDA SANCHEZ, LORETTA SANCHEZ, ADAM SCHIFF, BRAD SHERMAN, HILDA SOLIS, JACKIE SPEIER, PETE STARK, ELLEN TAUSCHER, MIKE THOMPSON, MAXINE WATERS, DIANE WATSON, AND LYNN WOOLSEY IN SUPPORT OF PETITIONER STATE OF CALIFORNIA** uses a 12 point Times New Roman font and contains 3123 words.

DATED: November 24, 2008

Respectively Submitted,



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